THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

CASE NO: 119/07
Reportable

In the matter between:

HEDLEY JAMES BROWN Appellant

and

DANO AGNES MBHENSE First Respondent

DEPARTMENT OF LAND AFFAIRS Second Respondent

Coram**:** Scott, Mthiyane, Nugent, Van Heerden et Maya JJA

Heard: 10 March 2008

Delivered: 28 May 2008

Summary: ***Land Reform (Labour Tenants) Act 3 of 1996 – action in terms of s 33(2A) – definition of 'labour tenant' – requirements for proof of***

Neutral citation: This judgment may be referred to as *Brown v Mbhense* (119/07) [2008] ZASCA 57 (28 May 2008)

VAN HEERDEN JA:

Introduction

[1] This appeal concerns an illiterate 67-year-old woman (the first respondent before us, but henceforth referred to as the plaintiff), who sought an order in the Land Claims Court declaring her to be a 'labour tenant', as contemplated by the Land Reform (Labour Tenants) Act 3 of 1996 (the Act). The action, which was brought in terms of s 33(2A) of the Act, was opposed by the appellant (defendant), the present owner of the farm in question. The second respondent (Department of Land Affairs) did not oppose the action and abided the decision of the court. The plaintiff's claim succeeded in the court a quo (Meer J), sitting in Durban. The appeal comes before us with leave granted by the court a quo.

[2] At the heart of the matter lies the question whether the plaintiff falls within the definition of 'labour tenant', as contained in s 1 of the Act, by which is meant 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,

…, but excluding a farm worker'.

[3] A 'farmworker', in turn, 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'.

[4] In terms of an amendment introduced into s 2 of the Act,[1] the onus resting on a plaintiff was eased somewhat by the following provision:
'(5) If in any proceedings it is proved that a person falls within paragraphs (a), (b) and (c) of the definition of "labour tenant", that person shall be presumed not to be a farmworker, unless the contrary is proved.'

Factual background

[5] The plaintiff was born on the farm in question and has lived there all her life. Her parents, who were also born on the farm, lived there and worked for the owner, Mr Willy Raw. Her father looked after the owner's horses and sheep and was paid two pounds per month. One of her brothers also provided labour on the farm and was already doing so at the time of her birth. Her mother also had to help out with weeding the maize fields when the owner requested her and the other people living on the farm to do so. According to the plaintiff, '[her parents] had all rights to own stock [and] plough'. She claimed that there was an agreement between her parents and the owner, entered into before she was born, that they could keep stock and also plough portion of the lands. They 'were given everything' and were not restricted with regard to the number of cattle they were allowed to keep. Both her parents died and were buried on the farm.

[1] Introduced by s 33 of Act 63 of 1997.

[6] The plaintiff married her late husband during 1962 and he – as well as his siblings, and their parents before them – also worked for the owner of the farm. Her parents-in-law were both buried on the farm. Her husband worked *inter alia* as a tractor driver, earning R80 periodically until his death in 1987. It is not clear from the plaintiff's evidence whether this was the amount paid to him monthly or in respect of longer periods of time. In addition he received a sack of maize every month.

[7] The plaintiff testified that she herself had worked on the farm 'for a long period of time' during the ownership of different generations of the Raw family. She was initially 'looking after the babies' and later worked in the kitchen, doing the cooking. She was paid an amount of R3 for six months' work. While she was working for Mr Joe Raw (the son of Mr Willy Raw) and later for Mr Robert Raw, one of Mr Joe Raw's sons, she worked for a period of six months at a time, thereafter returning to her kraal for the next six months while somebody from her family took over from her and worked in her stead. After those six months the pattern was repeated.

[8] The plaintiff conceded that during the years that she worked for Mr Dennis Raw, Mr Joe Raw's other son, she worked for the full year, still earning only R3 every six months. She stopped working when she gave birth to her children, which was approximately during 1979. In return for their labour, she and her husband had cropping rights on the farm. She insisted that they had an agreement with the owner that these cropping rights constituted part of the pay for their labour on the farm.

[9] It was put to the plaintiff during cross-examination that, during the few years that Mr Dennis Raw was managing the farm with his father, the grazing and cropping rights were 'given to the menfolk on the farm . . . as was tradition'. She agreed that this was so.

[10] As the learned judge in the court a quo stated (at para 39 of the judgment):

'Plaintiff's undisputed testimony is that she used cropping land on the farm whilst she worked thereon during her husband's lifetime and thereafter. Her undisputed testimony was that she continued to use cropping land on the farm after her husband's death and that she still does so today in a small vegetable garden in the front of her dwelling. There can therefore be no quarrel with the fact that Plaintiff personally used cropping land whilst she worked on the farm, and that she uses cropping land thereon. The all important enquiry is whether she had the right to use cropping land and whether she provided labour in consideration of such right.'

[11] Ms Zondekile Ngubane, the plaintiff's paternal aunt, gave evidence to the effect that she was familiar with the conditions on the farm as she often visited the plaintiff's parents when they were living and working there. She confirmed the plaintiff's testimony that they (the parents) had cropping and grazing rights and that the area on which they cropped was quite large.

[12] According to Ms Ngubane, the plaintiff had worked as a domestic worker on the farm from the time she was 'still a girl' and that after her marriage, she immediately returned to work. She was aware of the fact that the plaintiff's parents-in-law also had both grazing and cropping rights. At the time the plaintiff's husband died, a certain Mr Ross was the owner of the farm and the plaintiff and her husband still enjoyed cropping rights.

[13] The plaintiff continued cropping on the farm after her husband died, but her cropping rights were apparently summarily terminated after Mr Ross died and the farm passed into new ownership. Ms Ngubane knew this because she and the plaintiff live on neighbouring farms and she had seen the plaintiff's crops 'in the land' after the plaintiff's husband had passed away.

[14] The defendant testified that he only took transfer of the farm in question during 1995. In order to rebut the plaintiff's evidence concerning the basis of her tenancy, he relied on the evidence of Mr Dennis Raw, whose family owned the farm during the relevant period referred to by the plaintiff and who operated the farm with his father during the period 1968–1969.

[15] Mr Dennis Raw confirmed that, during those two years, there was an arrangement whereby a certain piece of land had been set aside for the workers on the farm and where they were allowed to plant crops. He stated that the various families of workers were allowed up to five head of cattle per family to graze on the farm. In addition, the male workers of the family were given an 80 kg bag of mealie meal each per month.

[16] According to Mr Dennis Raw, the plaintiff's husband was in full-time employment on the farm, and the Raw family 'never saw it [the cropping rights which he had] as part of his salary'. The plaintiff herself had no cropping or grazing rights on the farm – none of the women had such rights, so he alleged. The plaintiff worked as a domestic worker for the Raw family, rendering her services personally. Mr Dennis Raw denied that there was any

agreement with the plaintiff that part of her salary would be 'her cropping, grazing and accommodation rights'. He conceded, however, that he personally could not be sure what the arrangements in respect of cropping and grazing rights were on the farm before and after the two years during which he had operated the farm with his father, but stated that, to the best of his knowledge, his brother, Robert, did not change 'the systems' after he (Dennis Raw) left the farm. Of importance is that, in respect of the prior years, the material evidence on behalf of the plaintiff is unchallenged.

Discussion

[17] On the evidence as a whole, it is common cause that the plaintiff has satisfied the requirement of para (a) of the definition of 'labour tenant', having resided on the farm her whole life. The attempt by Mr Dennis Raw (referred to in the preceding paragraph) to prove that the plaintiff is or was a 'farmworker' as contemplated by the Act is, in the light of the totality of the evidence – discussed further hereafter – weak and unconvincing. The present appeal accordingly turns on the question whether or not the plaintiff has proved both requirements (b) and (c) of the definition quoted above.[2]

The para (b) requirement

[18] It is convenient to repeat the relevant requirement, which requires the plaintiff to be a person –

'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'.

[2] In *Ngcobo and Others v Salimba CC; Ngcobo v Van Rensburg* 1999 (2) SA 1057 (SCA) para 11, this Court held that paras (a), (b) and (c) of the definition had to be interpreted conjunctively.

[19] The plaintiff's evidence presented at the trial lacked precision insofar as dates and the specific terms of agreements were concerned. This, however, given her advanced age and lack of sophistication, is to be expected. That notwithstanding, it is nevertheless clear that she and her family have at all relevant times enjoyed the right to use cropping or grazing land on the farm.

[20] It was also conceded that the plaintiff did provide labour to the various owners of the farm. According to her, she was remunerated at the rate of R3 for six months. According to Mr Raw, the amount was 50c per day. Be that as it may, the conclusion that the remuneration was so paltry because it was augmented by the right enjoyed by her also to use cropping land on the farm is irresistible. In this regard, her insistence that there had been an agreement to the effect that she and her husband would receive remuneration partly in the form of cropping rights was not seriously challenged on behalf of the defendant and, in my view, is supported by the remaining evidence as well as the overall probabilities.

[21] 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 parent or grandparent, and the owner or lessee of the land concerned'.[3]

[22] The precarious position of labour tenants and their widespread loss of rights in the mass shift to wage labour farming in twentieth century South

[3] Section 2(6) of the Act.

Africa is referred to by DL Carey Miller (with Anne Pope) *Land Title in South Africa* (2000) at para 1.2.5.6. Carey Miller and Pope state the following:

'The relevant legislative history . . . was driven by considerations of agricultural policy. But, of course, the policy was determined primarily on a sectional basis with the end result demonstrating the vulnerability of a disenfranchised people.

Reform political thinking in South Africa has, from a relatively early stage, recognised the need for the protection of the position of labour tenants. Albie Sachs, writing at a stage when the reform agenda was taking definite shape, identified the unfairness of the existing position and predicted reform driven by recognition of a far wider spectrum of entitlement than the traditional narrow proprietary basis.

> "Share-cropping and labour tenancy in the past were examples of the co-involvement between black and white in production on a single farm. The black and white families occupied and farmed the same piece of land, and defined the mutual rights and responsibilities between them. In the conditions of the time, the parties contracted on a grossly unequal basis, in terms of which the white farmer was accorded a dominant position and the black farmer a subordinate one. What will become possible in the period of democratic transformation in which the human rights of all are acknowledged by the constitution, is a recognition of the terms of shared occupancy and use, but this time on the basis of objectively determinable criteria and in an atmosphere of equality".

The 1996 Green Paper comments on labour tenancy as an instance of a general problem of "[t]enants inadequately protected from arbitrary dispossession":

> "The unequal distribution of wealth and power between blacks and whites along with severe restrictions on black land ownership has inevitably resulted in the emergence of various forms of tenancy. Under labour tenancy, tenants are obliged to provide labour to farm owners in exchange for the right to occupy and use a portion of the farmland. There was an ongoing attempt by the previous

government to formally outlaw labour tenancy on a district by district basis during the period between 1966 and 1980." '[4] (Footnotes omitted.)

[23] In *Department of Land Affairs v Goedgelegen Tropical Foods (Pty) Ltd*, [5] Moseneke DCJ stated the following:[6]

'In any event, at its very core, labour tenancy under the common law arises from a so-called innominate contract between the landowner and the labour tenant, requiring the 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 individualised 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 a community of labour tenants. It must however be recognised that despite *the fiction of the 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.' (Emphasis added.)

[24] In the same judgment, Moseneke DCJ, dealing with the correct approach to the interpretation of various sections of the Restitution of Land Rights Act 22 of 1994, emphasised the fact that this 'is remedial legislation umbilically linked to the Constitution'. He continued as follows:[7]

'Therefore, in construing "as a result of past racially discriminatory laws or practices" in its setting of s 2(1) of the Restitution Act, we are obliged to scrutinise its purpose. As we do so, we must seek to promote the spirit, purport and objects of the Bill of Rights. We must prefer a generous construction over a merely textual or legalistic one in order to afford claimants the fullest possible protections of their constitutional guarantees. In searching for the purpose, it is legitimate to seek to identify the mischief sought to be

[4] Pages 526-527.
[5] 2007 (6) SA 199 (CC).
[6] Para 46.
[7] Paras 53 and 55.

remedied. In part, that is why it is helpful, where appropriate, to pay due attention to the social and historical background of the legislation. We must understand the provision within the context of the grid, if any, of related provisions and of the statute as a whole, including its underlying values. Although the text is often the starting point of any statutory construction, the meaning it bears must pay due regard to context. This is so even when the ordinary meaning of the provision to be construed is clear and unambiguous.

. . .

It is indeed so that the Restitution Act is an enactment intended to express the values of the Constitution and to remedy the failure to respect such values in the past, in particular, the values of dignity and equal worth. To achieve this remedial purpose . . . the history and context within which land rights were dispossessed and in particular the manner in which labour tenancy operated and was terminated must be considered.'

[25] In my view, the same approach must be adopted in respect of the interpretation of the relevant provisions of the Act with which we are dealing in this appeal. The Preamble to the Act points out that:

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

. . . it is desirable to ensure the adequate protection of labour tenants who are persons who were disadvantaged by unfair discrimination, in order to promote their full and equal enjoyment of human rights and freedoms; . . .

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

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

[26] The following words of Moseneke DCJ in the *Goedgelegen* case[8] are also relevant for the purposes of this judgment:

[8] Para 86.

'Finally, it is appropriate to observe that the rights of the individual applicants [labour tenants] were not merely economic rights to graze and cultivate in a particular area. They were rights of family connection with certain pieces of land, where the aged were buried and children were born and where modest homesteads passed from generation to generation. 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 formalised a minimal degree of respect by the farm owners for the connection of the indigenous families to the land. It had a cultural and spiritual dimension that rendered the destruction of the rights more than just economic loss.'

[27] 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, are 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.[9]

[28] It is simplistic to approach the relationship between a farm owner and a labour tenant as necessarily one in respect of which only one member of a household or family unit has the right to be or remain on the farm as a labour tenant. Complexities abound. For example, it might well be inferred in appropriate cases that *each* member of a family unit consisting of a father,

[9] See the *Goedgelegen Tropical Foods (Pty) Ltd* case para 46, cited in para 23 above.

mother and child agreed with the farm owner that he or she be afforded labour tenancy rights in return for his or her providing labour individually and not necessarily in equal measure. Furthermore, the arrangements in respect of the time periods during which and the manner in which labour is provided by each member of the family unit might mutate over time and in relation to successive owners of the farm, depending on the changing requirements of the farm and the demands of the owner. That metamorphosis would have led inexorably to labour tenancy relationships between the farmer and each individual member of the family unit. In those circumstances, to ask when the labour tenancy relationship commenced serves not just to obfuscate the enquiry but also to ignore our historical reality. Naturally, however, successive owners assume the responsibilities brought about by already established relationships and existing rights.

[29] As pointed out above, the attempt made by Mr Dennis Raw to prove that the plaintiff was a 'farmworker' is, in the light of the totality of the evidence and against the probabilities, wholly unconvincing. Thus, in the present case there are really only two hypothetical possibilities. The first is that the plaintiff is indeed a labour tenant, as defined in the Act. The second is that suggested by counsel for the appellant, namely that, in rendering labour to successive owners of the farm, the plaintiff was simply discharging the labour tenancy obligations of her father and, after her marriage, of her husband – the plaintiff being only the means by which the 'actual' labour tenant (her father or her husband) fulfilled his obligation to provide labour. Counsel contended that the plaintiff's 'right' to crop flowed simply from the fact that she was living on the farm with her husband and family and not *in consideration for* any obligation on her part to provide labour to the farm

owner. To my mind, this proposition needs only to be stated to be rejected: It is not disputed that the plaintiff *herself* provided labour for more than 17 years, and her evidence that *she* was remunerated for this labour predominantly through *her* right to use cropping land on the farm was not seriously challenged.

[30] The attempt by the appellant to deny the plaintiff the rights of a labour tenant by asserting that such labour tenancy arrangements as were made were limited to the male members (or perhaps even only to the male head) of a family unit smacks of opportunism, is not supported by the facts and would render her presently liable to discrimination of a kind not countenanced by the Constitution. To gauge the existence of a labour tenancy agreement in the technical and precise manner akin to that applicable to usual residential or commercial tenancies is far too restrictive an approach and one that goes against the objective and general tenor of the Act.

[31] For the reasons set out above and having regard to the overall effect of the evidence on this aspect, I can find no ground to interfere with the finding of the court a quo that the plaintiff did indeed have 'the right to use cropping land, an entitlement which she exercised unfettered over a period of time, both during her employment and thereafter, and in consideration for which right she provided labour'.[10]

[10] Para 43 of the judgment of the court a quo.

The para (c) requirement

[32] In the context of the present case, the requirement in terms of para (c) of the definition entails a threefold enquiry: (i) whether the plaintiff's parent or grandparent resided on the farm; (ii) whether he/they had the use of cropping or grazing land on such farm or another farm of the owner; and (iii) whether he/they provided labour to the owner of such farm in consideration of such right.

[33] The first two elements were not seriously disputed on behalf of the defendant. It was contended on behalf of the defendant that the plaintiff has not proved that the right to use cropping or grazing land was 'in consideration of the obligation to provide labour'.

[34] In this regard, the plaintiff stated that the agreement her parents had with the landowner was 'to the effect that they were to have a number of stock as they wanted to, and they were being paid as well.' The plaintiff's evidence in this regard was largely confirmed by the evidence of Ms Ngubane.

[35] Having regard to the 'meagre salary' (in the words of the trial judge) of two pounds paid to the plaintiff's father, again the conclusion seems in-escapable that he (the plaintiff's father) provided labour at least partly in consideration of the right also to use cropping or grazing land on the farm.

Conclusion

[36] In the circumstances, I conclude that there are no grounds to interfere with the order of the court a quo. The appeal is therefore dismissed with costs.

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BJ VAN HEERDEN
JUDGE OF APPEAL

CONCUR:
MTHIYANE JA
MAYA JA

NUGENT JA:

[37] I have read the judgment of my colleague but I regret that I cannot concur in the order she proposes. The difference between us relates to the construction of the evidence. I indeed assert the proposition that my colleague regrettably believes needs only to be stated in order to be rejected. I think the evidence of the respondent establishes without doubt that she is not and never has been a labour tenant as that term is defined in the Act. That her husband was a labour tenant is clear but labour tenancy is not capable of being acquired derivatively.

[38] A statute is not a mere statement of a legislative objective but is rather the route chosen by the legislature to achieve that objective. In *Goedgelegen Tropical Foods* (referred to by my colleague) Moseneke DCJ made the point that labour tenancy is a relationship between two individuals – the tenant and the landlord – rather than a relationship between a landlord and a group (whether it be a community or a family). That is not to say that more than one member of a community or a family might not be labour tenants, but only that the enquiry is to be directed at the individual who claims to be a labour tenant. At the core of that relationship is an obligation undertaken by the tenant to provide labour to the landlord (whether his or her own labour or that of others) in return for the right to use land for cropping or grazing. That essential feature of the relationship is expressed in subparagraph (b) of the definition of a labour tenant, which requires that the person concerned

'has or has had the *right* to use cropping or grazing land…and *in consideration of such right* provides or has provided labour…' (my emphasis).

[39] The circumstances in which labour tenancy can be expected to arise will seldom produce evidence of the relationship in the form of explicit contractual formalities. More often the relationship will be the product of long practice or custom, or of the conduct of the parties or their predecessors, and any oral expression of their intent will have been lost over time. In those circumstances a court must take particular care to examine all the circumstances surrounding the relationship to determine whether it was one of labour tenancy. Needless to say, the mere assertion by one or other of the protagonists that the relationship was or was not of that kind will not be helpful. Indeed, such assertions are strictly not even admissible, because it is for a court, and not a witness, to determine what conclusion is to be drawn from the facts.

[40] In most cases inferences to be drawn from the manner in which the parties have conducted themselves will provide the most cogent evidence of the existence or absence of such a relationship. For the relationship is one that entails reciprocal rights and obligations that both manifest themselves overtly in their exercise or performance. If a relationship is indeed one of labour tenancy the exercise of the rights will necessarily correlate with the performance of the reciprocal obligations. And if it is not a relationship of labour tenancy there will conversely be no such correlation.

[41] The respondent, Mrs Dano Mbhense (born Mhlongo), was born on the farm that is now in issue. The farm was then owned and operated by Mr Willy Raw. Later it passed to his son Mr Joe Raw. For a while Mr Joe Raw operated the farm in association with his son Mr Dennis Raw. Thereafter it was operated by Mr Joe Raw's second son, Mr Robert Raw. The farm then

passed to a Mr Ross (that seems to have been in about 1980). After the death of Mr Ross it seems first to have passed to a Mr Kibler and then to the appellant, Mr Brown.

[42] At the time Mrs Mbhense was born her father, Mr Sikhwebu Mhlongo, worked on the farm and the household grazed livestock and planted crops. Mrs Mbhense's mother was not in full time employment but worked on the farm from time to time according to the seasons. When Mrs Mbhense was young she and her young sisters alternated in providing domestic service on the farm in return for a wage. (Precisely what the wage was is a matter of dispute but I have accepted that it was paltry.)

[43] In 1962 she married Mr Mfesi Mbhense, who was also born on the farm. He had three brothers – Mr Mxhantini Mbhense, Mr Row Mbhense and Mr Mponono Mbhense. At the time of the marriage Mr Mfesi Mbhense and his three brothers all worked on the farm. Their parents were still alive but were no longer working. Mr Mbhense senior owned cattle that were grazed on the land, and the family also planted crops.

[44] After the marriage Mrs Mbhense continued to provide domestic service. Whether she did so continuously is not clear but I have assumed that she did. At some time in the course of the marriage Mr Mbhense senior died. His cattle were inherited by his son, Mr Mxhantini Mbhense. From then on Mr and Mrs Mbhense only planted crops.

[45] Mrs Mbhense stopped working for the occupier of the farm when she commenced bearing children – which seems to have been in about 1979 –

and she did not resume work again. In 1987 her husband died. At that time the farm was owned by Mr Ross who died approximately a month later. It was at about that time that cropping came to an end. Whether it was the death of her husband or the death of Mr Ross that brought that about is not altogether clear because Mrs Mbhense's evidence on that issue is rather ambiguous (she said that 'after my husband had passed away, Ross also passed away, therefore I could not plough any lands anymore') but I do not think that is material. Mrs Mbhense continued to live on the farm and at the time of the proceedings in the court below she was living in a dwelling that had a small vegetable garden.

[46] When determining whether a particular relationship existed – whether it be one of labour tenancy or any other relationship – I think it is always useful to ask when and in what manner the relationship is said to have begun. For every individualized relationship – like that of labour tenancy – must have had a beginning if it existed at all. No person is born into labour tenancy nor does the relationship arise spontaneously. It might be that the claimant and the farmer concerned were themselves party to the creation of the relationship whether expressly or merely by their conduct. It might also be that the relationship came into being by succession of the claimant to a practice or custom established by a previous owner – which is how Mr Mbhense became a labour tenant. I am not sure why it obfuscates the enquiry to ask when the relationship began. I prefer analyzing the effect of the evidence over relying upon its general impression and that question seems to me to provides a structure for that analysis.

[47] The cropping and grazing rights that were enjoyed by the Mhlongo household existed before Mrs Mbhense was born. Quite evidently those rights – and the obligation to provide labour in consideration for those rights – adhered to someone other than herself. It is also evident that those rights (and the corresponding obligation to provide labour) were not transferred to Mrs Mbhense during the time that she lived in that household because they continued to be exercised by the household after she left it upon her marriage.

[48] That Mrs Mbhense was not under an obligation to provide labour (and was thus not the holder of the corresponding rights) is confirmed by the fact that she rendered service only periodically. It is quite possible that the holder of the rights (her father or her mother) was obliged in return to ensure that domestic service was provided, and that the services of Mrs Mbhense and her sisters were rendered in fulfillment of that obligation, but that would not make Mrs Mbhense (or her sisters) a labour tenant. Her services would merely be the means by which the labour tenant (her father or her mother) fulfilled his or her obligations to provide labour. Absent an independent right enjoyed by Mrs Mbhense, and an independent obligation to provide labour in return, she was not a labour tenant.

[49] Clearly Mrs Mbhense was not a labour tenant during the time that she was in the household of her parents. It is also clear that her marriage did not alter her status in that regard. The Mbhense household had its own cropping and grazing rights at the time it was joined by Mrs Mbhense. There is no suggestion that additional cropping and grazing rights accrued to the Mbhense household after the marriage. It is also clear that the continuance

of those rights was not dependant upon Mrs Mbhense providing labour to the occupier because they continued unabated even though she stopped working (in about 1979). Once again the fact that the rights continued to be exercised unabated notwithstanding that Mrs Mbhense provided no labour confirms that the obligation to provide labour (and the corresponding right to crop and graze) did not adhere to her.

[50] After the death of Mr Mbhense senior the households of his descendants (including the household of Mr and Mrs Mbhense) continued to enjoy cropping and grazing rights. (Mr Mbhense had no cattle and only exercised cropping rights.) But there is nothing to suggest that the right to plant crops from that time adhered to Mrs Mbhense. On the contrary, it is clear that it did not, for she provided no labour. I think it is clear that the rights adhered to her husband, for which he provided his labour in return, and indeed, the cropping rights terminated upon his death. (If Mrs Mbhense continued to grow crops for a short time thereafter then clearly that was a gratuitous disposition because there was no accompanying obligation to provide labour.)

[51] It is difficult, then, to see when Mrs Mbhense might have become a labour tenant. I think that difficulty arises only because she never was a labour tenant. I think the evidence establishes that she never had an independent right to grow crops or graze animals, and that she never had an independent obligation to provide labour (which are two sides of the same coin).

[52] In his evidence Mr Dennis Raw said that it was the custom of his family to grant cropping and grazing rights to the male head of each household in return for which they were to provide labour. All the evidence is consistent with that having occurred. That Mrs Mbhense was the daughter of a labour tenant is clear. That she was the wife of a labour tenant – who succeeded to that relationship in accordance with established practice – is also clear. But it is also clear that she was not a labour tenant herself.

[53] We were told by counsel for the appellant that the appellant acknowledges that Mrs Mbhense enjoys the protection against eviction that is provided by the Extension of Security of Tenure Act 62 of 1997. Indeed, we were told that the appellant has no intention of attempting to evict her from the farm. What was in issue in these proceedings was only whether she was entitled to be awarded real rights in the farm.

[54] I would accordingly uphold the appeal and substitute the order of the court below with an order dismissing the application.

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R.W. NUGENT
JUDGE OF APPEAL

CONCUR:

SCOTT JA