

IN THE LAND CLAIMS COURT OF SOUTH AFRICA

Held at **RANDBURG** on 4 May 2001 & 29 June 2001
before **Moloto AJ**

CASE NUMBER: LCC 10/01

Decided on: 6 July 2001

In the matter between:

NKUZU DEVELOPMENT ASSOCIATION

Applicant

and

THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA

First Respondent

THE LEGAL AID BOARD

Second Respondent

JUDGMENT

MOLOTO AJ:

[1] This is an application for a declaratory order to the effect that persons who have a right to security of tenure in terms of the Extension of Security of Tenure Act¹ (“ESTA”) and the Land Reform (Labour Tenants) Act² (“Labour Tenants Act”) and whose tenure is threatened or has been infringed, have a right to legal representation or legal aid at State expense under certain conditions, and other relief.

[2] The first respondent entered an appearance to defend but later withdrew from participating in the case. The second respondent did not enter an appearance, choosing rather to abide the decision of the Court.

1 Act 62 of 1997, as amended.

2 Act 3 of 1996, as amended.

[3] The application is premised on the fact that the right to secure tenure or alternative redress is guaranteed in the Bill of Rights to the Constitution of the Republic of South Africa Act,³ (“the Constitution”). Section 25(6) of the Constitution reads:

“A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.”

[4] With a view to giving effect to section 25(6) of the Constitution, the Parliament enacted the Labour Tenants Act and ESTA. These acts define the extent to which a large number of rural and peri-urban people whose tenure of land is legally insecure, are entitled to legally secure tenure. However, a very large number of the people for whose benefit the Labour Tenants Act and ESTA were enacted, do not enjoy that entitlement when their rights are infringed or threatened with infringement. This is so because they are overwhelmingly poor and vulnerable people with little or no formal education. When their tenure security is threatened or infringed, they do not understand the documents initiating action or the processes to follow in order to defend their rights. On the other hand they cannot afford the fees for a lawyer to represent them because of their poverty. As a result they are quite often unable to defend or enforce their rights and their entitlement under the Constitution, the Labour Tenants Act and ESTA.

[5] The Legal Aid Board is the institution through which the Government provides legal aid to the indigent. However, most of these people or a large number of them are not able to obtain legal services through the Legal Aid Board. Several reasons can be identified for this situation:

- (a) The number of lawyers practising in the rural areas is small. Most attorneys prefer to practise in the cities and towns where there is a pool of reasonably well to do (comparatively speaking) clientele.

3 Act 108 of 1996.

- (b) Of the few lawyers practising in the rural areas most have very close social and professional connections with landowners in the district. As a result many of them are reluctant to represent labour tenants and occupiers against the landowners. In its circular no 5 of 1998, the Legal Aid Board states: “[I]n many rural areas local attorneys are unwilling to act against prominent local farmers.”
- (c) The Legal Aid Board has always paid very modest fees with the result that very few lawyers have been prepared to do legal work on instructions from the Legal Aid Board. This has had the effect that the pool of lawyers from whom legal aid representation could be sought is small.
- (d) The situation described in paragraph (c) above was aggravated in 1999 when the Legal Aid Board reduced its tariff of fees. Some of the lawyers who were at the time representing litigants on instructions from the Legal Aid Board, withdrew as representatives of such litigants.

[6] As a result of the above, very many poor, illiterate litigants appear in court unrepresented. Labour tenants and occupiers form a significant portion of such litigants. There is a need to assist labour tenants and occupiers to protect their constitutionally guaranteed rights. One of the ways in which the rights of labour tenants and occupiers, as outlined in section 25 of the Constitution and further expanded upon in the Labour Tenants Act and ESTA, can be protected is to ensure that their right in terms of section 34⁴ of the Constitution is upheld. This means that labour tenants and occupiers are entitled to a fair trial before they can be evicted and for the trial to be fair it is necessary that the labour tenant or occupier understands his or her rights under the law and the complexities of a trial. Where he or she does not understand, there is a need for legal representation, or at the very least, an explanation of his or her

4 Section 34 of the Constitution reads:

“Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.”

rights by the judicial officer. Given the order I intend making it is important that information about the rights of labour tenants and occupiers to a just and fair trial be disseminated as widely as possible.

[7] The issue of judicial officers informing litigants about their rights arose in criminal cases in the period before South Africa was a constitutional state. It is to that field of law that I look for guidance. The rights of an accused were then understood not to include the right to legal aid. The right of the accused was a right to representation, if he or she could afford it and obtain it. The question then arose whether the judicial officer was under a duty to inform the accused of that right to legal representation.

[8] The question arose crisply in *S v Radebe; S v Mbonani*.⁵ Goldstone J (Van der Merwe J concurring) referred to:

“ . . . a general duty on the part of judicial officers to ensure that unrepresented accused fully understand their rights and the recognition that in the absence of such understanding a fair and just trial may not take place.”⁶

[9] The court held further as follows:⁷

“If there is a duty upon judicial officers to inform unrepresented accused of their legal rights, then I can conceive of no reason why the right to legal representation should not be one of them . . . depending upon the complexity of the charge, or of the legal rules relating thereto, and the seriousness thereof, an accused should not only be told of this right but he should be encouraged to exercise it. He should be given a reasonable time within which to do so. He should also be informed in appropriate cases that he is entitled to apply to the Legal Aid Board for assistance. A failure on the part of the judicial officer to do this, having regard to the circumstances of a particular case, may result in an unfair trial in which there may well be a complete failure of justice. I should make it clear that I am not suggesting that the absence of legal representation *per se* or the absence of the suggested advice to an accused person *per se* will necessarily result in such an irregularity or an unfair trial and the failure of justice. Each case will depend upon its own facts and peculiar circumstances.”

5 1988 (1) SA 191 (T).

6 Above at 195B.

7 Above at 196F-J.

[10] This approach was followed in a number of cases⁸ culminating in the endorsement of the approach by the Supreme Court of Appeal.⁹

[11] Once it is found that there is a right to representation at State expense in certain civil cases, I can conceive of no logical reason why a judicial officer should not inform the person appearing before him/her of that right, and how to exercise it. There is no logical basis for distinguishing between criminal and civil matters. The issues in civil matters are equally complex and the laws and procedures difficult to understand. Failure by a judicial officer to inform these litigants of their rights, how to exercise them and where to obtain assistance may result in a miscarriage of justice.

[12] The following order is made:

1 It is declared that:

1.1 The persons who have a right to security of tenure in terms of the Extension of Security of Tenure Act, Act 62 of 1997 and the Land Reform (Labour Tenants) Act, Act 3 of 1996, and whose security of tenure is threatened or has been infringed, have a right to legal representation or legal aid at State expense if substantial injustice would otherwise result, and if they cannot reasonably afford the cost thereof from their own resources.

1.2 The State is under a duty to provide such legal representation or legal aid through mechanisms selected by it.

1.3 The cases in which substantial injustice could result include, but are not limited to, cases where

8 *S v Khanyile and Another* 1988 (3) SA 795 (N) at 800C-D; *S v Rudman*; *S v Johnson*; *S v Xaso, Xaso v Van Wyk NO and Another* 1989 (3) SA 368 (E) at 381G-382D; *S v Mthwana* 1989 (4) SA 361 (N) at 371D-F.

9 *S v Mabaso and Another* 1990 (3) SA 185 (A) at 203G.

- 1.3.1 the potential consequences for the person concerned are severe, which will be so if the person concerned might be deprived of a home and will not readily obtain suitable alternative accommodation; and
- 1.3.2 the person concerned is not likely to be able effectively to present his or her case unrepresented, having regard to the complexity of the case, the legal procedure, and the education, knowledge and skills of the person concerned.
- 1.4 Legal aid or legal representation need not be provided in cases where there is no reasonable or probable cause.
- 1.5 The State or its agent is entitled to adopt a screening process to establish whether the person concerned is entitled to legal aid or legal representation, before granting such aid or representation.
- 2 The Minister of Justice and the Minister of Land Affairs are directed to take all reasonable measures to give effect to this order, so that people in all parts of the country who have rights as set out in this order, are able to exercise those rights effectively.

ACTING JUDGE J MOLOTO

I agree

ACTING JUDGE A GILDENHUYS

For the applicant:

Mr G Budlender instructed by Legal Resources Centre, Johannesburg.

For the first and second respondents:

No appearance.