



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable

Case no: 463/2020

In the matter between:

DR HUBERT ADENDORFF N O

FIRST APPELLANT

DR HUBERT ADENDORFF

SECOND APPELLANT

and

DANIEL PHUNYULA KUBHEKA

FIRST RESPONDENT

DIRECTOR - GENERAL FOR

THE DEPARTMENT OF RURAL

DEVELOPMENT AND LAND AFFAIRS

SECOND RESPONDENT

Neutral citation: *Adendorff N O and Another v Kubheka and Another* (Case no 463/20) [2022] ZASCA 29 (24 March 2022)

Coram: PETSE AP, MBHA and CARELSE JJA and PHATSHOANE
and MOLEFE AJJA

Heard: 07 December 2021

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down of the judgment is deemed to be 10h00 on 24 March 2022.

Summary: Labour tenant – definition of a labour tenant in s 1 of the Land Reform (Labour Tenants) Act 3 of 1996 – farmworker – requirements in terms of s 2(5) of the Labour Tenants Act – application for an award of land in terms of s16 and 17 of the Labour Tenants Act – the question of compensation in terms of ss 22 and 23 of the Labour Tenants Act arising only after determination by a court that the occupier is a labour tenant.

ORDER

On appeal from: Land Claims Court, Randburg (Barnes AJ, sitting as a court of first instance):

- 1 The appeal is dismissed.
- 2 The order of the Land Claims Court is supplemented by the addition of the following:
 - ‘2.1 The second respondent is ordered and directed, within 60 days of this order, to cause the portion of the farm Cadie awarded to the first respondent to be evaluated, which evaluation should include the entire farm Cadie, to determine just and equitable compensation to be paid to the appellants for the said land.
 - 2.2 The second respondent is directed to cause the evaluation envisaged in paragraph 2.1 to be conducted and concluded within 60 days and to be made available to the appellants’ attorneys of record within five (5) days of completion thereof.
 - 2.3 The appellants are authorised to engage an expert valuer of their choice to evaluate the land described in paragraph 2.1 hereof, such evaluation to include the entire farm.
 - 2.4 The appellants shall cause to be served on the attorneys of record of the first and second respondents the said evaluation within five (5) days of completion thereof.
 - 2.5 The parties are directed to enter into negotiations in good faith with a view to settling the question of compensation as envisaged in s

23 of the Labour Tenant Act 3 of 1996 read with s 25 of the Constitution. Such discussions are to be concluded within 60 days of the date of exchange between the parties of the last valuation report.

2.6 Should no agreement be reached between the appellants and the second respondent regarding the issue of just and equitable compensation for the agreed land, either party is granted leave to approach the Land Claims Court, on notice to the other, for appropriate relief including the determination of just and equitable compensation.’

3 There shall be no order as to the costs of the appeal in this Court.

JUDGMENT

Carelse JA (Petse AP, Mbha JA and Phatshoane and Molefe AJJA concurring):

[1] The primary issue in this appeal is whether the Land Claims Court (LCC) was correct in finding that the first respondent, Mr Daniel Phunyula Kubheka, is a labour tenant in terms of s 33(2A) of the Land Reform (Labour Tenants) Act 3 of 1996¹ (the Labour Tenants Act). Mr Daniel Kubheka was the plaintiff in an action brought in the LCC. The second respondent is the Director-General for the Department of Rural Development and Land Affairs (the Department) who was the third defendant in the LCC. The registered

¹ Section 33 (2A) provides that:

‘At the instance of any interested person, including a person who avers that he or she is a labour tenant, irrespective as to whether or not such person has lodged an application in terms of section 17, the Court may determine whether a person is a labour tenant.’

owner of the farm which is the subject of the dispute was Mrs Adendorff (the first defendant in the LCC). She has since died and her husband, the second appellant, Dr Adendorff (the second defendant in the LCC) has been substituted as the first appellant, in his capacity as the Executor of the Estate of the late Mrs Adendorff.

[2] On 26 April 2019, the LCC, Randburg, per Barnes AJ, declared Mr Daniel Kubheka a labour tenant in terms of s 33(2A) of the Labour Tenants Act and, pursuant thereto, awarded him a portion of portion 1 of the farm Cadie No 12399 (Cadie), Registration Division HS, in the district of Newcastle, Kwa-Zulu Natal. This land included two grazing camps, which Mr Daniel Kubheka and his family members were occupying and using as at 2 June 1995 in terms of s 16² of the Labour Tenants Act. Barnes AJ made no order as to costs. Dissatisfied with the outcome of the trial, the Adendorffs applied for, and were granted, leave to appeal to this Court after the LCC had refused leave.

² Section 16 provides that:

- ‘(1) Subject to the provisions of this Act, a labour tenant or his or her successor may apply for an award of–
- (a) the land which he or she is entitled to occupy or use in terms of section 3;
 - (b) the land which he or she or his or her family occupied or used during a period of five years immediately prior to the commencement of this Act, and of which he or she or his or her family was deprived contrary to the terms of an agreement between the parties;
 - (c) rights in land elsewhere on the farm or in the vicinity which may have been proposed by the owner of the farm; and
 - (d) such servitudes of right of access to water, rights of way or other servitudes as are reasonably necessary or are reasonably consistent with the rights which he or she enjoys or has previously enjoyed as a labour tenant, or such other compensatory land or rights in land and servitudes as he or she may accept in terms of section 18 (5): Provided that the right to apply to be awarded such land, rights in land and servitudes shall lapse if no application is lodged with the Director-General in terms of section 17 on or before 31 March 2001.
- (2) The terms of an agreement whereunder a labour tenant waives the rights conferred on him or her by this section shall not come into operation unless –
- (a) the Director-General has certified that he or she is satisfied that the labour tenant had full knowledge of the nature and extent of his or her rights as well as the consequences of the waiver of such rights; or
 - (b) such terms are incorporated in an order of the Court or an arbitrator appointed in terms of section 19.’

[3] Mr Daniel Khubeka, who has resided on Cadie since 1975, instituted action proceedings against the Adendorffs in the LCC. In addition to seeking a declaration that he was a labour tenant and that he be awarded the portion of Cadie that he and his family members were using on the 2nd of June 1995, he sought an order that monies needed to compensate the Adendorffs for that portion of land on Cadie be made available by the Department. The LCC did not order the Department to make funds available to compensate the Adendorffs for that portion of the land awarded to Mr Daniel Kubheka. The Department elected not to participate in the trial but instead gave a written undertaking that it would make money available to compensate the land owner if an award of the land were made by the LCC.

[4] There are a number of interrelated issues that require determination in this appeal. These are:

4.1 whether Mr Daniel Kubheka satisfied the requirements set out in paragraphs (a), (b) and (c), read conjunctively, in terms of the definition of ‘labour tenant’ in s 1 of the Labour Tenants Act. Pertinently, has he complied with paragraph (b) in s 1 of the Labour Tenants Act. Put differently, has Mr Daniel Kubheka proved that as at 2 June 1995 he was a labour tenant as defined in the Labour Tenants Act;

4.2 whether the Adendorffs proved that Mr Daniel Kubheka is a farmworker.³ In order to succeed, it was incumbent upon the Adendorffs to prove that: (i) Mr Daniel Kubheka was paid predominantly in cash or in some other form of

³ Section 2(5) of the Labour Tenants Act.

remuneration, and not pre-dominantly in the right to occupy and use land, and
(ii) that Mr Daniel Kubheka was obliged to perform his services personally;

4.3 whether Mr Daniel Kubheka had lodged a valid claim before 31 March 2001 in terms of ss 16 and 17⁴ of the Labour Tenants Act;

4.4 whether the LCC should have ordered just and equitable compensation in terms of s 23 of the Labour Tenants Act, and whether the LCC should have granted orders in terms of s 22⁵ of the Labour Tenants Act; and,

⁴ Section 17 of the Labour Tenants Act provides as follows:

- ‘(1) An application for the acquisition of land and servitudes referred to in section 16 shall be lodged with the Director-General.
- (2) On receiving an application in terms of subsection (1), the Director-General shall –
- (a) forthwith give notice of receipt of the application to the owner of the land and to the holder of any other registered right in the land in question;
- (b) in the notice to the owner, draw his or her attention to the contents of this section and section 18;
- (c) cause a notice of the application to be published in the Gazette; and
- (d) call upon the owner by written request, to furnish him or her within 30 days –
- (i) with the names and addresses of the holders of all unregistered rights in the land in question, together with a copy of any document in which such rights are contained, or if such rights are not contained in any document, full particulars thereof;
- (ii) with any documents or information in respect of the land in question and the rights in such land as the Director-General may reasonably require.
- (3) A notice in terms of subsection (2)(a) or (d), may be given by way of registered mail or through service in the manner provided for the service of summons in the Rules of Court made in terms of the Magistrates’ Courts Act, 1944 (Act 32 of 1944), read with section 6(3) of the Rules Board for Courts of Law Act, 1985 (Act 107 of 1985).
- (4) The owner of affected land shall within one calendar month of receipt of the notice referred to in subsection (2) (a), inform the Director-General in writing –
- (a) whether he or she admits or denies that the applicant is a labour tenant within the meaning of this Act; and
- (b) if he or she denies that the applicant is a labour tenant, the grounds on which he or she does so.
- (5) If the owner fails to inform the Director-General within the period referred to in subsection (4) that he or she denies that the applicant is a labour tenant, the applicant shall be presumed to be a labour tenant, unless the contrary is proved.
- (6) If the owner does not inform the Director-General within the period referred to in subsection (4) that he or she admits that the applicant is a labour tenant, the Director-General shall, at the request of either party, refer the application to the Court.
- (7) Any person whose rights are affected by the application shall have the right to participate in the proceedings before the arbitrator and the Court, in the manner provided in the rules.
- (8) Should the owner, without good reason, fail to give to the Director-General any information or documents requested in terms of subsection (2)(d) within 30 days of receipt of a written request
- (a) the Court may order him or her to do so;
- (b) the Court may make an order for costs against him or her; and
- (c) he or she shall be liable for any loss which the Director-General or the applicant or any person may suffer as result of such failure, and the Court may, on application by the affected person concerned, give judgement against him or her for such loss.’

⁵ Section 22 of the Labour Tenants Act provides as follows:

4.5 whether the LCC should have awarded costs in the action against the Department, even though the Adendorffs were unsuccessful? It is unnecessary to recapitulate all of the facts because the LCC set out a detailed and proper exposition of the facts. I intend to only set out those facts as are relevant for present purposes.

[5] As to the first issue, the term ‘labour tenant’ is defined in the Labour Tenants Act as 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

‘(1) An arbitrator and the Court may dismiss an application referred to in section 16: Provided that the arbitrator and the Court shall not dismiss an application if it is found by the arbitrator or the Court, or if it is not in dispute, that the applicant is a labour tenant.

(2) The Court may order that land or a right in land, held by an owner of affected land, be awarded to the applicant.

(3) The Court may, instead of or in addition to making an order for the award of land or a right in land held by the owner of affected land, order that land or a right in land held by another person (including the State) who is willing to have such land or right in land awarded to the applicant, be awarded to such applicant.

(4) The Court may make an order or award, and an arbitrator may make a determination, on the following matters:

(a) Whether the applicant is a labour tenant, if that is in dispute;

(b) the nature, location and extent of any land or right in land which is to be awarded to an applicant, which may include undivided shares in grazing land;

(c) such servitudes of access to water or rights of way or other servitudes as are reasonably necessary or are reasonably consistent with the rights which the applicant or the owner of the affected land enjoys or has previously enjoyed;

(d) the compensation to be paid by the applicant to the owner or affected land or to a person other than the owner whose rights are affected by the determination, order or award;

(e) the manner and period of payment of compensation;

(f) compensation which shall be paid to the applicant in lieu of the award of land or a right in land; and

(g) other matters which, in the opinion of the arbitrator or the Court, need to be regulated by an order or award of the Court, or by a determination of an arbitrator.

(5) In determining the nature of the order which is to be made the Court shall have regard to –

(a) the desirability of assisting labour tenants to establish themselves on farms on a viable and sustainable basis;

(b) the achievement of the goals of this Act;

(c) the requirements of equity and justice;

(d) the willingness of the owner of affected land and the applicant to make a contribution, which is reasonable and within their respective capacities, to the settlement of the application in question; and

(e) the report and any determination made by an arbitrator appointed in terms of section 19e(1)(a).’

- (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.’

[6] Paragraphs (a), (b) and (c) of the definition must be read conjunctively;⁶ a person who satisfied the three jurisdictional requirements on 2 June 1995⁷ is presumed not to be a farmworker, unless the contrary is proved.⁸ It is common cause that paragraph (a) was met. The Adendorffs argued that because Mr Daniel Kubheka did not work for Mrs Adendorff, the owner of Cadie, on 2 June 1995, paragraph (b) of the definition was not fulfilled. The Adendorffs also challenged whether paragraph (c) of the definition was fulfilled. There was nothing to gainsay Mr Daniel Kubheka’s evidence that his parents resided on the farm Glenbarton (Glenbarton) and had cropping and grazing rights. It is trite that the *onus* is on Mr Daniel Kubheka to prove that he has satisfied the requirements of the Labour Tenants Act, including, in particular, paragraphs (a), (b) and (c) of the definition of the Labour Tenant Act. Once this has been

⁶ *Mokwena v Marie Appel Beleggings CC and Another* [1999] 2 All SA 157 (LCC) at 161E; see also *Ngcobo and Others v Salimba CC*; *Ngcobo v Van Rensburg* [1999] 2 All SA 491 (A); 1999 (2) SA 1057 (SCA) at 1057I-J.

⁷Section 3(1) of the Labour Tenants Act states:

‘(1) 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 –

(a) to occupy and use that part of the farm in question which he or he or his or her associate was using and occupying on that date;

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

⁸ See Section 2(5) of the Labour Tenants Act, which states as follows:

‘(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.’

established, the *onus* then shifts to the Adendorffs to prove that Mr Daniel Kubheka is a farmworker.

[7] The Adendorffs contended that Mr Daniel Kubheka is not a labour tenant but a farmworker. The term ‘farmworker’ is defined in the Labour Tenants Act as:

‘. . . 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.’ (My emphasis.)

[8] In 2017 when the trial commenced, Mr Daniel Kubheka was 69 years old and is currently 73 years old. He still resides with his wife and children at Cadie. He attended school up to standard 2. Mr Daniel Kubheka was born and raised on Glenbarton farm, Kwa-Zulu Natal and lived with his parents and 10 siblings on Glenbarton. His parents had nine structures with a few gardens and grazing fields. They also had cropping and grazing rights. In return for their labour, Mr Daniel Kubheka’s parents provided labour to the owner of Glenbarton, the late Mr Wynand Adendorff. According to Mr Daniel Kubheka his parents were not paid in cash for their labour. In order to survive and earn a livelihood his parents sold cattle. At the tender age of 11 he started working at Glenbarton and was occasionally paid R1,00 in cash. His duties at Glenbarton included mending the fences, tending the chickens, fetching the cows for milk and working in the fields. Mr Daniel Kubheka’s parents are deceased and are buried on Glenbarton. In 1975, at the age of 25, Mr Daniel

Kubheka relocated to Cadie. In 1980, he got married. His wife was a resident at Cadie and together they built their homestead comprising of 8 structures. Two of his children are deceased and are buried at Cadie.

[9] It is common cause that in 1962, after the death of Mr Wynand Adendorff, Mr Daniel Kubheka worked for the late Mr Boet Theunissen (also known as De Villiers) at Glenbarton. He relocated with Mr Boet Theunissen to Cadie, and from 1975 until 1978 he provided his labour to Mr Boet Theunissen at Cadie. From 1978 until 1984, Mr Daniel Kubheka worked for Mr Van der Linde, who leased Cadie. Dr Adendorff leased Cadie from 1984. During his testimony, and in response to a question relating to Cadie put to him by his legal representative, Dr Adendorff said:

‘That farm was purchased.

When was that approximately?

I purchased that from the Theunissens.

In 1986?

In 1986. It was registered in 1987.

...

And the farm is registered in your wife’s name?

In my wife’s name.

And that is still the position.

...

... [W]hat did you do with the farm?

After that I rented it out to Mr Paul Oosthuizen.’

From 1995 until 2001, Mr Daniel Kubheka worked for Mr Paul Oosthuizen who leased Cadie. From 2001 until 2004, Mr Daniel Kubheka provided his labour to Mr George Lubbe who paid him R750 per month. In 2004, he stopped working at Cadie.

[10] Barnes AJ accepted the evidence of Mr Daniel Kubheka and his witnesses. The test for interference with a trial court's factual findings by a court of appeal imposes a high threshold. There are a number of principles which should guide an appellate court when asked to overturn a trial judge's findings of fact. It is trite that an appeal court will only (in exceptional and very limited circumstances) interfere with a trial judge's findings unless the appeal court is satisfied that the trial judge was 'plainly wrong'. It would be essential to show that fundamental and relevant evidence has not been considered and that the decision reached by the trial judge is not supportable on the evidence.⁹

[11] It is apparent from the record that the versions of Mr Daniel Kubheka and his witnesses and that of Dr Adendorff and his witnesses are mutually destructive. In *Stellenbosch Farmers Winery Group Ltd and Another v Martell*

⁹ See *Rex v Dhlumayo and Another* 1948 (2) SA 677 (A) (*Dhlumayo*) at 705-706 where this Court held that: 'I summarise the conclusions to which I have come with regard to the principles which should guide an appellate court in an appeal purely upon fact as follows:

1. An appellant is entitled as of right to a rehearing, but with the limitations imposed by these principles; this right is a matter of law and must not be made illusory.
2. Those principles are in the main matters of common sense, flexible and such as not to hamper the appellate court in doing justice in the particular case before it.
3. The trial Judge has advantages – which the appellate court cannot have – in seeing and hearing the witnesses and in being steeped in the atmosphere of the trial. Not only has he had the opportunity of observing their demeanour, but also their appearance and whole personality. This should never be overlooked.
4. Consequently the appellate court is very reluctant to upset the findings of the trial Judge.
5. The mere fact that the trial Judge has not commented on the demeanour of the witnesses can hardly ever place the appeal court in as good a position as he was.
6. Even in drawing inferences the trial Judge may be in a better position than the appellate court, in that he may be more able to estimate what is probable or improbable in relation to the particular people whom he has observed at the trial.

...

12. An appellate court should not seek anxiously to discover reasons adverse to the conclusions of the trial judge. No judgment can ever be perfect and all-embracing, and it does not necessarily follow that, because something has not been mentioned, therefore it has not been considered.'

& Cie SA 2003 (1) SA 11 (SCA),¹⁰ this Court set out guidelines on how to approach the evaluation of evidence when faced with two mutually destructive versions.

Was Mr Daniel Kubheka a labour tenant in terms of the Labour Tenants Act, as at 2 June 1995?

[12] Mr Daniel Kubheka bears the onus to prove that he is a labour tenant as defined in s 3(1)(a), (b) and (c) of the Labour Tenants Act.

[13] It is common cause that Mr Daniel Kubheka has resided at Cadie since 1975 (and still resides at Cadie), thus paragraph (a) has been met. The findings of the LCC in respect of paragraph (b) for the period 1975 to 1986 and the period 1995 to 2001 are not in issue. In issue is the period 1986 to 1995, during which the Adendorffs allege that Mr Daniel Kubheka did not meet the requirement in paragraph (b) in that he did not provide his labour to the *owner* or the *lessee* of Cadie¹¹ as at 2 June 1995.

¹⁰ At para 5 this Court held:

‘... The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court’s finding on the credibility of a particular witness will depend on the impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness’s candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness’s reliability will depend, apart from the factors mentioned under (a)(ii), (iv) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party’s version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court’s credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail.’

¹¹ *Selsey Farm Trust v Mhlongo* [2009] ZASCA 124; [2010] 1 All SA 466 (SCA).

[14] Dealing with this issue, the LCC held that:

‘On his own version, Dr Adendorff, bought the farm and registered it in his wife’s name. Dr Adendorff ran the farm. Mr Daniel Kubheka quite understandably, in these circumstances, believed that Dr Adendorff was the owner of the farm. He was certainly the person in charge. It is arguable that a purposive interpretation of paragraph (b) of the definition of labour tenants would include “person in charge” within its ambit.’

[15] The LCC held further that:

‘The second difficulty with Mr Du Plessis’s submission is that it fails to adopt a holistic and continuous approach to the definition of labour tenant. Even if one discounts the labour provided by Mr Daniel Kubheka to Dr Adendorff, Mr Daniel Kubheka provided labour to the other owners and lessees of the farm for a cumulative period of 18 years. On a holistic and continuous interpretation of the labour tenant definition, this clearly, in my view, constitutes compliance with paragraph (b) thereof.’

For this reason, the LCC found that the first respondent also fulfilled the requirement set out in paragraph (b).

[16] It is common cause that the late Mrs Adendorff received the requisite s 17 notice from the Department. In response thereto, she instructed her attorneys to write to the Department and to, *inter alia*, say that Mr Daniel Kubheka is not a labour tenant, but a farmworker. The relevant parts of the letter read:

‘Both applicants resided on the farm when our client acquired the farm in 1973 *but never had the right to use cropping or grazing land on the farm and in consideration of such right, provided or has provided labour to the owner. Our instructions are that at all times, both applicants, whilst our client has been with the owner of the land, worked as labourers for the owner or her lessee and in consideration for such labour, both applicants were paid*

predominantly in cash and not predominantly in the right to occupy and use the land in question.

After having had a consultation with our client and her husband, Dr Adendorff, we are respectfully of the opinion that the Extension of Security and Tenure Act, No 62 of 1997 (“ESTA”), apply. In respect of both clients, they were entitled to use approximately 25 hectares of the farm land of our client in addition to their wages and were paid R400,00 and R300,00 per month respectively. They also received maize on an annual basis and were allowed to keep stock not exceeding 10 head of cattle, 10 goats and 2 horses.

...

With regard to Mr Kubheka, our client has advised that Mr Kubheka is not employed by her since 2006 and is presently unemployed.

With regard to the information sought by you in respect of your written request in terms of Section 17(2)(d) of the Land Reform (Labour Tenants) Act no 3 of 1996, we wish to reply on behalf of our client, as follows . . .’ (My emphasis.)

[17] During cross-examination, Dr Adendorff was hard pressed to explain the material contradictions between his evidence and that of his witnesses, in particular that of Mr Zikalala, one of his employees. What is more, the contents of the letter contradict Dr Adendorff’s evidence materially. Mr Nel, the late Mrs Adendorff’s attorney, was never called as a witness to clarify these contradictions. It is uncertain when the late Mrs Adendorff died. Her substitution by Dr Adendorff as a party in these proceedings took place at the appeal stage. There is no explanation as to why the late Mrs Adendorff was not called to clarify such material discrepancies between her instructions and her husband’s testimony. The independent and objective documentary evidence, namely, the letter written on behalf of the late Mrs Adendorff, the owner of Cadie, is dispositive of the issue, to the extent that the letter categorically states that Mr Daniel Kubheka worked for Mrs Adendorff, the

owner of Cadie. I am satisfied that Mr Daniel Kubheka provided his labour to the owner of Cadie during the period 1987-1995. In the result, Mr Daniel Kubheka has complied with paragraph (b) of the Labour Tenants Act.

[18] Mr Daniel Kubheka's undisputed evidence is that his parents resided at Glenbarton and, in exchange for their labour, they were given cropping and grazing rights by the owner of Glenbarton.

[19] Consequently, Mr Daniel Kubheka has satisfied the requirements in paragraphs (a), (b) and (c) in s 1 of the Labour Tenants Act and was correctly declared a labour tenant. This conclusion triggered s 2(5) of the Labour Tenants Act. Thus, the *onus* shifted to the Adendorffs to prove that he is a farmworker.

Is Mr Daniel Kubheka a farmworker?

[20] The definition of a 'farmworker' requires an evaluation of cash and other forms of remuneration earned by a worker on the one hand, and the value of his rights to occupy and use the land on the other, to ascertain which of the two is predominant. The question is whether Mr Daniel Kubheka was paid predominantly in cash or in the right to occupy and use the land. Mr Daniel Kubheka testified and called his wife as a witness. Dr Adendorff testified and called Mr Zikalala, Mr Van der Linde, Mr Willem Oosthuizen, Paul Oosthuizen's son, and Mr Hubert Adendorff, the Adendorffs' son (Mr Adendorff Junior).

[21] To justify interference with the factual findings of the trial court, the Adendorffs must at least have demonstrated that the trial court misdirected

itself on the facts. No misdirection has been shown to warrant a disturbance of the trial court's factual findings, nor have I found any. On the contrary, the record reflects that on the probabilities, the evidence of Mr Daniel Kubheka and his wife was correctly preferred over that of Dr Adendorff and his witnesses.

[22] There are several inherent contradictions and improbabilities between the evidence of Dr Adendorff and his witnesses. During cross-examination, Mr van der Linde said that he was surprised that Mr Daniel Kubheka earned R400 per month during the period 1978 until 1984, when he worked for him. It came to light that Mr Hubert Adendorff called Mr van der Linde a day before his testimony to discuss the issue relating to Mr Daniel Kubheka's earnings and benefits. I have no doubt that R400 in 1978 was a large sum of money, which is probably why Mr van der Linde was surprised that Mr Daniel Kubheka earned that amount of money. Therefore, I find it improbable that Mr Daniel Kubheka would have earned R400 during the period 1978 until 1983. Not only did Mr Zikalala materially contradict Dr Adendorff's evidence, but his evidence is also improbable, to the extent that he remembered what Mr Daniel Kubheka earned some 35 years ago when he could not even remember what he earned at the time of giving his evidence. Cadie was run as a business enterprise. It is improbable that the Adendorffs would not have kept a written record of what they paid Mr Daniel Kubheka for tax purposes or even keep a record of the income and expenses of Cadie. If Mr Daniel Kubheka was in fact a farmworker, it is improbable that the terms and conditions relating to his employment as a farmworker were not recorded in writing.

[23] Moreover, it is improbable that Mr Adendorff junior, who was only twelve years' old at the time, would have remembered what his father paid Mr Daniel Kubheka. The record demonstrates unequivocally that the LCC's findings cannot be faulted. Since no misdirection was shown on the part of the LCC, this Court is, on the authority of *Dhlumayo*, precluded from interfering with the findings of the LCC.

[24] Mr Adendorff junior, who is a chartered accountant, drafted a report containing various calculations in order to demonstrate that Mr Daniel Kubheka was paid predominantly in cash and not in the right to occupy and use the land. According to Mr Adendorff junior, the calculations were based on an agreement between his father and Mr Daniel Kubheka. It is unclear whether he meant an oral or a written agreement. The Adendorffs are a sophisticated and educated family who run several farming enterprises. It is unlikely that the agreement was not reduced to writing. Although not a legal requirement it is certainly best business practice. The calculations in the report were predicated on a number of assumptions, the most significant being that Mr Daniel Kubheka earned R400 between the period 1975 until 1995 when he then allegedly earned R680 and received 56 bags of mealie meal per month. Counsel for the Adendorffs submitted that if the version of Mr Daniel Kubheka is preferred, that he received R30 per month that the amount increased to R80 per month, the report will serve no purpose because these amounts were not considered. I am satisfied that the Adendorffs failed to prove that Mr Daniel Kubheka was paid predominantly in cash and have also failed to establish that he provided his labour personally. Accordingly, the Adendorffs failed to prove that Mr Daniel Kubheka is a farmworker in terms of s 2(5) of the Labour Tenants Act.

Did Mr Daniel Kubheka lodge a valid application in terms of s 17 of the Labour Tenants Act on or before 31 March 2001?

[25] It is a jurisdictional requirement that a labour tenant must have lodged an application¹² before the 31 March 2001 with the Department for an award of land, conferring ownership of the portion of land that he or she were occupying and using for cropping and grazing. The Department must notify the landowner as soon as the application has been lodged.¹³ Thereafter the Department must publish the notice in the Government Gazette.¹⁴ If the landowner opposes the claim and no settlement is reached,¹⁵ the Department must, even if the parties had attempted to mediate,¹⁶ refer the claim to the LCC.

[26] Mr Daniel Kubheka was 69 years old when he testified and almost 16 years after the cut-off date for lodging applications in terms of s 17 of the Labour Tenants Act. The discrepancies in Mr Daniel Kubheka's evidence on this issue are understandable. He is an unsophisticated witness who had to rely on memory some 16 years later. Mr Daniel Kubheka stated that in 1998 he went to a school in Vryheid to complete certain forms for an award of land. He was assisted by Nomusa, an official in the Department, to complete the necessary forms for his application. This is uncontroverted. When he had not heard from the Department, Mr Daniel Kubheka went back to the Department in 2007, and there he lodged another application. He did not receive any proof from the Department that he had lodged an application.

¹² Section 17(1) of the Labour Tenants Act.

¹³ Ibid, s 17(2)(a).

¹⁴ Ibid, s 17(2)(c).

¹⁵ Ibid, s 18.

¹⁶ Section 18(3) of the Labour Tenants Act.

[27] Mr Malibongwe Kubheka testified on behalf of Mr Daniel Kubheka (the first respondent). Although he shares the same surname with Mr Daniel Kubheka, they are not related. Mr Malibongwe Kubheka is employed at the Department. During his testimony he produced a file containing two incomplete documents. Contained in one of the documents is the identity number and name of Mr Daniel Kubheka. The date of 23 January 2000 and a reference number KZN 3/4/126 are also reflected on the document. The second document is a pro forma letter generated by the law firm, Cheadle, Thompson and Haysom with a date stamp, 4 May 2009, which served as an instruction to the law firm to deal with Mr Daniel Kubheka's application. Under cross-examination and contradicting himself, Mr Daniel Kubheka said that he lodged three applications because the Department did not respond to him. Mr Zungu, a deputy director in the Department, testified that after a thorough search at the Department's offices, he located a document which he claimed was the original application of Mr Daniel Kubheka.

[28] The analysis of the evidence by the LCC on this issue cannot be faulted. What is also dispositive of this issue is the documentary evidence that was handed in by the Department's officials. It bears mentioning that the Department and its officials are the lawful and authorised custodians of the documents

[29] It is common cause that the late Mrs Adendorff, the owner of Cadie, received the s 17 notice at the beginning of March 2008. She responded by way of a letter dated 27 March 2008, wherein she denied that Mr Daniel Kubheka was a labour tenant. On the probabilities, the Department would not

have sent out a s 17 notice if an application were not lodged timeously. On this score the LCC correctly held that:

‘121. In my view this question can be decided solely on the basis of the documentation that is in existence.

122. Contrary to Mr Du Plessis’s submission, I am of the view that the information sheet and the documentation presented by Mr Zungu accord with each other in all material respects. They both reflect Mr Kubheka’s full names and identity number. They both reflect that date as 23 January 2001. They both reflect the same reference number; KZN 3 4 126. It seems clear that the 5 page document in the series of document presented by Mr Zungu constitutes Mr Kubheka’s application form itself.’

[30] The documents that were handed in had the full names and identity number of Mr Daniel Kubheka. On the probabilities, the Department could only have obtained this information from Mr Daniel Kubheka when he attended the Department’s offices. If the application was not lodged timeously it is improbable that Cheadle Thompson and Haysom would have been instructed to proceed with Mr Daniel Kubheka’s claim.

[31] The testimony of the officials of the Department demonstrates the shortcomings, lack of proper record keeping, missing documents and administrative blunders, where many applications have not been captured on the Department’s database. Blame cannot be placed at the door of Mr Daniel Kubheka for any shortcoming or even the failure by the Department to capture Mr Daniel Kubheka’s application. In *Mwelase v Director-General for the Department of Rural Development and Land Reform (Mwelase)*,¹⁷ Cameron J writing for the majority said that: ‘the Department admitted that labour tenant

¹⁷ *Mwelase v Director-General for the Department of Rural Development and Land Reform* [2019] ZACC 30 (CC); 2019 (11) BCLR 1358 (CC) para 18.

applications had not been proactively managed for a number of years'. During the hearing, the Department presented its statistics to the LCC. The Constitutional Court in *Mwelase* held that, '[i]n April 2015, the Department estimated that it would need two more years *just to capture the details* of thousands of applications still outstanding'.¹⁸ When the matter was heard in the Constitutional Court the collation process was not yet finalised.¹⁹ The Adendorffs' submission that there is no proof that Mr Daniel Kubheka lodged his claim has no merit. Data capturing is an administrative function and not a legal requirement as proof that a claim has been lodged. I have no doubt that had the application been captured these proceedings would have been curtailed.

[32] The overwhelming evidence indicates on a balance of probabilities that Mr Daniel Kubheka lodged his application before the cut-off date, 31 March 2001, for an award of land on Cadie. It is common cause that the Department had not gazetted the claim. This too, cannot be laid at the door of Mr Daniel Kubheka. The Adendorffs failed to challenge this failure by way of review and now seek to raise it in this appeal.

[33] It is common cause that Mr Daniel Kubheka had a homestead with 8 structures on Cadie. The farm Cadie is 598,354 hectares in extent. The extent of Mr Daniel Kubheka's use of the land on Cadie is in issue. Mr Daniel Kubheka consistently stated that he had the use of two grazing camps. Dr Adendorff estimated that the two grazing camps were, in extent, approximately 50 hectares. He stated that Mr Daniel Kubheka only had the use

¹⁸ Ibid para 20.

¹⁹ Ibid, see footnote 46 of *Mwelase*.

of one camp. Contradicting Dr Adendorff and corroborating Mr Daniel Kubheka, Mr Zikalala said that he saw Mr Daniel Kubheka's cattle graze on two camps at Cadie. Mr Hubert Adendorff admitted that Mr Daniel Kubheka was permitted to use two camps, but only for a week at a time to wean his calves. I am satisfied that Mr Daniel Kubheka had the use of two grazing camps on Cadie.

Whether or not the LCC should have granted just and equitable compensation under s 23 of the Labour Tenants Act or alternatively an order under s 22 of the Labour Tenants Act.

[34] In his statement of claim, Mr Daniel Kubheka sought an order²⁰ that the Department make available monies needed to compensate the Adendorffs for a portion of land on the farm that the LCC might see fit to award to him. The Department takes no issue with the relief sought. And indeed, as already mentioned, the Department indicated at the outset that it would assist Mr Daniel Kubheka in the event that a portion of the farm is awarded to him. The powers of a court considering an application to award land or right in land are provided for in s 22 of the Labour Tenants Act.²¹ The court has the jurisdiction and power, inter alia, to order that land or a right in land held by an owner of the affected land be transferred to the claimant. In this case the LCC made such an order. Counsel for the Adendorffs correctly submitted that it is open to a court to make any order under s 22 of the Labour Tenant Act, in particular an order under s 22(5)(d) thereof.²¹

²⁰ Paragraph 3 above.

²¹ See fn 5 above.

[35] The Adendorffs submitted an expert valuation report that was compiled by Mr Winckler, an expert valuer. Mr Daniel Kubheka had no objection that the report be handed in as evidence. The expert report dealt with the whole of the farm Cadie and not only a portion thereof. Mr Winckler determined the market value of the whole 598.354 hectares of Cadie in the amount of R8 110 250.

[36] The LCC declared Mr Daniel Kubheka a labour tenant and awarded him a portion of portion 1 of Cadie, which he and his family had occupied and used as of 2 June 1995, including the two grazing camps. Section 23(2)²² of the Labour Tenants Act is triggered if no agreement is reached between the relevant parties in respect of compensation. In this case the relevant parties are the Adendorffs and the Department. It is common cause that there was no agreement between them regarding compensation. Therefore, the LCC did not have the jurisdiction to deal with the issue of just and equitable compensation.

[37] As pointed out above, the Department undertook to compensate the Adendorffs if an award of land, in favour of Mr Daniel Kubheka, were made. There is no evidence that the parties (the Adendorffs and the Department) were in fact unable to reach an agreement concerning the amount of compensation to be paid. The valuation on which the Adendorffs rely, is the market value of the entire farm. Whether the Department wishes to purchase the entire farm or

²² Section 23 of the Labour Tenants Act makes provision for an owner's right to compensation. It states as follows:

'(1) The owner of affected land or any other person whose rights are affected shall be entitled to just and equitable compensation as prescribed as prescribed by the Constitution for the acquisition by the applicant of land or a right in land.

(2) *The amount of compensation shall, failing agreement, be determined by the arbitrator or the Court.*

(3) Compensation shall, failing agreement, be paid in such manner and within such period as the arbitrator or the Court may determine as just and equitable.' (My emphasis.)

not is a matter for the Department to decide and not this Court or the LCC. Thus, it is best to allow the process envisaged in the order set out below to run its course.

Costs

[38] The LCC made no order as to costs, which is the usual order made in the LCC. It is trite that a trial court has a judicial discretion whether or not to award costs. The Adendorffs submitted that if the appeal is upheld with costs, the Department should bear those costs on a punitive scale. The reason for seeking such an order, so it was argued, is because the Department failed to oppose the matter and as a result, the Adendorffs incurred additional costs, causing them to suffer prejudice. It is correct that the Department did not oppose the proceedings. However, at the outset it undertook to compensate the Adendorffs if the LCC made an award of land or a right in land. With that undertaking having been given by the Department, its stance not to enter the fray is perfectly understandable. I am therefore not persuaded that the Department should be mulcted with costs, let alone a punitive costs order both in this Court and the LCC.

[39] At the conclusion of argument the parties were requested to submit their respective draft orders for our consideration, which they did. Because there is no merit in the appeal, the appeal falls to be dismissed. The order set out below is based on the draft order submitted by counsel for Mr Daniel Kubheka, duly amended as to this Court seemed meet.

[40] In conclusion, it bears mentioning that the order below seeks to promote a speedy determination of the question of just and equitable compensation. In the result the following order is made:

- 1 The appeal is dismissed.
- 2 The order of the Land Claims Court is supplemented by the addition of the following:
 - ‘2.1 The second respondent is ordered and directed, within 60 days of this order, to cause the portion of the farm Cadie awarded to the first respondent to be evaluated, which evaluation should include the entire farm Cadie, to determine just and equitable compensation to be paid to the appellants for the said land.
 - 2.2 The second respondent is directed to cause the evaluation envisaged in paragraph 2. 1 to be conducted and concluded within 60 days and to be made available to the appellants’ attorneys of record within five (5) days of completion thereof.
 - 2.3 The appellants are authorised to engage an expert valuer of their choice to evaluate the land described in paragraph 2.1 hereof, such evaluation to include the entire farm.
 - 2.4 The appellants shall cause to be served on the attorneys of record of the first and second respondents the said evaluation within five (5) days of completion thereof.
 - 2.5 The parties are directed to enter into negotiations in good faith with a view to settling the question of compensation as envisaged in s 23 of the Labour Tenant Act read with s 25 of the Constitution. Such discussions are to be concluded within 60 days of the date of exchange between the parties of the last valuation report.

- 2.6 Should no agreement be reached between the appellants and the second respondent regarding the issue of just and equitable compensation for the agreed land, either party is granted leave to approach the Land Claims Court, on notice to the other, for appropriate relief including the determination of just and equitable compensation.’
- 3 There shall be no order as to the costs of the appeal in this Court.

Z CARELSE
JUDGE OF APPEAL

APPEARANCES

For appellant:	R du Plessis SC (with him D S Gianni) Loubser van der Walt Inc, Pretoria Kramer Weihmann Inc, Bloemfontein
For first respondent:	S H Ngcobo ZM Zuma & Co Inc, Verulam MDP Attorneys, Bloemfontein