IN THE LAND CLAIMS COURT OF SOUTH AFRICA

RANDBURG **CASE NUMBER: LCC 51/2010**

Before: Loots AJ

Date of Judgment: 30 May 2014

In the matter between

DE FACTO INVESTMENTS 255 (PTY) LTD	**Plaintiff**
And	
TOYE NKALA AND OTHERS	**First Defendant**
SKESHE MAVUNDLA AND OTHERS	**Second Defendant**
DEPARTMENT OF RURAL DEVELOPMENT AND LAND REFORM	**Third Defendant**
OKHAHLAMBA MUNICIPALITY	**Fourth Defendant**

JUDGMENT

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[1] This is an action in which the plaintiff company claims the eviction of two families from a farm which is situated in the district of Bergville, KwaZulu-Natal. The plaintiff is a commercial entity which owns the farm in question. The first defendant is Toye Nkala, 68 years of age, who is the head of a family numbering approximately 16 people, comprised of his wife, children and grandchildren (the Nkala family). The second defendant is Skeshe (Alec) Mavundla, age 64, who is the head of a family numbering approximately 17, comprised of his wife, children and grandchildren (the Mavundla family). The Department of Land Affairs, now known as the Department of Rural Development and Land Reform (DRD&LR), cited at its provincial office in

Pietermaritzburg, is joined as the third defendant. The UKhahlamba Municipality, situated in Bergville, is cited as the fourth defendant.

[2] The plaintiff company purchased the farm in question from a Mr C.F.C van der Merwe (Mr van der Merwe). At the time when the farm was sold the Nkala and Mavundla families, as well as a third family headed by Mr Nongau Hadebe, were resident on the farm. The plaintiff pleads that in October 2002 the seller, Mr van der Merwe, acting on behalf of the plaintiff, entered into a written agreement with the heads of each of the three families in terms of which they, with all persons occupying through them would leave the farm. In return Mr van der Merwe would pay them each R1 000,00 and deliver to each of them 400 concrete building blocks at the place to which they would relocate.

[3] The plaintiff pleads that it complied with all of its obligations in terms of the agreement and that Mr Hadebe and his family complied with their obligations by moving off the farm. It is alleged that the first and second defendants breached the agreement in that they took possession of the building material and money and then refused to vacate the farm. The particulars of claim go on to describe what prejudice is suffered by the plaintiff as a result of the continued presence of the two families on the farm and then pleads in paragraph 27 that:

> 'As a consequence of the aforesaid breach of the oral agreements between the parties and the continued unacceptable conduct of the first and second defendants a fundamental breach in the relationship between the parties has occurred and the plaintiff avers that the relationship between the parties cannot be reasonably restored.'

[4] The defendants pleaded that the first and second defendants are labour tenants who can be evicted only in terms of the LTA, and that the requirements of the LTA were not complied with. Alternatively, they pleaded that they are occupiers in terms of section 10 of ESTA and that the requirements for eviction in terms of that section had not been met. Furthermore, they alleged that the written agreements to leave the farm relied upon by the plaintiffs were not valid and should in any event be disregarded by the court in terms of section 25 of ESTA.

[5] It seemed that this matter might be settled because the plaintiff had tendered in its particulars of claim to purchase an alternative piece of land for the Nkala and

Mavundla families to relocate to. This tender was repeated at a pre-trial conference. However, despite a number of pre-trial conferences held in terms of Rule 30, no settlement could be reached and the matter was eventually set down for trial.

[6] It is common cause that –

(a) The plaintiff company is the owner of the farm Vaalbank No 1266, Bergville, which is approximately 1600 hectares in extent and that it purchased the portion of that farm known as *Habanera*, being 706 hectares in extent from Mr van der Merwe in 2002 and took transfer thereof in 2003.

(b) The first and second defendants were born on the farm known as *Habanera* and are now the heads of their families which reside in homesteads on the western boundary of this farm.

(c) The first and second defendants and some of their family members provided labour to Mr van der Merwe while he owned the farm, and previously to his father and then lessees of the farm, but after it was sold to the plaintiff, the plaintiff brought in outside labourers and did not employ them at all.

(d) The first and second defendants did sign, by making an 'X' the document which purports to be an agreement to leave the farm in exchange for R1 000,00 and building blocks. Both defendants retained the R1 000,00.

(e) After taking transfer of the farm, the plaintiff company had a pivot installed on the farm for the purpose of planting, fertilizing and irrigating a circle of land on the farm in order to commercially produce maize, wheat and soya.

(f) The homesteads of the Nkala and Mavundla families fall within the boundary of the pivot circle on its western edge, interrupting its operation so that a wedge shaped piece of land within the circle measuring approximately 13 hectares cannot be cultivated with the benefit of the pivot.

(g) There are family graves in the vicinity of the homesteads of the first and second respondents, some of which fall within the pivot circle.

[7] Mr N W Frey, the director and sole proprietor of the plaintiff company, gave evidence that when the company purchased the farm from Mr van der Merwe it was

a condition of the sale agreement that the seller would ensure that his employees would vacate the farm and their living quarters by a certain date. He relied on this clause when he took the decision to install the pivot, even though the two families were still in occupation of their homesteads. This was an ill-advised decision because such an agreement is unenforceable in law. If occupiers refuse to vacate land they can be evicted only by order of a court.

[8] Mr Frey said that Mr van der Merwe told him that he had an agreement with his labourers that he would pay them some money and give them some cement blocks to build accommodation elsewhere. He was told that the labourers had signed agreements to this effect. The three 'agreements' were identified in the bundle of documents before the court. Mr Frey said that Mr van der Merwe borrowed the plaintiff company's truck to deliver the blocks. The truck was driven by Mr Hadebe, who had a truck driver's licence. The Hadebe family did move, but the Nkala and Mavundla families decided not to move. These two families sought help from the Campus Law Clinic of the University of Natal. Mr Frey communicated with various officials and attorneys at the Law Clinic, but was eventually told that the two families were not willing to relocate. The company then issued a summons against them in this court claiming an order of eviction.

[9] Both the first and second defendants gave evidence that at the time when they 'signed' the document they did not understand that they were agreeing to leave the farm. Mr Mavundla and his son Goodluck, who is approximately 37 years of age, gave evidence that when Mr Mavundla senior reached his homestead with the R1 000,00 and the document, it was only when Goodluck and his sister read the document that it became known to him that it contained the agreement to vacate the farm. Their evidence was that they immediately telephoned Mr van der Merwe and arranged to meet with him the next day.

[10] When they went to meet him the next day he was not at the farm house, as expected, but they found him in a field where a tractor was ploughing. They confronted him about the purported agreement. He responded by saying that it was the wife of the new owner who typed up the agreement and he did not know about it. They said that Mr van der Merwe took the typed copy of the agreement from them and tore it into little pieces, which he threw to the ground. They further said that they

tried to give the R 1 000,00 back to him, but he said that Mr Mavundla senior must keep it to buy mealiemeal for the family because he (Mr van der Merwe) was leaving. This incident was denied by Mr van der Merwe.

In terms of what legislation is eviction claimed?

[11] The Land Claims Court can hear applications for eviction in terms of the Extension of Security of Tenure Act 62 of 1997 (ESTA) and in terms of the Land Reform (Labour Tenants) Act 3 of 1996 (LTA). The plaintiff's particulars of claim do not state under which of these Acts the action is brought, however paragraph 27, quoted above in paragraph [3], indicates reliance on section 10(1)(c) of ESTA. Further indication that the drafter of the pleading intended to rely on ESTA is that it is alleged that notice of the action will be given to the third and fourth defendants; that these defendants are cited only in their legislative capacities; and that no relief or costs order is sought against them. Section 9(2)(d) of ESTA requires a party claiming an eviction order to give notice to the municipality in whose area of jurisdiction the land in question is situated and to the head of the relevant provincial office of the Department of Land Affairs (now DRD&LR), for information purposes. It has become common practice to join these parties as defendants, as was done in this case. Another indication that the plaintiff intended to rely on ESTA is that the plaintiff requested the registrar of the court to request a report in terms of section 9(3) of that Act. I will accordingly first consider whether the applicant would be entitled to an order in terms of ESTA before turning my attention to the allegation that the occupiers are labour tenants.

Is there compliance with ESTA?

[12] The purported agreement by the occupiers to vacate the farm would be important if the matter were to be decided in terms of ESTA because the first step that a landowner must take in evicting an occupier under ESTA is to terminate the right of residence in terms of section 8 of that Act. That written 'agreement' might arguably have constituted notice of termination or evidence that such notice had been given. However section 8(1) of ESTA provides –

'(1) Subject to the provisions of this section, an occupier's right of residence may be terminated on any lawful ground, provided that such termination is just and equitable, having regard to all relevant factors and in particular to-

(a) the fairness of any agreement, provision in an agreement, or provision of law on which the owner or person in charge relies;

(b) the conduct of the parties giving rise to the termination;

(c) the interests of the parties, including the comparative hardship to the owner or person in charge, the occupier concerned, and any other occupier if the right of residence is or is not terminated;

(d) the existence of a reasonable expectation of the renewal of the agreement from which the right of residence arises, after the effluxion of its time; and

(e) the fairness of the procedure followed by the owner or person in charge, including whether or not the occupier had or should have been granted an effective opportunity to make representations before the decision was made to terminate the right of residence.' *(my underlining)*

Mr van der Merwe's evidence was that he met with Mr Hadebe, Mr Nkala and Mr Mavundla in October 2002, after the farm was sold but before the 'agreements' were signed. He testified that he told them that he had sold the farm and that the new owner would not be employing them. He did not say that he told them at that stage that they and their families would have to leave the farm. It seems that it was only after Mr Mavundla's children read the 'agreement' to him that it was realised that they were expected to leave the farm. Having regard to the criteria set out in section 8(1) of ESTA and to the facts in this case I do not regard the purported termination of the right of residence of the first and second defendants as being just and equitable. For one thing, they were given no effective opportunity to make representations before the decision was made to terminate their right of residence. For another, there is no evidence that retrenchment monies were offered or paid to them. This is unacceptable, particularly considering that they and their parents had worked on the farm for so long. Having regard to all the factors set out in section 8(1), I find that the there was no just and equitable termination of the rights of residence of the first and second defendants.

[13] Counsel for the plaintiff has argued that their right of residence was lawfully terminated in terms of section 8(2) of ESTA, which provides –

> '(2) The right of residence of an occupier who is an employee and whose right of residence arises solely from an employment agreement, may be terminated if the occupier resigns from employment or is dismissed in accordance with the provisions of the Labour Relations Act.'

No evidence of a dismissal 'in accordance with the provisions of the Labour Relations Act' was placed on record and the first and second defendant did not resign from employment.

[14] Another reason why I cannot grant an eviction in terms of ESTA is that the plaintiff has not established a ground for eviction in terms of section 10 of ESTA. This section applies when the occupiers were in occupation before 4 February 1997, which Mavundla and Nkala families certainly were. The quotation from paragraph 27 of the particulars of plaintiff's claim, which is set out in paragraph [3] above, indicates that the plaintiff appears to rely on section 10(1)(c), which provides that an order for the eviction of a person who was an occupier on 4 February 1997 may be granted if-

> '(c) the occupier has committed such a fundamental breach of the relationship between him or her and the owner or person in charge, that it is not practically possible to remedy it, either at all or in a manner which could reasonably restore the relationship;'

I am not persuaded that the occupiers did commit a 'fundamental breach of the relationship between them and the owner'. The plaintiff alleged that they left farm gates open; cut fences on the farm; put sand in the irrigation pump's oil and were generally involved in acts of criminality such as theft. The occupiers denied these allegations. Mr Frey conceded in cross examination that he had no evidence that it was the Nkala or Mavundla families who were guilty of these actions and admitted that it could have been his labourers or people from a nearby settlement.

[15] I accordingly find that the plaintiff cannot succeed in its claim for eviction in terms of ESTA because neither a lawful termination of the rights of occupation of the first and second defendant, nor a ground for their eviction has been established.

Are the first and second defendants labour tenants?

[16] This question is important for two reasons. First, if they are labour tenants, then that is another reason why they cannot be evicted in terms of ESTA.[1] A labour tenant can be evicted only in terms of the LTA and the requirements for eviction in terms of that Act have certainly not been satisfied.[2] Secondly, the first and second defendants amended their pleadings to request an order declaring that they are labour tenants. If they are declared to be labour tenants then they can be evicted only in terms of the LTA and they are entitled to certain benefits.

[17] Section 1 of the LTA provides –

> **'labour tenant'** means a person-
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> *(a)* who is residing or has the right to reside on a farm;
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> *(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
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> *(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;
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> **'farmworker'** means a person who is employed on a farm in terms of a contract of employment which provides that-
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> *(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
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> *(b)* he or she is obliged to perform his or her services personally;

Section 2(5) provides that in any proceedings if the requirements of paragraphs *(a)*, *(b)* and *(c)* of the definition of labour tenant is proved, 'that person shall be presumed not to be a farmworker, unless the contrary is proved.'

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[1] Section 5 of the Land Reform (Labour Tenants) Act 3 of 1996. See KusaKusa CC v Mbele 2003 (2) BCLR 222 (LCC) para [14] and [15].

[2] See ss 5 – 7 and ss 9 -- 15 of the Land Reform (Labour Tenants) Act 3 of 1996.

[18] The first and second defendants, both gave evidence and corroborated one another in the following respects –

(a) Both of these defendants were born on the farm;

(b) Their fathers both resided and worked on the farm where they lived with their wives and numerous children;

(c) Their fathers worked on the farm as general labourers, but as far as they know, they received no remuneration;

(d) Both families were allowed to reside on the farm, keep their own cattle and cultivate their own crops;

(e) They survived by slaughtering or selling cattle and harvesting their crops such as mealies, pumpkin, potatoes, sweet potatoes and beans;

(f) Their mothers worked in the farm house kitchen and in return received only a bar of soap and maybe some salt;

(g) When the two defendants became heads of the families they continued to reside on the farm, keep the family cattle and cultivate their own crops, in return for which they provided labour.

[19] The only witness for the plaintiff who could give evidence with regard to these facts was the previous owner of the farm, Mr van der Merwe, who is approximately 60 years of age. He was born on the farm, but left it when he was eight years old because his father became very ill and then died. The farm continued to belong to his family and was farmed by various lessees. In about 1974 or 1975, he returned to the farm, first to work for the then lessee and later to take over the management himself. He and his brother inherited the farm. He bought his brother's half share in about 1984 and became the sole owner. His evidence was that the Nkala and Mavundla families had resided and worked on the farm ever since he could remember and he did not dispute that they kept cattle and cultivated crops.

[20] I have no doubt that this uncontroverted evidence given by the first and second defendants, as set out in paragraph [16] above, is sufficient to satisfy the requirements of sub-sections *(a)*, *(b)* and *(c)* of the definition of a 'labour tenant'. It

has been held that *(a)*, *(b)* and *(c)* are to be read conjunctively[3] and I find that all their requirements have been met. That means that the plaintiff has the onus of establishing that the first and second defendant were farmworkers.[4] It is clear from the definition of 'farmworker', quoted above in paragraph [17], that this means that the owner has to establish on a balance of probabilities that the defendants were paid predominantly in cash and commodities like mealiemeal, not predominantly by way of having the right to occupy and use the land. The plaintiff has not been able to establish this in respect of the fathers of the first and second defendant. I make this finding because when it was put to Mr van der Merwe that the fathers of the first and second defendants were not remunerated and that the only way the families survived was that they were allowed to keep cattle and cultivate crops, he said that he could not dispute this as it was before his time.

[21] In his opening statement at the beginning of the trial counsel for the plaintiff said that the plaintiff's case is essentially that the first and second defendants were farmworkers and that their employment ended when the farm was sold in October 2002. The plaintiff was able to adduce some evidence as to the remuneration of the first and second defendants. Mr van der Merwe remembered that when he first went back to work on the farm he and the first and second defendants queued together to receive remuneration. They would all have been young men at the time. He said that in later years, just before he sold the farm he thought that they earned something between R500 and R900 per month, but he could not be sure of this. He was not able to produce any documentation as to what they were paid. One would expect a farmer to keep written records relating to the employment of his labourers, but Mr van der Merwe said he could not produce any written evidence of what they had been earning because he and his wife had moved twice since he sold the farm and 'a lot of things got lost'.

[22] Both the first and second defendant gave evidence that when they became old enough they started working on the farm from time to time, doing jobs such as looking after the farmer's sheep or inspanning his oxen. Both said that they were initially paid 10 shillings a month and then later a pound a month. Mr Nkala testified that he never earned more than R100 per month, right up to the time when the farm

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[3] *Ngcobo and Others v Salimba CC; Ngcobo v Van Rensburg* 1999 (2) SA 1057 (SCA) para [11].
[4] Section 2(5) of the Land Reform (Labour Tenants) Act 3 of 1996.

was sold. Mr Mavundla said that he earned R180 per month and a bag of mealiemeal, but later added that he may even have earned as much as R550 for a few months shortly before the farm was sold. Mr Goodluck Mavundla testified that, as far as he knew, his father only earned R180 per month and that this amount was not enough to look after their family. He said he knew this because they were always short of money to buy things which were needed for school. There is accordingly evidence given on behalf of the first and second defendants that they did receive some compensation in the form of cash and perhaps a bag of mealiemeal and soap each month, but that this was not enough for their families to survive on.

[23] The Supreme Court of Appeal[5] has held that the proviso relating to a 'farmworker' refers to 'the whole period in respect of which the present occupier, whose occupation is under attack, has been occupying the land in question'. This means that the focus of the enquiry must be whether the first and second defendants themselves were employees or labour tenants. I venture to suggest, however, that in a case like this one, where the fact that these defendants' fathers were so clearly labour tenants on the same farm has been established, a court might take that historical fact into account in deciding the issue. I say this because a labour tenancy of this kind is often a continuum. In this case it seems that it began with one generation and probably continued with the next.

[24] What the court has to do in order to decide whether the first and second defendants were 'farmworkers' or 'labour tenants' is to weigh the value of the right to reside on the farm and use some of its land against the value of any remuneration received in cash or some other form such as mealiemeal.[6] It has been held by Moloto J that the value of the rights enjoyed by farm labourers must be calculated from the point of view of the worker and not the farm owner.[7] However, Gildenhuys J has held the following:[8]

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[5] *Ngcobo and Others v Salimba CC; Ngcobo v Van Rensburg* 1999 (2) SA 1057 (SCA) para [26].
[6] *Landman & Another v Ndlozi; Landman & another v Gama* 2005 (4) SA 89 (LCC) para [11].
[7] *Mahlangu v De Jager* 2000 (3) SA145 (LCC) paras [26] and [41]; *Msiza & Others v Uys & Others* 2005 (2) SA 456 (LCC) 469F.

[8] *Landman & Another v Ndlozi; Landman & another v Gama* 2005 (4) SA 89 (LCC).

> [14] The *onus* which a land-owner bears to show that an employee is not a labour tenant because he is a farmworker, indicates that the valuation of the different components of the remuneration does not necessarily have to be made from the employee's perspective. The land-owner might not know what a particular component is worth to the employee.
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> [15] Some of the examples given in the *Woerman* case of evidence which would assist in placing a monetary value on the different components of remuneration, require a valuation from the perspective of the employee, whilst others bear on the perspective of the landowner, or depend on objective norms. The different perspectives will yield different values; for example, the income which a worker can obtain from cattle farming could be very different from the amount that a landowner would charge for allowing cattle to be grazed on his farm.
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> [16] It would, in my view, be unwise to adopt a dogmatic approach when deciding upon a suitable valuation approach. Each case must be considered on its own merits. A method or methods of valuation must be selected which is or are just and equitable in the circumstances of the particular case. That, I believe, is the thinking which underlies the examples given by Streicher JA in the *Woerman* case. *(footnotes not included)*

The judgment referred to in this extract is that of the Supreme Court of Appeal, per Streicher JA, in *Woerman NO and Another v Masondo and Others*[9] and the passage referred to is the following;

> '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 miealies. 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

[9] [2002] 2 All SA 53 (SCA) para [10].

> 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.'[10]

[25] The *Landman*[11] case illustrates the application of the principles set out in the *Woerman* judgment. Unfortunately, in the case before me very little evidence was adduced from either side as to the value of the components of the right to occupy and use the land. Even the evidence as to the cash amounts paid to the first and second defendants was vague and uncertain, particularly from Mr van der Merwe who, as the former owner and manager of the farm, should have been able to produce or refer to some books of account or other documentary evidence of what amounts he was paying to his labourers on a monthly basis.

[26] The SCA, in the *Woerman* case, held that the occupiers had not discharged the onus of establishing that they were labour tenants, however, that case was decided on the basis of the LTA as it was before it was amended[12] to add section 2(5), which 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.'

This section now places the onus on the land owner to prove that the persons concerned were 'farmworkers'. Since the plaintiff, on whom this onus rests, did not adduce sufficient evidence to discharge its onus, the presumption that the first and second respondents are labour tenants prevails. In any event, I believe that this is an

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[10] Para [21] of the judgment.
[11] *Landman & Another v Ndlozi; Landman & another v Gama* 2005 (4) SA 89 (LCC).
[12] *Woerman NO and another v Masondo & others* [2002] 2 All SA 53 (SCA) para [10].

equitable outcome, given the facts of this case, and in accordance with the precedent set by the Supreme Court of Appeal in *Ngcobo and Others v Salimba CC; Ngcobo v Van Rensburg.*[13] The following extract from the judgment case, written by the late Judge Olivier JA, seems particularly apposite to the case before me:

> '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.'[14]

[26] The application for the eviction of the first and second defendants must accordingly be dismissed. It cannot be granted in terms of ESTA because a labour tenant cannot be evicted in terms of that Act and, in any event, the requirements of that Act were not complied with, as explained in paragraphs [12] – [15] above. It cannot be granted in terms of the LTA because that Act was not relied upon in the particulars of claim nor was there compliance with its requirements.[15]

Other relief claimed

[27] The first and second defendants amended their plea to claim a declaration that they are labour tenants. I have no difficulty about making a declaratory order that the first and second respondents are labour tenants and were so on 2nd June 1995. Section 3 of the Act provides that a person who was a labour tenant as at 2nd June 1995 is entitled to occupy and use such property as he was occupying and using on such date. This right extends to his family members.

[28] The plaintiff amended its particulars of claim to insert an alternative prayer in the event of the court finding that the first and second defendants are labour tenants. The alternative order sought by the plaintiff is that this court should order the defendants to relocate their homesteads within six months of the granting of the order to an area situated at the north-west corner of the farm which has been

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[13] 1999 (2) SA 1057 (SCA).
[14] Para [28] .
[15] See ss 5 – 7 and ss 9 - 14 of the Land Reform (Labour Tenants) Act 3 of 1996.

demarcated by the plaintiff. It also sought an order that the third defendant, the Regional Land Claims Commissioner for KwaZulu-Natal (RLCC), should appoint and pay for a registered land surveyor to cause this area to be subdivided into two evenly sized erven with such servitudes as may be necessary. The plaintiff also requests in this alternative prayer that the RLCC should be ordered to pay the costs of relocating the families and constructing new dwellings, as well as the costs of the action.

[29] I do not believe that I am in a position to grant this alternative relief. Chapter III of the LTA sets out the procedure by which a labour tenant can apply for the acquisition of ownership or other rights in land and makes it very clear what functions the state officials are required to perform. The first and second defendants are entitled to an award of land commensurate with the extent of the land that they were occupying and using on 2 June 1995.[16] If the procedures prescribed in the Act are followed a decision can be made or agreement can be reached as to what is an appropriate award of land.[17]

[30] During a pre-trial conference I was advised that the first and second defendant had lodged applications in terms of section 16 of the LTA applying for an award of land. I made an order in terms of Land Claims Court Rule 30(7)(a) which directed the Director-General of the Department of Rural Development and Land Reform (DRDLR) to file a written report with the court as to status of the applications allegedly made by the first and second defendants. In response to this order the acting manager of the Ladysmith District Office of the DRDLR made an affidavit confirming that, according to the Labour Tenant Database, the first and second defendants did lodge applications in terms of section 16, however, the office had misplaced the actual documents.

[31] It is totally unacceptable that officials tasked with the exceptionally important function of implementing land reform legislation can simply lose original documents such as these applications. Section 17 of the LTA provides that an application for the acquisition of land and servitudes referred to in section 16 shall be lodged with the Director-General. Sub-section (2) provides that, on receiving an application, 'the

[16] See s 3 and s 16(1)(a) of the Land Reform (Labour Tenants) Act 3 of 1996.
[17] Section 18 of the Act provides for resolution of the claim by agreement. Section 19 provides that the Director-General may refer the application for an award of lad to the court to be heard by a judge or an arbitrator.

Director-General shall forthwith give notice of receipt of the application to the owner' and cause a notice of the application to be published in the *Gazette.* Section 18 provides a procedure for resolution of the claim by agreement, failing which the claim is referred to the Land Claims Court in terms of section 19.

[32] Since an official acting on behalf of the Director-General of the DRD&LR has confirmed that an application in terms of section 16 of the LTA for an award of land was made by the first and second defendants, and this court has now declared that they are labour tenants, the Director-General should appoint a mediator in terms of section 18(3) of the LTA to assist the parties to reach an agreed resolution as to the land to be awarded to the first and second respondent. Failing such agreement the Director-General should refer the application to the President of the Court in terms of section 19(1) of the LTA. The DRD&LR was represented by the State Attorney at the commencement of these proceedings and has filed a notice to abide the court's decision. If the plaintiff wants to take the initiative then it can bring an application for relocation of the first and second defendants, with their families, in terms of section 8 of the LTA. This court does not have sufficient information before it to enable it to make an order for the award of land or an order of relocation. Chapter III and section 8 of the Act are designed to deal with such applications.

Costs

[33] The practice of the Land Claims Court, which has been approved by the Supreme Court of Appeal, is to make no order of costs unless there is good reason to do so.[18] Plaintiff's counsel argued that the third respondent should be ordered to pay the costs because if it had performed its statutory functions in terms of the LTA as it should have then this litigation would have been unnecessary. While it is true that the Director-General of the Department is guilty of serious dereliction of his or her duty in failing to give the owner notice of the claims for an award of land by the 1st and second defendants, the plaintiff also bears culpability for installing the pivot so that it would literally crash into the homesteads of the two families while they were still in occupation of those homesteads and for relying on an unenforceable vacant possession clause in the agreement of sale. The DRD&LR is already burdened with

[18] *Mahlangu v de Jager* 1996 (3) SA 235 (LCC) 246--7 and 2000 (3) SA 145 (LCC); *Haakdootnbuly Boerdery CC v Mphela* 2007 (5) SA 596 (SCA) 618.

paying for the legal representation of the labour tenants. I do not believe that there is good reason to make them also pay the plaintiff's costs. Accordingly no order as to costs will be made.

Order

1. The plaintiff's application for an eviction order and for certain alternative relief is dismissed.
2. The first and second defendant are declared to be labour tenants, as defined in terms of the Land Reform (Labour Tenants) Act 3 of 1996.
3. The Registrar of this Court must arrange for a copy of this judgment to be delivered to the Director-General of the Department of Rural Development and Land Reform, under cover of a letter drawing his or her attention to paragraphs [29] to [32] of this judgment.
4. No order is made as to costs.

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C E LOOTS
Acting Judge
Land Claims Court

For the plaintiff:
K C McIntosh instructed by Shepstone & Wylie Attorneys

For 1st and 2nd defendants:
A A Gabriel instructed by Mzila H M Inc.

For 3rd defendant: State Attorney, KwaZulu-Natal