IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Reportable

Case No: 428/99

In the matter between:

H J WOERMAN and M L SCHUTTE NNO Appellants

and

S O MASONDO 1st Respondent
E SHABANGU 2nd Respondent
M A KHUMALO 3rd Respondent

Coram: Nienaber, Marais, Streicher, Cameron and Navsa JJ A

Heard: 27 August 2001

Delivered: 9 November 2001

Land Reform (Labour Tenants) Act 3 of 1996 – S 2(5) does not apply to actions pending at the time of its introduction.

J U D G M E N T

STREICHER J A:

[1] Mrs E Woerman ('the plaintiff') instituted an action against the three respondents in the Magistrate's Court for the district of Vryheid ('the trial court') in which she claimed amongst other relief the eviction of the respondents from the farm Grootfontein ('the farm') which she owned. The respondents defended the action. In their pleas they denied that their occupation of the farm was unlawful. They alleged that they qualified as labour tenants in terms of the Land Reform (Labour Tenants) Act 3 of 1996 ('the Act') and that as labour tenants they were entitled, in terms of s 3 of the Act, to occupy and use part of the farm. The trial court granted an eviction order against the respondents. However, an appeal by the respondents to the Land Claims Court ('the court *a quo')* was upheld and an order dismissing the claim for eviction was substituted. With the leave of the court *a quo* the

plaintiff appealed to this court. Since the noting of the appeal the plaintiff has died and has been substituted by the executors of her estate ('the appellants').

[2] In terms of s 3 of the Act a person who was a labour tenant on 2 June 1995 has a right with his family members, to occupy and use that part of the farm, which he was using and occupying on that date. A labour tenant is defined in s 1 of the 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
>
> (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;'.

In *Ngcobo and Others v Salimba CC; Ngcobo v Van Rensburg*[1] this court held that paras (a), (b) and (c) of the definition had to be interpreted conjunctively.

[3] A farmworker is defined in s 1 of the 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;'.

[1] 1999 (2) SA 1057 (SCA) at 1067J-1068I (para 11).

[4] To establish whether a person is or was a farmworker and thus disqualified from being a labour tenant this court held in the *Ngcobo* case[2] that what has to be determined is 'the predominant quality of occupation over the whole period during which the present occupier has been complying [or complied] with paras (a) and (b)' (my insertion).

[5] It was not contended in the court *a quo* or in this court that the requirements of subsections (a) and (c) of the definition of labour tenant had not been satisfied. The issue which the trial court and the court *a quo* had to decide and which is the subject of this appeal is, in respect of each of the respondents, whether the requirements of subsection (b) of the definition of labour tenant were satisfied and, if they were, whether the respondent concerned was a farmworker and thus not a labour tenant. The issue entails the following questions:

[2] Footnote 1. At 1075H (para 27).

(i) Did the respondent, on or before 2 June 1995, have a right to use cropping or grazing land on the farm?

(ii) Did the respondent in consideration of such cropping or grazing right provide labour to the owner of the farm?

(iii) Was the respondent employed on the farm in terms of a contract of employment which provided that in return for the labour which he provided to the owner of the farm he would be paid predominantly in cash or in some other form of remuneration and not predominantly in the right to occupy and use land?

[6] The first respondent alleged in his plea that he provided labour to the previous owner of the farm ('Mr Woerman') and that in consideration of his services he had the right to plant crops on the farm. According to his

evidence he approached Mr Woerman during about 1984 for permission to live on the farm. At that stage he was already a pensioner. Mr Woerman 'out of the goodness of his heart' allowed him to stay on the farm in four houses which he, the first respondent, built. He wanted a 'piece job' and for a period of approximately 5 years he worked on the farm. He and his wife fed the chickens and cleaned the chicken runs. Initially he was paid R18 per week for his services and by the time he ceased working he was being paid R40 per week. He had no right to keep livestock on the farm but had a field, which he could cultivate. Mr Woerman ploughed the land and planted mealies for him using his, Mr Woerman's, own seed. The field was small but provided mealies, which he used to cut and cook while they were still fresh. After he stopped working, on 16 March 1989, Mr Woerman handed him a document, the first paragraph whereof read:

> 'You are allowed to live on the farm Grootfontein of Mr J WOERMAN District Vryheid for humanitarian reasons and will not attain the living rights on said farm in future.'

[7] The second respondent, likewise, alleged in his plea that he provided labour to the previous owner of the farm and that in return for his services he had the right to plant crops on the farm. He testified that after having worked on the farm previously he returned to work on the farm during 1994. He moved onto the farm with his wife, six children and his brothers. They occupied two existing houses and built another two. He drove tractors and other vehicles. He worked five days per week from 06h00 until 16h00 and was entitled to two weeks leave per year. He was paid a salary of R120 per week and kept a cow, a calf, chickens, four ducks and approximately 19 geese on the farm. Mr Woerman stipulated that five to six cattle was the maximum number that he could keep on the farm. He planted mealies in a

field which was a bit smaller than a soccer field. Mr Woerman supplied the tractor used for ploughing the field and also the seed which was planted. After Mr Woerman was killed in November 1995, he left the farm in April 1996.

[8] The third respondent alleged in his plea that he worked for Mr Woerman in consideration of the right to plant crops and graze animals. Of the three respondents he alone alleged in his plea that he was entitled to grazing rights in return for his services. He testified that he moved to Mr Woerman's farm in 1973 with his wife and children. He built a kraal consisting of eight houses. He kept five cattle, six goats and chickens. Mr Woerman ploughed an area approximately 20 feet wide around his house where he (third respondent) planted mealies using his own seed. All his children worked on the farm and received salaries for their services. He

worked seven days a week from 03h00 to 19h00 and was entitled to one week's leave per year. He was obliged to perform his services personally. He was paid a salary which had increased from R4 per week to between R80 and R90 per week by the time Mr Woerman passed away.

[9] The trial started on 11 November 1997. It appears that the respondents accepted that the onus was on them to prove that they were labour tenants and, by agreement, they started with their case. Evidence was heard on 11 and 12 November 1997 when the trial was postponed to 28 November 1997. By that time the respondents had closed their case (save in one respect, not relevant for present purposes, in so far as the third respondent was concerned) and the examination in chief of the plaintiff had just been completed. Upon the resumption of the trial on 28 November 1997 the respondents were granted a postponement to enable them to consider the

effect of the Extension of Security of Tenure Act 62 of 1997, which came into operation on that day. The trial resumed on 13 July 1998 when the respondents were granted an amendment of their pleas in terms of which they added an alternative defence based on the provisions of the Extension of Security of Tenure Act. This defence is no longer of any relevance in that an initial appeal against the dismissal of the defence by the trial court was not proceeded with.

[10] Nothing was made in the trial court of an amendment to the Act which came into operation on 21 November 1997 in terms of which s 2(5) was introduced. The section provides as follows:

> '2(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.'

The trial court dealt with the matter on the basis that the onus was on the respondents to prove that they were paid predominantly in cash or some other form of remuneration and not predominantly in the right to occupy and use land. It found that the respondents failed to prove that and granted an eviction order against them.

[11] The respondents did not argue in the court *a quo* that s 2(5) was applicable. The court *a quo* nevertheless referred to the section but found it unnecessary to decide whether the respondents bore the onus of proving that they were not farmworkers. It was of the view that the respondents had in any event proved that they were not. It stated that it was clear that the occupation and use rights of each of the respondents exceeded the salary and other forms of remuneration (such as the use of a tractor and seed) received by the respondent concerned.

[12] The plaintiff alleged that she was the owner of the farm and that the respondents were in occupation of a portion of the farm. Those facts would, in terms of the common law, have entitled her to an eviction order unless the respondents could show that they were entitled to so occupy a portion of the farm.[3]

[13] Section 26(3) of the Constitution provides as follows:

> 'No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.'

In *Ross v South Peninsula Municipality*[4] Josman J (Desai J concurring) concluded that the common law as laid down in *Graham v Ridley*[5] had been modified by s 26(3) to the extent that a plaintiff seeking to evict a person from his home is now required, in terms of that section, to

[3] *Graham v Ridley* 1931 TPD 476 at 479; and *Chetty v Naidoo* 1974 (3) SA 13 (A) at 20A-E.
[4] 2000 (1) SA 589 (C) at 596H.
[5] Footnote 3.

allege relevant circumstances which would entitle the court to issue such order. Reading the proposition in its context, Josman J would seem to suggest that an owner, in order to succeed in an action for the eviction of a person from his home, not only has to allege more than that he is the owner and that the defendant is in occupation but also has to prove more if the action is defended. What it was that an owner should allege and prove in addition to those facts Josman J considered to be beyond the scope of the appeal before him.[6] In *Betta Eiendomme (Pty) Ltd v Ekple-Epoh*[7] Flemming DJP disagreed with the conclusion reached in the *Ross* case. Notwithstanding an invitation to make submissions on the correctness and applicability of the judgment in *Ross v South Peninsula Municipality* the respondents did not place any reliance thereon. The respondents also

[6] At 596I.
[7] 2000 (4) SA 468 (W).

declined an invitation to make submissions on the question whether, given the manner in which the proceedings were conducted in both the trial court and the court *a quo*, it is open to them to contend, at this stage, that the onus on the disputed issues was on the appellants.

[14] In *Ellis v Viljoen*[8] Thring J delivered the judgment of the full court of the Cape Provincial Division on appeal from a decision by Griesel J. Referring to Griesel J's finding that the judgment in *Ross v South Peninsula Municipality* did not bring about a change as regards the incidence of the *onus*, he said:[9]

> '[E]ven if it was held in the *Ross* case that the incidence of the *onus* of proof had been altered by s 26(3) of the Constitution, that conclusion was erroneous and cannot be supported. I find myself in respectful agreement with what was said by Flemming DJP in the passage which I have quoted above from his judgment in the *Betta Eiendomme* case *supra* at 474I-475I. In particular, I respectfully support his conclusion

[8] 2001 (4) SA 795 (C).
[9] At 804J-805E.

that the right of ownership as recognised before the Constitution has not been affected by the Constitution (at 475D), at least as regards the type of case presently under consideration. It seems to me to be self-evident, as the learned Deputy Judge President says at 475F-G, that in the absence of legislative interference and postulating that nothing more is known than that the plaintiff is the owner and that the defendant is in possession, it is right and proper that an owner should be granted an ejectment order against a defendant who has no business interfering with the plaintiff's possession of his own property. If those are the only 'relevant circumstances' placed before the Court, surely the owner must be entitled to an eviction order. If there are other 'relevant circumstances' upon which the defendant wishes to rely in justifying his continued occupation, the *onus* must, on all the recognised principles of pleading and evidence, rest on him to allege and prove them, whatever they may be. Like Flemming DJP, I can find nothing in those principles which is in any way repugnant to or inconsistent with anything in the Constitution. On the contrary, they seem to me to be eminently consonant with the provisions of s 25(1) of the Constitution, which reads:

"No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property"'

[15] I do not consider it necessary to pronounce on the precise ambit of s 26(3) and, not having heard argument in this regard, I do not consider it

advisable to do so either. For these reasons, and save to the extent that my conclusion set out hereunder is either at variance or in conformity with the decisions in the *Ross, Betta,* and *Ellis* cases, I do not express any view on the correctness or otherwise of those decisions. The respondents alleged in their plea that they were labour tenants and the plaintiff denied that they were. That was and is the issue to be decided on the pleadings. Moreover, counsel for the respondents did not contend that there were any other relevant circumstances to consider. If the respondents are correct, the fact that they are labour tenants is a relevant circumstance which would have obliged the trial court to have regard to the provisions of the Act, more particularly the provisions restricting the owner's right to evict. If the respondents are not correct, they do not contend that there are any relevant circumstances which may persuade a court not to grant an eviction order against them. As the

respondents alleged that they were labour tenants they, in terms of the common law, had to prove that fact. In my view the incidence of this onus is not affected by s 26(3) of the Constitution. The section does not require a plaintiff to allege and prove circumstances irrelevant to its claim such as that the respondents are not labour tenants.

[16] The respondents did not contend otherwise in the courts below. They alleged and, at the trial, set out to prove that they were labour tenants and as such, in terms of s 3 of the Act, entitled to occupy and use part of the farm. However, in his heads of argument in this court counsel for the respondents submitted that the coming into force of s 2(5) during the trial shifted the onus as regards the question whether the respondents were labour tenants from the respondents to the plaintiff. He submitted that the incidence of the onus was a procedural matter and that a procedural amendment applied to pending

suits. This submission was not pressed in argument before us but needs to be considered in any event.

[17] It is not correct to say that procedural amendments apply to all pending suits.[10] In any event onus, in the sense of the duty that is cast on a particular litigant, in order to be successful, of finally satisfying the court that he is entitled to succeed on his claim or defence is a matter of substantive law and not of procedure.[11] In *During NO v Boesak*[12] E M Grosskopf JA said:

> 'Die ligging van die bewyslas word deur die substantiewe reg bepaal. Soos gestel word in Hoffmann en Zeffertt *The South African Law of Evidence* 4de uitg op 495:

[10] See *Minister of Public Works v Haffejee NO* 1996 (3) SA 745 (A) at 753B-C and *Unitrans Passenger (Pty) Ltd* t/a *Greyhound Coach Lines v Chairman, National Transport Commission, and Others; Transnet Ltd (Autonet Division) v Chairman, National Transport Commission, and Others* 199 (4) SA 1 (A) at 9H.
[11] See *Eskom v First National Bank of Southern Africa Ltd* 1995 (2) SA 386 (A) at 390F-G and *During NO v Boesak and Another*.
[12] 1990 (3) SA 661 (A) at 672H-I

> "Any rule of law which annexes legal consequences to a fact . . . must, as a necessary corollary, provide for which party is supposed to prove that fact."'

[18] Even if a statute is amended with retrospective effect the rights of the parties to a pending action must be decided in accordance with the law as it was when the action was instituted, unless a contrary intention appears from the statute.[13] In the present case there is no indication to be found in the Act that the legislature intended s 2(5) to apply to pending actions and the respondents' counsel did not contend that there was.

[19] It follows that, notwithstanding the provisions of s 2(5) of the Act, the onus was on the respondents to prove that they were labour tenants on 2 June 1995. That entailed, *inter alia,* that they bore the onus of proving that they were not farmworkers. To discharge that onus each one of them had to

[13] See *Bell v Voorsitter van die Rasseklassifikasieraad en Andere* 1968 (2) SA 678 (A) at 684E-F; *Bellairs v Hodnett and Another* 1978 (1) SA 1109 (A) at 1148F-G; and *Naude en Andere v Heatlie en Andere; Naude en Andere v Worcester-Oos Hoofbesproeiingsraad en Andere* 2001 (2) SA 815 (HHA).

prove that in return for the labour which he provided to the owner of the farm he was remunerated predominantly in the right to occupy and use land and not in cash or some other form of remuneration.

[20] Each of the respondents, together with his wife and in the case of the second and third respondents, their children, resided on the farm and had permission to harvest mealies from a field allocated to him. The second and the third respondents were also allowed to graze livestock on the farm. It was submitted on behalf of the appellants that the respondents did not have a "right" within the meaning of the word in the definition of labour tenant or if they did that such right was not given to them 'in consideration' of the services they had to render. In the light of the conclusion to which I have come it is not necessary to deal with these arguments. I shall assume in favour of the respondents that each of them provided labour to the owner of

the farm in consideration of a right to use a small field for the cultivation of mealies; a right, in the case of the second respondent, to keep 5 to 6 cattle, chickens, 4 ducks and 19 geese on the farm; and a right, in the case of the third respondent, to graze 5 cattle and 6 goats on the farm. On the other hand, the first respondent received a salary of R40 per week and had the field which was allocated to him ploughed by the owner and planted with mealie seed provided by the owner; the second respondent received a salary of R120 per week, ploughed the field allocated to him with the owner's tractor and planted mealie seed provided by the owner; and the third respondent received a salary of between R80 and R90 and used the owner's tractor to plough the field allocated to him. The court *a quo* was of the view that the use of the tractor and the seed provided by the owner constituted

another form of remuneration for the respondents' labour. In argument before us counsel for the respondents accepted the correctness of this view.

[21] In order to determine whether each of the respondents was remunerated predominantly in the right to occupy and use land and not in cash or in some other form of remuneration one obviously has to compare like with like and the only way to do that would be to place a monetary value on each component. It was, therefore, necessary for the respondents to adduce evidence in the trial court to enable the trial court to do so. However, no evidence whatsoever, which could assist in the valuation of the respondents' residential rights, their grazing rights, their cropping rights, the use of the tractor to plough the fields allocated to the respondents and the seed supplied by the owner was adduced in the trial court. The respondents, who were legally represented at all stages, could have adduced evidence at

the trial as to the number of bags of mealies they used to harvest per year and of the price of a bag of mealies. If they had done that it should have been possible to place a value on their cropping rights. Without evidence as to the size of the fields concerned, the crop that could be expected and the price of mealies, the trial court was in no position to place any value on the cropping rights of the respondents. The same applies to the respondents' grazing rights. Grazing may or may not have been available in abundance in that area. The availability thereof would obviously affect the value of grazing rights. It should have been possible to adduce evidence as to what a farmer would charge for allowing animals to be grazed on his farm or evidence could have been led as to the value to the respondents of the right to keep livestock on the farm. However, no evidence was adduced on the basis of which a value could be placed on the respondents' grazing rights. The value

of the right to reside on a farm will depend on the price or rental payable for similar accommodation elsewhere in that region. Evidence could have been adduced as to what farmers would charge a person, who was not expected to work for the farmer, for such accommodation. Evidence as to the rental payable for comparable accommodation in the nearest town could also have been of assistance. Furthermore, it should not have been difficult or costly to produce evidence as to the value of the seed supplied by the owner and the cost of hiring the owner's tractor to plough the fields.

[22] In the absence of any evidence on the basis of which the respondents' residential, grazing and cropping rights could be valued, the trial court correctly held that the respondents failed to discharge the onus to prove that they were labour tenants.

[23] In finding that it was clear that each respondent's right to occupy and use the plaintiff's land exceeded the cash and other remuneration received by him for his services the court *a quo* relied on the following passage in the *Ngcobo* case[14]:

> 'There is an admitted paucity of evidence relating to the value of the rights to residence, grazing and cultivating the land in question, and to the value of the remuneration paid to the appellants whether in cash or in specie. But what is clear is that the appellants and their forebears had for many years received the absolute minimum in the form of remuneration for their services. It must be overwhelmingly clear that the value of residence, grazing, cultivation and of having a hearth and home of their own, a place where they could find the fundamental security of living and surviving off the land, must have far outweighed the benefits they received as remuneration in cash or in kind.'

It does not appear from the judgment in the *Ngcobo* case on what evidence this court found that the value of residence, grazing and cultivation must have far outweighed the benefits received as remuneration in cash or in kind.

[14] At 1076A-C (para 28).

Each case must be decided on its own facts and, whatever the factual position may have been in that case, I am satisfied that on the evidence in this case there is no basis for such a finding.

[24] It follows that the appeal should be upheld. Counsel for the appellants indicated that no costs orders were sought in this court or in the court *a quo*, and furthermore, that the appellants abandoned the costs order made in favour of the plaintiff in the trial court. Counsel for the appellants also asked that the eviction order against the third respondent be stayed until his death.

The following order is made:

(a) The appeal is upheld.

(b) Paras (2) and (4) of the order by the Land Claims Court are set aside and replaced with the following order:

The appeal of the first, third and fourth appellants is dismissed.

(c) The eviction order against the third respondent may not be executed during his lifetime.

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P E STREICHER
Judge of Appeal

Nienaber JA)
Marais JA)
Cameron JA)
Navsa JA) concur