



THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 301/08

In the matter between:

SELSLEY FARM TRUST

APPELLANT

v

SIMON MHLONGO

RESPONDENT

Neutral citation: *Selsley Farm Trust v Mhlongo* (301/2008) [2009] ZASCA
124 (28 September 2009).

Coram: Harms DP, Navsa, Van Heerden, Mhlantla JJA, Leach AJA

Heard: 7 September 2009

Delivered: 28 September 2009

Summary: Labour tenant under Act 3 of 1996 – whether requirements of the definition of ‘labour tenant’ satisfied.

ORDER

On appeal from: Land Claims Court (Ncube AJ sitting as court of first instance).

The following order is made:

- 1 The appeal succeeds.
- 2 The orders of the court a quo in respect of both the main application and the counter application are set aside and are replaced with the following:
 - ‘(a) The application is dismissed.
 - (b) There will be no order made on the counter application.
 - (c) There will be no order as to costs.’

JUDGMENT

LEACH AJA (Harms DP, Navsa, Van Heerden, Mhlantla JJA concurring)

[1] The appellant is the current owner of the farm commonly known as 'Selsley' situated in the district of Lions River in KwaZulu-Natal. The respondent, who resides on the farm and has done so since about 1953, instituted proceedings against the appellant in the Land Claims Court seeking certain relief, including an order under s 33(2A) of the Land Reform (Labour Tenants) Act 3 of 1996 ('the Act') declaring him to be a labour tenant under the Act .

[2] The proceedings went to trial and culminated in a finding that the respondent was indeed a labour tenant on Selsley. The respondent was therefore granted the declarator he sought. The court also issued a further interim order regulating the respondent's use of land on Selsley pending the determination of an application for the acquisition of land which the respondent, as a labour tenant, had lodged with the Director-General under s 16(1) and 17 of the Act. The appellant now appeals to this court against the finding that the respondent was a labour tenant.

[3] Much of the factual background is not in dispute. In 1934 the respondent was born on the farm Maritzdal where his parents resided and were employed by the farmer, Mr Guy Kimber. Although the respondent's father died when he was a child, he and his mother remained living on Maritzdal where his mother, Mrs Violet Mhlongo, was employed as a domestic worker. Eventually the respondent was also taken into Guy Kimber's employ as a labourer and driver.

[4] In about 1953, on the marriage of their son David, Guy Kimber and his wife moved from Maritzdal, leaving it to be farmed by the newlyweds, and

relocated a few kilometers to Selsley, a farm which some 30 years previously had been acquired by his father, Mr Percy Kimber, for purposes of winter grazing. The respondent and his mother moved with them and continued working in their employ on Selsley, he as a general labourer and driver and she as a domestic worker. At all times since then the respondent has been resident on Selsley, despite the farm having changed hands from time to time as I shall mention in due course. On the other hand, in about 1958 or 1959 when Guy Kimber's wife left Selsley and moved to Tongaat, the respondent's mother moved with her to continue in her service.

[5] It is not clear whether Guy Kimber moved to Tongaat together with his wife. However, he continued to farm Selsley until his death. Quite when that occurred is not clear. While it appears to have been in about 1986, another of his sons, Michael Kimber, who testified on behalf of the appellant and who had also moved to live on Selsley when his brother had married, stated at one stage that his father had died in about 1960. In the light of the view I have of the matter, nothing turns on this.

[6] Michael Kimber, who had also moved to live on Selsley when his brother had married and continued to live on the farm until 1998, only took over the farming operations on the death of his father (whenever that occurred). On doing so, he also took the respondent into his service and employed him in the same capacity as his late father had done.

[7] Michael Kimber continued farming on Selsley until November 1998 when he sold the farm to either a Mr David Watson or a company the latter represented known as Meander-Selsley Farm (Pty) Ltd.¹ Fortunately the precise identity of the purchaser is not relevant to the determination of this appeal. Of greater importance is the fact that the new owner, either Watson or his company,

¹ Watson stated in evidence that he purchased the farm but there is documentation in the form of a letter addressed to the Department of Land Affairs signed by Watson on behalf of the Meander-Selsley Farm (Pty) Ltd which appears to be to the effect that the company was the owner.

continued to employ the respondent who remained resident on the farm. Several months later the respondent became ill. In mid-1999 he stopped working and has since received a state pension. Despite ceasing to work, he remained living on Selsley, even after the farm was sold to the present appellant in 2004.

[8] According to the respondent, after his mother left Selsley he looked after the few head of cattle she had accumulated but which remained behind on the farm. When his mother died in about 1982, he inherited these cattle and their progeny from her. This was disputed by the appellant but, once more, nothing really turns on this. It is common cause that the respondent had a simple home on the farm, and that he was permitted to both grow crops on a small piece of land and to graze a number of cattle. The precise number of cattle he grazed, although a matter of great dispute at the trial, is not relevant for purposes of this appeal as the appellant concedes that the respondent had the right to both grow some crops and to graze a few cattle on the farm.

[9] In the light of this background, I turn to the respondent's contention that he was a labour tenant under the Act. In s 1 of the Act a 'labour tenant' is defined as being 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 contradistinction, the Act defines a 'farmworker' as being:

‘ . . . 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.’

It is clear from this that a labour tenant by definition cannot be a farmworker. It should also be mentioned that s 2(5) of the Act provides that:

‘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.’

[10] Importantly, sub-paragraphs (a), (b) and (c) of the definition of labour tenant are to be interpreted conjunctively or cumulatively.² Thus, although the respondent clearly satisfied the criteria set out in (a) of the definition, he can only be regarded as a labour tenant under the Act if he also satisfies the criteria set out in both (b) and (c).

[11] In arguing that he had satisfied requirements of both (b) and (c), the respondent relied on his and his mother’s admitted entitlement to grow crops and graze cattle on Selsley which, he submitted, had been extended to them in consideration for their labour on the farm. The appellant, on the other hand, denied this, contending that the respondent and his mother had been allowed to graze cattle and grow crops due to their employer’s goodwill. In regard to this issue, the trial court concluded that the evidence fell short of proving that ‘ . . . the right to use cropping and grazing land on the farm was exercised in consideration for the labour which he and his mother provided to the owner of the farm’.

² *Ngcobo & others v Salimba CC; Ngcobo v Van Rensburg* 1999 (2) SA 1057 (SCA).

[12] Despite having reached that conclusion, which meant in effect that the respondent had not proved that he was a labour tenant, the trial court still found for the respondent. It did so by reasoning that the test was not whether the respondent had proved a link between the provision of labour and the right to grow crops and graze cattle but whether or not the respondent was a 'farmworker' as defined in the Act; that the appellant bore the onus under s 2(5) to prove that the respondent was a 'farmworker'; that it had not discharged that onus; and that the respondent was therefore presumed to be a 'labour tenant'.

[13] By reasoning in this way the trial court misdirected itself by putting the cart before the horse. While a farmworker is excluded from being a labour tenant, the presumption in s 2(5) that a person is not a farmworker only arises where the person concerned is shown to fall within the definition of labour tenant. Accordingly, if it is not shown that the person in question satisfies the requirements of all three sub-paragraphs of the definition of labour tenant, the presumption cannot arise.

[14] The respondent therefore bore the onus of proving that he was a labour tenant as defined. To do so, he had to lead evidence to satisfy the requirements of the definition and, only on having done so, would the presumption in s 2(5) have become operative. The trial court found that the respondent had not established an essential requirement of the definition (viz that in consideration of their labour he and his mother had received their right to crop and graze). It ought therefore to have found that, as the requirements of the definition had not been satisfied, the presumption in s 2(5) did not arise, and that the respondent's claim should be dismissed.

[15] On appeal, the respondent argued that he and his mother had received their cropping and grazing rights in consideration of their labour and that the trial court had erred in not finding that to have been the case. The appellant argued to

the contrary. In my view it is unnecessary to decide this issue as, for another reason, the respondent's claim must clearly fail.

[16] In respect of (c) of the definition, it was incumbent upon the respondent to establish that he had a parent who (i) resided or resides on a farm (ii) had the use of cropping or grazing land on such farm or another farm of the owner, and (iii) in consideration of such right provided or provides labour to *the owner or lessee* of such farm or other farm.

[17] The respondent's case as pleaded was that this requirement had been fulfilled by his mother having been employed by Guy Kimber on Selsley from about 1953, when the Kimber family moved to the farm, until she left and moved to Tongaat with Mrs Kimber, during which period, in consideration for providing her labour, she had enjoyed the right to grow crops and to graze cattle. While much of the evidence and a great deal of the argument centred on whether Mrs Mhlongo had indeed grazed cattle on Selsley and, if she did, whether she had done so and had enjoyed her rights to grow crops in consideration of providing her labour, sight appears to have been lost of the further requirement for (c) of the definition to be satisfied, viz that her labour had to be provided to the owner or lessee of the farm.

[18] It is on this aspect of the matter that the respondent's claim flounders. The 'owner' of the farm as contemplated by the definition of 'labour tenant' is defined in s 1 of the Act as meaning:

' . . . the owner, as defined in section 102 of the Deeds Registries Act, 1937 (Act 47 of 1937), of a farm, and where it occurs in the definition of "labour tenant", includes his or her successors and predecessors in title.'

Had Guy Kimber been the owner, as so defined, or the lessee of Selsley, the statutory requirement in question would have been met. But the respondent neither attempted to prove that Guy Kimber was the owner of Selsley at any time

nor who the owner was at the material time that Mrs Mhlongo exercised her rights to grow crops and graze cattle on the farm. He appears to have overlooked that Michael Kimber, in an affidavit filed before the hearing and confirmed by him at the outset of his testimony, said the following:

'5 Selsley farm was purchased by my grandfather during or about 1919 to 1923. My grandfather, whose names were PERCY DICKSON KIMBER, had a farm in the Impendle area and purchased Selsley Farm for the purpose of moving cattle and horses to the Dargle area during the winter months.

6 When my grandfather died, Selsley Farm was inherited by my father, GUY McKENZIE KIMBER. I then inherited Selsley Farm from my father when he died during or about 1986.

7 In fact, ownership of the farm did not follow what I have referred to above as ownership. During my grandfather's lifetime he transferred the farm to me. I recall this being during or about 1950. My father thereafter farmed the farm until his death when I took it over.'

[19] As appears from this, during the material time that the respondent's mother resided on Selsley Farm and worked for Guy Kimber and his wife, the farm was in fact owned by Michael Kimber to whom she did not render her labour. How it came about that Guy Kimber farmed the farm owned by his son was neither canvassed in evidence nor explained in any way. He may well have leased it, in which event the requirement in sub-para (c) that the labour be provided to the owner or lessee would have been satisfied: but one cannot speculate on whether that was the case. It takes little imagination to think of circumstances under which Guy Kimber came to farm Selsley without being its owner or lessee.

[20] Faced with this difficulty, counsel for the respondent fell back on an argument that Mrs Mhlongo had worked for Guy Kimber at a time when he owned Maritzdal. Not only had this never formed part of the respondent's claim as pleaded but, probably as a result, the issue of who had been the owner of

Maritzdal was not investigated during the trial and there is nothing to show that Guy Kimber was its owner at that time.

[21] The respondent therefore failed to satisfy an essential element of his case, viz that his mother had provided labour to the owner or lessee of a farm as required by sub-clause (c) of the definition of labour tenant. The court a quo thus erred in finding that the respondent was a labour tenant and its finding and declarator in that regard cannot stand. The appeal must therefore succeed.

[22] In its counter application the appellant sought an order evicting the respondent from Selsley. However, while counsel for the appellant asked for the order of the court a quo dismissing the counter application to be set aside, he informed us that the appellant sought neither an eviction order nor a costs order against the respondent. In the light of the appellant's attitude on these aspects, this court need order no more than as is set out below.

[23] The following order is made:

- 1 The appeal succeeds.
- 2 The orders of the court a quo in respect of both the main application and the counter application are set aside and are replaced with the following:
 - ‘(a) The application is dismissed.
 - (b) There will be no order made on the counter application.
 - (c) There will be no order as to costs.’

L E LEACH
ACTING JUDGE OF APPEAL

APPEARANCES:

COUNSEL FOR APPELLANTS: A de Wet

INSTRUCTED BY: Hay & Scott Attorneys; Pietermaritzburg

CORRESPONDENT: Honey Attorneys; Bloemfontein

COUNSEL FOR RESPONDENT: T C Mbhense

INSTRUCTED BY: Legal Aid Board; Pietermaritzburg

CORRESPONDENT: Bloemfontein Justice Centre; Bloemfontein