IN THE LAND CLAIMS COURT OF SOUTH AFRICA

(HELD AT RANDBURG)

Before: **Carelse J**

Heard:

DELETE WHICHEVER ONE IS NOT APPLICABLE:

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

(3) REVISED

26/10/2018 Order

DATE SIGNATURE

Case number: **LCC 203/2015**

In the matter between:

Luke Fourteen Binda	Plaintiff
and	
Kwagga Kliprivier Eiedom Trust	First Defendant
Jacobus Gerhardus Fourier N.O	Second Defendant
Daniel Rudolf Fourie N.O	Third Defendant

The Director General of the Defendant of	
Rural Development and Land Reform	Fourth Defendant
The Minister of Rural Development and	
Land Reform	Fifth Defendant
Lekwa Local Municipality	Sixth Defendant

Judgment

Carelse J:

[1] This is an action wherein Mr Binda, the plaintiff seeks the following relief *inter alia:*

1.1 a declaration in terms of section 33(2A) of the Land Reform (Labour Tenants) Act 3 of 1996 (the "LTA") that the plaintiff is a Labour Tenant; and

1.2 to award those portions of the farm, Remaining Extent of the farm Sterkfontein 34 Registration Division HS, Mpumalanga ("Sterkfontein"), to the plaintiff that he and his family members were using as at 2 June 1995 and are currently using K1, K2 and K15 as well as reasonable access to the graves of the plaintiff's family members on the farm.

[2] At the outset of the hearing, the parties agreed that prayer 1.2 above in which Phe plaintiff seeks an award for that portion of the farm be postponed *sine die.* I accordingly granted an order postponing prayer (1.2) above *sine die.*

The parties

[3] The plaintiff is a 55-year-old unemployed male and has resided on the farm, Sterkfontein since 1982[1] and is still resident on the farm. Kwagga Kliprivier Eiendom Trust, is the registered owner of Sterkfontein ("the first defendant"). The second and third defendants are trustees of the farm. The first, second and third defendants ("the defendants") oppose the relief sought. The fourth, fifth and sixth respondents do not oppose the relief sought.

Common cause facts

[4] The plaintiff's biological father passed away when he was quite young. His late father resided on another farm, Waaihoek. The plaintiff's mother got remarried to Mr Paul Lephoto ("Mr Lephoto"), his stepfather who resided on the farm, Sterkfontein. It is not disputed that Mr Lephoto worked on Sterkfontein and was remunerated as follows: he was paid an amount in cash; he was allowed to keep several heads of cattle that were allowed to graze on Sterkfontein and he was allocated a portion of the harvest of maize which was sold on his behalf. The proceeds were given to him as a "bonus".

[5] Mr Pierre Terblanche, the erstwhile owner of Sterkfontein died sometime in 1989 and his son Mr Henk Terblanche inherited Sterkfontein. The plaintiff has been residing on Sterkfontein since 1982 and still resides there. Mr Lephoto

[1] Paragraph 8.1 of the plaintiff's amended Statement of Claim on page 33 of bundle 1.

worked for Mr Pierre Terblanche until his death. Mr Henk Terblanche sold the farm as a going concern to Germit Boerdery CC in August 2006. Mr Stemmet was a member of Germit Boerdery CC and resigned as a member. The farm was then sold to the first defendant in 2009.

[6] It is not disputed that in support of the plaintiff's claim for an award of the land, he submitted an application to the Director General of the Department of Rural Development and Land Reform for the acquisition of those portions of the farm that the plaintiff occupied and used as at 2 June 1995.

[7] It is the plaintiff's case that he still resides on Sterkfontein. He had the right to crop and graze on Sterkfontein and in consideration for such right he provided labour to the late Mr Pierre Terblanche. The plaintiff's biological father resided on the farm Waaihoek in the Free State where he had the right to graze on Waaihoek and in exchange of this right, he provided labour to the owner of Waaihoek alternatively the lessee of the farm.

[8] The plaintiff categorically denies that he was employed in terms of a contract of employment which provided that in exchange for his labour, he would be paid predominantly in cash or in some other form of remuneration and not predominantly with the right to occupy and use the land, and that he was obliged to perform his services personally.

[9] The defendants vehemently deny that the plaintiff provided labour in consideration of the right to reside and further deny that the plaintiff had any cropping and, or grazing rights. It is the defendants case that the plaintiff was allowed to have a maximum of four head of cattle on Sterkfontein and was at all relevant times employed as a farmworker as contemplated in section 1 of the LTA. The defendants allege in their plea that the plaintiff was employed on Sterkfontein in terms of a verbal agreement, along the following terms; he was paid predominantly in cash or in some other form of remuneration, performed his services personally and did not have the right to use cropping or grazing land on Sterkfontein and in consideration of such rights provided labour to the owners.

[10] The defendants further deny that the plaintiff's father resided on the farm Waaihoek where he was permitted to use grazing land in consideration of such right and provided labour to the owner of the farm on which he resided.

[11] The defendants further allege that the plaintiff was dismissed from his employment in terms of the Labour Laws of the country and that he was a farmworker. To this extent the defendants submit that the plaintiff abandoned or waived all his rights because he failed to mention that he was a Labour Tenant, when he challenged his dismissal.

The relevant legislation

[12] The term Labour Tenant is defined in section 1 of the LTA as:

"labour tenant" means a person-

(a) who is residing or has the right to reside on a farm;

(b) who has or 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 the use of cropping or grazing land on such farm or another farm of the owner and in consideration of such rights provided or provides labour to the owner or lessee of such or such other farm including a person who has been appointed as a successor to a labour tenant in accordance with the provisions of section 3(4) and (5), but excluding a farmworker.

[13] It is trite law that in order to qualify as a Labour Tenant, a person must comply cumulatively with paragraphs (a), (b) and (c) above.[2]

The issues

[14] The plaintiff conceded that he provided his services personally to the owner of Sterkfontein. The defendants conceded that paragraph (a)[3] of the definition of

[2] Mahlangu v de Jager 2000(3) SA 145(LCC)
[3] See paragraph 7 above.

a Labour Tenant has been complied with to the extent that the plaintiff has resided on Sterkfontein as at 2 June 1995 and still resides on Sterkfontein.

[15] The central issue I am required to determine in this matter is whether the plaintiff was paid predominantly in cash or in some other form of remuneration and not predominantly in the right to occupy or use land. On this issue the *onus* lies on the defendants to show that the plaintiff was paid predominantly in cash or in some other form of remuneration. But before I determine this issue I must first determine whether the plaintiff has discharged the onus in respect of paragraphs (b) and (c) in section 1 of the LTA. The defendants deny that paragraphs (b) and (c) in section 1 of the LTA have been established by the plaintiff. A further issue is the number of cattle the plaintiff was allowed to keep on Sterkfontein.

[16] To determine the issues the plaintiff testified on his own behalf and no further witnesses were called on his behalf. The defendants themselves did not testify but called the erstwhile owners of Sterkfontein, Mr Henk Terblanche and Mr Stemmet. I intend to only deal with the evidence relevant to the issues in dispute.

The Evidence.

Mr Luke Fourteen Binda

[17] The plaintiff was born and raised on the farm, Waaihoek with his parents and siblings. His late father lived and worked on the farm, Waaihoek. His father had an agreement with the owner where he was allowed to live on Waaihoek and had the following duties *inter alia;* he had to look after the owner's sheep, cattle and attend to the breeding thereof. In exchange for his right to reside on Waaihoek, his late father was given the right to have his own fields where he was allowed to plough the fields and crop. His late father was also permitted to keep 30 cattle, eight horses and approximately 15 sheep. He said he was too young to remember if his father received any money. Under cross- examination he could not remember the name of the owner of Waaihoek. It was not disputed during cross-examination that the plaintiff's father resided on Waaihoek. However, during re- examination the plaintiff said that his father lived on Rusthoek.

[18] His father died sometime in 1978 on Waaihoek. The plaintiff's uncle fetched him from Waaihoek and took him to the farm, Rusthoek, where he later went to live on the farm, Zondervlei. In 1982 he moved to Sterkfontein with the permission of the owner, the late Mr Pierre Terblanche. He found his mother at Sterkfontein. His mother remarried Mr Lephoto, his stepfather and both of them lived on Sterkfontein. Under cross- examination he was adamant that his stepfather was employed as a gardener and not a general labourer.

[19] With the permission of the late Mr Pierre Terblanche, the plaintiff put up his own structure next to his mother's homestead. His stepfather worked as a gardener at Sterkfontein for the late Mr Pierre Terblanche. Under cross -

examination the plaintiff said that when his stepfather worked for the late Mr Pierre Terblanche, Mr Henk Terblanche was not living on Sterkfontein. The plaintiff's stepfather was allowed to live on Sterkfontein and was also allowed to keep cattle and goats. His stepfather had 11 cattle and 5 goats on Sterkfontein. His stepfather in exchange for his labour was paid with 70 bags of maize after each harvest. His mother together with other women folk were given a number of furrows where they planted crops and would get the harvest from some of the furrows. He said that the owner ploughed the furrows which were located on the owner's fields.

[20] In terms of the agreement with the late Mr Pierre Terblanche, the plaintiff worked as a truck driver and would sometimes erect fences on Sterkfontein. In exchange for the plaintiff's labour, he was allowed to reside on Sterkfontein in his own homestead which he built. It was not disputed during cross – examination that the plaintiff arrived at Sterkfontein with his own structures. The plaintiff received R21,00 in cash for cigarettes, and 50 bags of maize at the end of the harvest. The plaintiff sold some bags of maize for cash. He also received one bag of maize at the end of each month. The R21,00 was not payment for his labour. It was for the plaintiff to buy cigarettes. This was not disputed during cross-examination.

[21] The plaintiff said that with the cash amount he received, he would not have been able to buy bags of mealies or crops for planting or be able to pay rent. The late Mr Pierre Terblanche, also allocated 25 furrows to the plaintiff for

cropping. His cattle were allowed to graze on all six of the late Mr Pierre Terblanche's farms. The plaintiff's cattle were allowed to mix with Mr Pierre Terblanche's cattle. Under cross - examination he strongly disputed Mr Henk Terblanche's version that the late Mr Pierre Terblanche was not the one who offered him the school as his homestead. Under further cross- examination the plaintiff said that Mr Henk Terblanche did not live on Sterkfontein. Mr Henk Terblanche only arrived on Sterkfontein after the death of Mr Pierre Terblanche. This was not disputed during the cross - examination of the plaintiff nor was Mr Henk Terblanche's version put to the plaintiff on this issue in order for the plaintiff to respond.

[22] Under further cross- examination the plaintiff said that Mr Pierre Terblanche gave him a bull to breed with. This was disputed and the plaintiff elaborated and said that if he kept a bull it had to be kept in his camp.

[23] After the death of Mr Pierre Terblanche, his son, Mr George Terblanche started to sell some of the livestock. As a result, thereof, the plaintiff reduced the 70 head of cattle which he was allowed to keep, by 45 before Mr Henk Terblanche arrived on Sterkfontein. It was disputed that the plaintiff was allowed an unlimited number of livestock. It was not disputed that prior to Mr Henk Terblanche inheriting the farm the plaintiff had 70 livestock which he reduced by 45. The plaintiff was left with 15 cattle and 18 sheep. Mr Stemmet corroborated the plaintiff to the extent that when he arrived on Sterkfontein , the plaintiff had approximately 15 cattle and 18 sheep. It was not disputed

during cross - examination that the plaintiff had 15 cattle and 18 sheep. Under cross-examination the plaintiff conceded that he did not keep any goats during the time of the late Mr Pierre Terblanche and Mr Henk Terblanche. It was during Mr Stemmet's time that the plaintiff kept goats.

[24] The plaintiff said that he had a garden in the same area as his homestead. The furrows were a distance from his homestead, but not in the camp in which he resided. Under cross - examination the plaintiff found it difficult to point out his homestead as well as the area in which he cropped.

[25] After Mr Pierre Terbalnche died his son Mr Henk Terblanche inherited Sterkfontein and the remainder of the farms were inherited by the late Mr Pierre Terblanche's children. It was agreed between the plaintiff and Mr Henk Terblanche

that he and two other families could remain on Sterkfontein. The rest of the employees followed Mr Henk Terblanche's brother, Mr George Terblanche to his farm.

[26] The plaintiff said that he was employed by Mr Henk Terblanche on the same terms and conditions that he enjoyed with the late Mr Pierre Terblanche, save for the following changes; the plaintiff was initially paid R170,00 by Mr Henk Terblanche which was increased to approximately R500- R600 at the end of Mr Henk

Terblanche's time. The number of furrows were reduced to two, and he received ten bags of mealies at the end of each year as a bonus. Corroborating Mr Henk Terblanche, the plaintiff was given a calf. The calf according to the plaintiff was for breeding purposes. The livestock that he had was milked. He had 15 cattle and 18 sheep during Mr Henk Terblanche's time.

[27] When Mr Henk Terblanche sold the farm to Gemrit Boerdery CC, the plaintiff was told that he would continue to work under the same terms and conditions as he did with the Terblanche family. This was not denied during cross - examination of the plaintiff. Mr Stemmet, an erstwhile member of Gemrit Boerdery CC put a fence around the plaintiff's homestead which had the effect of reducing the size of his camp. The plaintiff's cattle were moved and placed in a smaller camp. He did not dispute that Mr Henk Terblanche at some point hired out the fields to a Mr Hannes Rautenbach who was instructed by Mr Henk Terblanche to give the workers some furrows.

[28] During his evidence in chief he categorically stated that crops were planted in the camp in which they lived. Mr Henk Terblanche allowed him to keep 15 cattle and 18 sheep and the number of cattle increased to 18 when Mr Henk Terblanche sold the farm to Gemrit Boerdery CC. He said that the cattle he had were milked

by him. Under cross- examination he denied that he was only permitted to keep 4 head of cattle (two cattle and two siblings).

[29] When Mr Stemmet and his family took over the farm there were changes to his conditions of employment. At the end of December 2004, Mr Stemmet insisted that he sign a written contract of employment. He refused to sign the contract and was told to stay at home. He refused to sign the contract because his living conditions would be changed. In terms of the contract he had to reduce his livestock and would only be permitted to keep two cattle. When Mr Stemmet took over the farm, the plaintiff and the other two remaining employees had a total of 25 cattle of which 15 belonged to him. The number of livestock that the plaintiff had during both Mr Pierre and Henk Terblanche's time was never disputed during cross - examination. In fact, Mr Stemmet corroborated the plaintiff on the number of livestock he had. He said that he had 18 sheep, 32 goats and between 50 to 100 chickens during Mr Stemmet's time.

[30] The plaintiff was eventually dismissed. He referred his dismissal to the CCMA. He entered into a settlement agreement with Mr Stemmet on the basis that no notice was given to him. It was for this reason that he accepted a settlement of R4800,00. Under cross - examination he explained that he did not inform his

attorney that he is a farmworker. His attorney completed the CCMA form on his behalf. All that he did was append his signature and bears no knowledge as to what is contained on the other pages. There is no evidence led to gainsay this evidence.

[31] Under - cross examination he said that his father was given a cropping area the size of two soccer fields. He was unable to recall how many cattle his father had. He was adamant that Mr Henk Terblanche did not reside on Sterkfontein and only returned after the death of his father. He was not challenged during cross – examination. Under cross- examination he said that he was allowed to keep a bull. The farm owner also provided him with a bull for breeding purposes. This was not challenged during cross- examination.

[32] The plaintiff denied the fact that he was not allowed to keep sheep during Mr Henk Terblanche's time. He kept goats during Mr Stemmet's time and not during Mr Henk Terblanche's time. It was only Mr Stemmet who wanted to change his conditions to the extent that he insisted that the plaintiff reduce his livestock. He confirmed that he signed the document that was filled in by the Department of Rural Development's staff which was intended to secure his labour tenancy rights. Under cross- examination he said that Mr Pierre Terblanche did not plough his furrows.

[33] Under cross- examination he said that his attorney Mr Ramdaw filled in the form for the CCMA hearing. He did not inform Mr Ramdaw that he is farmworker.

[34] He conceded under cross -examination that Mr Henk Terblanche rented out certain portions of the farm to a neighbour, Mr Hannes Rautenbach to crop and that they were giving two furrows each under this arrangement.

[35] That concluded the evidence for the plaintiff.

The defendants witness- Mr Henk Terblanche

[36] Mr Henk Terblanche was born on Sterkfontein, in 1960. His late father, Mr Pierre Terblanche inherited Sterkfontein from his father and managed the farm in a partnership with his late brother, Mr George Terblanche until his father's death. His late father owned approximately six farms and had 45 employees who lived on Sterkfontein and the other farms, some of which fell within the Free State.

[37] He said that he went to the army sometime in 1977. Thereafter he attended University and came home for the holidays. He got a job as an entomologist, not on the farm but was actively involved in the farming business. His father at one point

had between 2000 - 6000 cattle.

[38] He had the following agreement with the plaintiff: The plaintiff was allowed to reside on Sterkfontein for as long as he worked on the farm. The plaintiff received a salary but he cannot remember how much. The plaintiff was a good worker and was paid at least 10 -20% more than the others and at least 20-30% above the minimum wage. This was never put to the plaintiff during cross –examination.

[39] He said that the workers were only allowed to keep 4 head of cattle (two adults and two siblings). Pertinently, the purpose for which was to provide the workers with milk to sustain their diet. The cattle were kept in the employees' camps and were not allowed to mix with the owners. Mr Henk Terblanche was adamant that the employees were not allowed to keep sheep, save for the lambs that he provided annually which had to be slaughtered or sold. He further denied that the plaintiff was allowed to crop and he was allocated 25 furrows during his father's lifetime. He also denied that he allocated the plaintiff two furrows during his time.

[40] Under cross- examination, Mr Henk Terblanche said that the late Mr

Lephoto was a herder and not a gardener. He only inherited Sterkfontein with the game that was on the farm. He had to buy his own livestock. He could not provide the employees with the 50 bags of maize because he could not afford it. He incorporated a bonus into the plaintiff's salary and provided the plaintiff with one bag of maize every month. He did not cultivate maize. He established a dairy farming business with the help of his father in law.

[41] He said that the plaintiff did not have a problem when he was asked to reduce the number of livestock. This was never put to the plaintiff during cross - examination. In fact, the plaintiff said that he was never requested by either Mr Pierre or Henk Terblanche to reduce his cattle. He planted for grazing purposes. He did not plant maize because it was not viable.

[42] He gave the plaintiff a calf as a bonus with an approximate value of R800,00 which was equivalent to two month's salary. Corroborating the plaintiff, he said that he rented a portion of the farm for 1-3 years to Mr Rautenbach who planted crops but denied that he instructed Mr Rautenbach to allocate two furrows to the plaintiff. He denied that he received any documentation relating to the Labour Tenancy of the plaintiff.

[43] Under cross- examination he said that he monitored the worker's cattle during the inoculation period which took place near his homestead. When he passed the plaintiff's camp which was least three times a day, he observed that the plaintiff had 12 cattle. This was never put to the plaintiff during cross –examination. He insisted that Mr Lephoto was a herder who had grazing and cropping rights. That concluded his evidence.

The defendants' witness – Mr Stemmet

[44] He was a member of Gemrit Boerdery CC that purchased Sterkfontein and he was personally involved in the day to day farming operations. He said that Mr Henk Terblanche told him that the workers received a basic salary and were allowed to keep 4 heads of cattle for milking purposes. The workers could not keep any other livestock and had no cropping rights. Corroborating the plaintiff, he said that when he arrived on Sterkfontein he found 20 sheep and 25 cattle. He said that the cattle were not part of the plaintiff's salary. It was goodwill.

[45] Mr Stemmet said that the plaintiff refused to sign a written contract of employment with terms that were better than the plaintiff's previous terms. The plaintiff refused to sign the contract after several attempts to negotiate failed. The plaintiff was subsequently dismissed. At a CCMA hearing that was initiated by the

plaintiff, in which the plaintiff requested his reinstatement, they entered into a settlement agreement in which he paid the plaintiff R4800, 00, the equivalent of 6 months' salary.

[46] Under cross - examination he said 90% of the farm was for grazing and approximately four areas were cultivated predominantly for maize. When he arrived on the farm he observed that a portion of the farm was used for cropping and that maize was planted.

Evaluation of the evidence

[47] It is important to contextualise cases in which a claim for Labour Tenancy rights are sought. This contextualisation has been clearly set out in the well-known judgment of the Supreme Court of Appeal , in the matter of Ngcobo &Others v Salimba CC[4] in which the court held:

> "It is important to keep in mind that the Act was intended to reform the legal relationship that had prevailed between the owner of a farm and labour tenants since the apartheid era. Under that regime, the 'rights' of those who served an owner in return for the privilege of working and grazing pieces of land for their own benefit were as illusory as they were precarious. These labour tenants occupied the land at the whim of the landowner, who could eject them subject

[4] 1996[1] ALL SA at paragraph 13

only to compliance with the common-law requirement of reasonable notice. In our country, land ownership was effectively beyond the reach of the majority of black people – people who were, because of the apartheid system and its concomitant discriminatory education system, kept in ignorance even of their rudimentary rights. Rural people had little choice but to become either farmworkers, with no prospect of building up even a minuscule estate, or tenant labourers, with no legal protection of their tenancy. The last group was thus reduced to feudal dependency: they had either to comply with the orders of the land owner, even if harsh and unjust, or face the prospect of nomadic trekking and seeking, in an unsympathetic environment, new land to occupy. One of the main objects of the Act is to give labour tenants greater security."

[48] The purpose of the LTA[5] is,

"To provide for security of tenure of labour tenants and those persons occupying or using land as a result of their association with labour tenants; to provide for the acquisition of land and rights in land by labour tenants; and to provide for matters connected herewith.

WHEREAS the present institution of labour tenancy in South Africa is the result of racially discriminatory laws and practice which have led to the systematic breach of human rights and denial of access to land;

WHEREAS it is desirable to ensure the adequate protection of labour tenants, who are persons who were disadvantaged by unfair discrimination, in order to promote their full and equal enjoyment of human rights and freedoms;

[5] LTA page 623

WHEREAS it is desirable to institute measures to assist labour tenants to obtain security of tenure and ownership of land;

AND WHEREAS it is desirable to ensure that labour tenants are not further prejudiced."

[49] I turn now to deal with the two submissions made on behalf the defendants that the plaintiff is an occupier under the Extension of Security of Tenure Act 62 of 1997("ESTA") and that the plaintiff either waived his rights in terms of the LTA or is estopped from doing so.

[50] The first difficulty for the defendants is the submission that the plaintiff is an occupier. That the plaintiff is an occupier under ESTA is of no moment because it does not detract from the rights that the plaintiff may have under the LTA. In any event once a person claims that he / she has rights under the LTA, it is the provisions of the LTA that are triggered. There is no authority for the proposition that even if a person meets the requirements of ESTA that a person would be precluded from invoking the provisions of the LTA.

[51] The claim by the defendants is that the plaintiff waived his rights under the LTA when he signed the settlement agreement. The plaintiff can hardly be said to

be a sophisticated witness. In his evidence, the plaintiff categorically stated that he understood the settlement to be on the basis that Mr Stemmet failed to give him the required notice and that the R4800.00 was to settle that issue. There is nothing to gainsay this evidence. In my view that he waived his rights in terms of the LTA is not borne out by his uncontroverted evidence.

[52] Even if I am wrong the alleged waiver does not comply with the provisions of section 3 (6) and (7) of the LTA. Section 3 (6) and (7) of the LTA provides:

> "……
>
> (6) A labour tenant may, subject to subsection (7), waive his or her right or a part of his or her rights if such waiver is contained in a written agreement signed by both the owner and the labour tenant.
>
> (7) The terms of an agreement where under a labour tenant waives his or her rights or part of his or her rights in terms of subsection (6) shall not come into operation unless-
>
> (a) the Director- General has certified that he or she is satisfied that the labour tenant had full knowledge of the nature and extent of his or her rights as well as the consequences of the waiver of such rights; or
>
> (b) such terms are incorporated in an order of the Court or of an arbitrator appointed in terms of section 19."

[53] There is no evidence, which I might add, is mandatory that the Director General

has certified that he or she is satisfied that the Labour Tenant had full knowledge of the nature and extent of his or rights and the consequences thereof. There is also no evidence that the waiver is contained in any written agreement. That the plaintiff waived his rights is not borne out by the evidence and neither is the alleged waiver in compliance with section 3(6) and (7) of the LTA. In my view this defence is unsustainable.

[54] The parties are in dispute on a number of issues. Firstly, whether or not the plaintiff had cropping or grazing rights on the land. Secondly, whether or not the plaintiff's father had cropping and grazing rights on land, albeit on another farm. The plaintiff relies on his late father's as well as his stepfather's Labour Tenancy rights to the extent that they both had cropping and grazing rights on the land in exchange for their labour and the right to reside. The defendants dispute that the plaintiff's biological father was a Labour Tenant and that Mr Lephoto, his stepfather was a Labour Tenant. Pertinently, the defendants submit that the plaintiff was never raised by Mr Lephoto because on His own version he came to live on the farm when he was an adult and put up his own structures and did not live with his mother and Mr Lephoto. Therefore on the facts of this case his stepfather cannot be included in the definition of parent.

[55] In the view I take of the matter it is not necessary to determine whether on the facts of this case, the plaintiff's stepfather is included in the definition of a parent, so the defendants submit.

[56] When a court is faced with mutually destructive versions the approach is set out in the well-established case of Stellenbosch Farmers Winery Group Ltd & Another v Martell Et Cie & Others [6], where the Supreme Court of Appeal, approved this approach saying:

> "The technique generally employed by Courts in resolving factual disputes of this nature may be conveniently summarised as follows. To come to a conclusion on the disputed issues the Court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. ."

[57] When there are mutually destructive versions before the court, the principle is established, that the plaintiff's *onus* of proof can only be discharged if he/she establishes his/her case on a preponderance of probabilities. The principle is also established that the requirement that a court has to be satisfied that the version is true and that of the defendant false in order for the plaintiff to succeed in

[6] 2003 (1) SA 11 (SCA) at 14I – 15E [also reported at [2002] JOL 10175 (SCA) – Ed],

discharging his/her *onus* of proof, is only applicable in cases where there are no probabilities one way or the other.[7]

[58] The consequences of the failure to cross – examine a witness was set out in the Constitutional Court judgment of President of the RSA and Others vs SARFU and Others [8] where the court held :

> "The institution of cross-examination not only constitutes a right; it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness box, of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct. This rule was enunciated by the House of Lords in *Browne v Dunn* and has been adopted and consistently followed by our courts.
>
> The rule in *Browne v Dunn* is not merely one of professional practice but "is essential to fair play and fair dealing with witnesses". It is still current in England and has been adopted and followed in substantially the same form in the Commonwealth jurisdictions.
>
> The precise nature of the imputation should be made clear to the witness so that it can be met and destroyed, particularly where the imputation relies upon inferences to be drawn from other evidence in the proceedings. It should be made clear not only that the evidence *is* to be challenged but also how it is to

[7] See African Eagle Life Assurance Co Ltd v Cainer 1980 (2) SA 324 (W) [also reported at [1980] 1 All SA 122 (W) – Ed].
[8] 1999 (10) BCLR 1059 [61; 62;63]

> be challenged. This is so because the witness must be given an opportunity to deny the challenge, to call corroborative evidence, to qualify the evidence given by the witness or others and to explain contradictions on which reliance is to be placed."

[59] The defendants submit that because the plaintiff was not certain whether his biological father lived on Waaihoek or Rusthoek, his evidence on this score must be rejected in light of the contradiction.

[60] The plaintiff was very young when his father died. The events that he testified about occurred some 40 years ago and he was unable to remember all the details. Pertinently, during cross-examination the plaintiff was never challenged on the fact that his biological father lived on Waaihoek. In my view the witness clearly made a mistake. The plaintiff was a credible and impressive witness. A large part of his evidence is uncontroverted. He remembered events that took place some 40 years ago. Whether his father lived on Waaihoek or Rusthoek is of no moment. What is important is that his father lived on a farm when he was growing up. No evidence was led to gainsay the plaintiff's evidence that his late father had grazing rights in consideration for his labour, i.e. that his late father was a Labour Tenant.

[61] The plaintiff testified that his father lived on a farm where he had grazing

rights in return for which he provided labour to the owner of the farm. In the matter of Zulu and Others v Van Rensburg and Others[9] where the court held:

> "Of course the definition does not require an applicant to show that his or her parents or grandparents themselves complied with all the components of the definition. It is sufficient that they resided on a farm and enjoyed cropping or grazing rights on that or another farm of the owner, and in return provided him or lessees of the farm with labour."

[62] The plaintiff, in my view has satisfied the requirement in paragraph (c) in section 1 of the LTA namely that his father resided on a farm and in exchange for his labour received grazing rights on the land. For this reason, it is not necessary to deal with whether or not his stepfather is included in the definition of parent in the LTA. Be that as it may be, it bears mentioning that the plaintiff and Mr Terblanche gave opposing evidence on the plaintiff's stepfather's duties on Sterkfontein. Mr Henk Terblanche insisted that Mr Lephoto was a herder, whereas the plaintiff said that he was gardener. Pertinently what was not disputed during cross-examination was the evidence of the plaintiff, to the effect that Mr Henk Terblanche was not living on the farm and only came to live on the farm after Mr Pierre Terblanche died. Having regard hereto, and on the probabilities I accept that the plaintiff's stepfather worked as a gardener on Sterkfontein.

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[9] (LCC8/96) [1996]ZALCC 2 (17 May 1996)

[63] I turn now to deal with whether or not the plaintiff has complied with section 1(b) of the LTA that he has had the right to use cropping or grazing land on the farm and in consideration of such right provided labour to the owner. The versions of the plaintiff and Mr Henk Terblanche on the issue of cropping or grazing rights are mutually destructive.[10]

[64] Both Mr Stemmet and Mr Henk Terblanche are credible witnesses and Mr Henk Terblanche like the plaintiff had to remember events that took place some 40 years ago. Mr Henk Terblanche was adamant that the plaintiff did not enjoy cropping rights on the farm. The plaintiff on the other hand testified that prior to Mr Henk Terblanche taking over the farm from his late father he and other family members were allocated 25 furrows each for cropping. After Mr Henk Terblanche took over the farming operations the number of furrows were reduced to two for each remaining family.

[65] Contradicting Mr Henk Terblanche, Mr Stemmet testified that when he arrived on the farm it was obvious to him that a certain portion of Sterkfontein was

[10] Stellenbosch xxxxxxx

harvested with mealies. Mr Henk Terblanche testified that he did not seriously crop because Sterkfontein was not suited, save for cropping some bale and a few crops of mealies. He further testified that he rented a portion of the farm to one of his neighbours in exchange for fodder for the cattle.

[66] The application for an award that was submitted on the plaintiff's behalf makes no mention of the 25 furrows for cropping which were allocated to the plaintiff and later reduced to 2 furrows. All that the application describes, is a garden around his homestead. It is not in dispute that the plaintiff signed the application for an award. There is no evidence that this document was read back to him, to confirm the contents before he signed the document. The person who assisted him was not called to dispute this. Pertinently, Mr Stemmet disputed Mr Henk Terblanche's evidence that maize crops were planted. To this extent Mr Stemmet corroborates the plaintiff's evidence that when he took over Sterkfontein he observed that maize was in fact harvested. There is a material contradiction between Mr Stemmet and Mr Henk Terblanche's testimony in this regard. In my view, I am satisfied notwithstanding the omission in the application form for an award. I accept that the plaintiff had cropping rights on Sterkfontein.

[67] I now turn to deal with whether the plaintiff had grazing rights on the farm and in consideration of such right he provided labour. The plaintiff testified that there were no limits to the livestock that he was allowed to keep. He testified that he was entitled to keep sheep, goats and a bull at different stages. Mr Henk Terblanche disputed this version and testified that the plaintiff was only permitted to keep 4 head of cattle which included two head of cattle and two calves. Mr Stemmet testified that during the negotiations, he offered that the plaintiff could keep 8 head of cattle and in total the number of cattle that could be kept by the workers was 25 head of cattle in which the plaintiff had the majority.

[68] Mr Henk Terblanche testified that the cattle that the plaintiff was allowed to keep was solely for milking purposes. The plaintiff vehemently disputed this. Corroborating the plaintiff, Mr Stemmet said that when he arrived on Sterkfontein the plaintiff had 15 cattle and 18 sheep. When Mr Pierre Terblanche died the plaintiff said that he had 70 livestock which he reduced by 45. This evidence was not seriously challenged save for an attempt to suggest that it was improbable that he would have had 70 livestock. The plaintiff repeatedly testified that when he had the 70 livestock, the late Mr Pierre Terblanche had 6 farms and his livestock were allowed to graze on these farms. He reduced the livestock when the farms were sold. It is highly probable that he had 70 cattle that grazed on the six farms which he

reduced by 45.

[69] The plaintiff disputed that his cattle were only for milking purposes. The plaintiff and Mr Henk Terblanche corroborated each other to the extent that Mr Henk Terblanche supplied him with calves and lambs when the mothers died. Mr Henk Terblanche said that once the livestock had grown it had to be sold or slaughtered. The uncontroverted evidence is that the plaintiff had 15 cattle and 18 sheep. If the livestock was slaughtered, it is highly improbable that the plaintiff would have had the number of livestock he had. On the probabilities, in my view, the plaintiff's livestock was not only for milking but also for breeding. On the probabilities and the totality of the evidence, I find that the plaintiff did have grazing rights on Sterkfontein.

[70] The defendants take issue with the documents submitted on behalf of the plaintiff in relation to the CCMA hearing. The CCMA form describes him as a farmworker. The plaintiff bore no knowledge of this and said that all he did was sign the document which was completed by his attorney. There was no evidence to gainsay this explanation.

[71] The defendants in order to rebut the plaintiff's version that he is a Labour

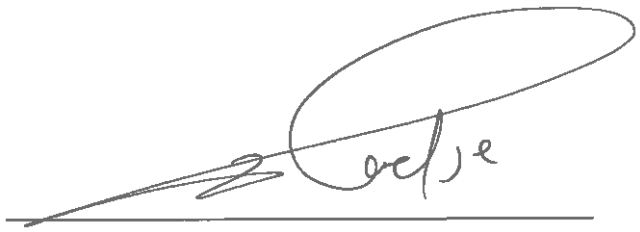
Tenant, claim that the plaintiff is in fact a farmworker. It is conceded that the plaintiff provided his labour personally. But this is not the end of the matter because the defendants bear the *onus* to establish whether or not the plaintiff in return for his labour which he provided to the owner of the farm was paid predominantly in cash or in some other form of remuneration and not predominantly in the right to occupy and use the land.

[72] The defendants have not provided any evidence to support this contention and rely on the evidence of Mr Henk Terblanche who clearly could not remember what the plaintiff earned as the cash component. The R21,00 that the plaintiff received from Mr Pierre Terblanche that was for cigarettes, was not disputed. Mr Henk Terblanche tendered no evidence as to the value of the grazing land and his evidence on the value of the livestock was not supported by any facts. It was speculation on his part. In my view the defendants have not discharged the *onus* to prove that the plaintiff was paid predominantly cash and not predominantly in the right to crop or graze.

[73] For the aforegoing reasons, I am satisfied that the plaintiff has complied with all three requirements set out in sections 1(a) (b) and (c) of the LTA and is declared a Labour Tenant in terms of the LTA. The parties correctly submit that I should make no order as to costs.

[74] In the result I make the following order:

1. The plaintiff is declared a Labour Tenant in terms of section 33(2A) of the Land Reform (Labour Tenants Act 3 of 1996).
2. The issue of the award of the land is postponed *sine die*.
3. No order as to costs is made.



Judge Z Carelse

Acting Judge of the Land Claims Court

Appearances

For the plaintiff : Advocate Whittington

Instructed by : Bhayat Attorneys

For the defendants : Advocate Niemann

Instructed by : Niemann Grobelaar Attorneys