THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable
Case No: 652/17

In the matter between:

FRIEDSHELF 325 (PTY) LIMITED **FIRST APPELLANT**

IAN RICHARD BAILIE **SECOND APPELLANT**

and

SIZANE BETTY MOKWENA **RESPONDENT**

Neutral citation: *Friedshelf 325 (Pty) Ltd & another v Mokwena* (652/17) [2018] ZASCA 102 (5 July 2018)

Coram: Maya P, Mbha, Van der Merwe and Schippers JJA and Mothle AJA

Heard: 11 and 29 May 2018

Delivered: 5 July 2018

Summary: Land reform – labour tenant – person who has a right to reside on a farm under the Land Reform (Labour Tenants) Act 3 of 1996 – 'farm' defined as a portion of land under the Subdivision of Agricultural Land Act 70 of 1970 – subject land in area of jurisdiction of a municipality – not agricultural land – respondent not a labour tenant but an 'occupier' as defined in the Extension of Security of Tenure Act 62 of 1997– appeal upheld.

ORDER

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

1 The appeal is upheld.

2 The order of the Land Claims Court is set aside and replaced with the following order:

'The plaintiff's claim is dismissed. There is no order as to costs.'

JUDGMENT

Schippers JA (Maya P, Mbha and Van der Merwe JJA and Mothle AJA concurring):

[1] Two issues arise in this appeal. The first is whether certain land known as Portion 50 of the farm Kromdraai 292 JS, Emalahleni, Mpumalanga (the subject property), on which the respondent (Ms Mokwena) resides, constitutes a 'farm' as contemplated in the Land Reform (Labour Tenants) Act 3 of 1996 (the LTA). The second, which has to be determined only if the first issue is decided against the appellants, is whether Ms Mokwena had the right to use cropping and grazing land on the subject property and in consideration of such rights provided her labour to the owner thereof.

[2] The basic facts can be shortly stated. Ms Mokwena, who was 71 when the case was heard in 2016, has been living on the subject property since 1992. It was previously owned by her former employer, Mr Neil Francis. It is now in

the registered ownership of the first appellant, Friedshelf 325 (Pty) Ltd. The second appellant, Mr Ian Bailie, is the sole shareholder and director of the first appellant.

[3] In August 2015 Ms Mokwena instituted an action in the Land Claims Court (LCC). She claimed an order that she be declared a labour tenant under the LTA, and that she be awarded that portion of the subject property that she and her family were using on 2 June 1995. In support of her claim for labour tenancy, Ms Mokwena alleged the following in her statement of case. She and her family lived on the subject property since 1992. As at 2 June 1995 they resided and continued to reside on the subject property, exercised the right to use a portion thereof for cropping and grazing purposes, and in consideration of the right to occupy and use the subject property, provided labour to its former owner, Mr Francis. Ms Mokwena did not terminate her labour tenancy by leaving the farm, appointing a successor or waiving her rights. Her late father had lived on the farm Elasfontein, near Arnot, had the right to crop and graze on it and in consideration of that right, provided labour to the owner of that farm. All of these allegations were denied in the plea.

[4] The parties agreed that the question whether Ms Mokwena was a labour tenant would be decided first, and that her claim for a portion of the subject property would be postponed. In the ensuing trial, Ms Mokwena testified that in 1982 she left Groblersdal in search of employment in Witbank, where Mr Francis employed her as a domestic worker. She looked after his children and did the washing, ironing and cooking. She was paid R150 per month and received annual salary increases.

[5] The Francis family left Witbank when Mr Francis bought the subject property. He told Ms Mokwena that he would be farming on it and that the

same would apply to her. The Francis family moved to the subject property in 1992, together with Ms Mokwena, her children, grandchildren and mother. She continued to receive her monthly salary and said that she had an oral arrangement with Mr Francis that she would look after his children and he would give her a piece of land, on which she now lives. He built a four-roomed house for Ms Mokwena and her family. In terms of their arrangement she was also allowed to grow crops and keep livestock. She planted vegetables and maize, and kept cows and chickens. According to Ms Mokwena, Mr Francis gave her the piece of land, granted her cropping and grazing rights and paid her a salary, in return for the domestic work she did and her labour in raising Mr Francis' children.

[6] Mr Francis left the subject property in 2002. The first appellant bought the property at a sale in execution in 2003. Ms Mokwena and her family continued living on it. She said that she never worked for Mr Bailie. He came to her home and told her that the entire property was his, as she put it, 'the land is all … one thing'. She denied this. In her words,

'I said no, this piece belongs to me, referring to where I was residing'.

[7] Ms Mokwena said that when she left Groblersdal to look for work, her father was already working on the farm Elasfontein, where he lived. Mr Francis was not the registered owner of Elasfontein which Mr Mokwena worked and ploughed. He was not paid for that work but was given a piece of land to plough and a home on that farm. Her father kept cattle, horses, sheep and chickens, and also planted crops such as maize and beans. All of this evidence went unchallenged.

[8] Mr Bailie did not testify and the appellants closed their case without adducing any evidence. But they raised a preliminary point that the subject

property was not a farm as contemplated in the LTA, on the basis that it was located within the area of jurisdiction of the Emalahleni Local Municipality.

[9] The LCC dismissed the preliminary point. It held that the subject property was 'agricultural land' within the meaning of that term in the Subdivision of Agricultural Land Act 70 of 1970 (the Agricultural Land Act), and therefore was a 'farm' as envisaged in the LTA. The court found that had Ms Mokwena not provided labour to Mr Francis, she would not have been permitted to reside, plant crops or graze stock on the subject property. The contract of labour tenancy was not one concluded between equals and, having regard to the combined effect of the substance of the arrangements entered into between Ms Mokwena and Mr Francis, Ms Mokwena was a labour tenant. The appeal against this decision is with the leave of the LCC.

[10] I turn to consider the first issue – whether the subject property is a 'farm' as defined in the LTA. Section 1 of the LTA provides that a labour tenant means a person–

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

(b) who has or has had the right to use cropping or grazing land on the farm, referred to in paragraph *(a)*, … and in consideration of such right provides or has provided labour to the owner …; and

(c) whose parent or grandparent resided 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'.

[11] Section 1 of the LTA defines a 'farm' as meaning 'a portion or portions of agricultural land as defined in the Subdivision of Agricultural Land Act'. The Agricultural Land Act, in relevant part, defines 'agricultural land' as meaning any land except–

'*(a)* land situated in the area of jurisdiction of a municipal council, city council, town

council, village council, village management board, village management council, local board,

health board or health committee … and in the province of the Transvaal, an area in respect of which a local area committee has been established under section 21(1) of the Transvaal Board for the Development of Peri-Urban Areas Ordinance, 1943 (Ordinance 20 of 1943 of the Transvaal), but excluding any such land declared by the Minister after consultation with the executive committee concerned and by notice in the *Gazette* to be agricultural land for the

purposes of this Act;

…

(f) land which the Minister after consultation with the executive committee concerned and by notice in the *Gazette* excludes from the provisions of this Act:

Provided that land situated in the area of jurisdiction of a transitional council as defined in s 1 of the Local Government Transition Act, 1993 (Act 209 of 1993), which immediately prior to the first election of the members of such transitional council was classified as agricultural land, shall remain classified as such'.

[12] The following facts were common cause in the LCC. At the relevant times and from 1971, the subject property fell within the area of jurisdiction of the Witbank Municipality. Immediately prior to the first election of the members of the Witbank Transitional Local Municipality, it was situated within the area of jurisdiction of the relevant transitional council. The subject property is currently situated within the area of jurisdiction of the Emalahleni Local Municipality. The title deed of the subject property states that it shall be used solely for residential and agricultural purposes, ie the number of buildings shall not exceed one residence, together with further buildings and structures required for the purposes of agriculture. According to its zoning certificate, the subject property is zoned 'AGRICULTURAL (Primary uses: Agricultural buildings and Dwelling house)'.

[13] On the first issue the appellants' case was straightforward. They contended that since 1971 the subject property was not agricultural land because it had been incorporated into the area of jurisdiction of the former Witbank Municipality. Therefore, it was exempted from the definition of 'agricultural land' in the Agricultural Land Act and consequently did not fall within the definition of a 'farm' as contemplated in the LTA.

[14] The LCC concluded that the term 'agricultural land' in the Agricultural Land Act should be interpreted 'to include land which is situated within the area of jurisdiction of any municipality which is used for agricultural purposes or which is agricultural in character'. It came to this conclusion apparently on the basis of a 'purposive interpretation' of the word, 'farm' as defined in the LTA, and 'agricultural land' in the Agricultural Land Act, having regard to s 25(6) of the Constitution;[1] the purposes of the LTA; and s 39(2) of the Constitution.[2]

[15] It is a settled rule of statutory interpretation that words in a statute must be given their ordinary grammatical meaning and be construed in the light of their context. That context is not limited to the language of the rest of the statute, but includes the subject matter of the statute, its apparent scope and purpose and within limits, its background.[3] Put tersely, when interpreting legislation, what must be considered is the language used; the context in which

[1] Section 25(6) of the Constitution provides:
'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.'
[2] Section 39(2) of the Constitution reads:
'When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.'
[3] *Jaga v Dönges, NO & another; Bhana v Dönges NO & another* 1950 (4) SA 653 (A) at 664E-H, affirmed in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism & others* [2004] ZACC 15; 2004 (4) SA 490 (CC) para 89.

the relevant provision appears; and the apparent purpose to which it is directed.[4]

[16] It is also settled that s 39(2) of the Constitution requires courts to 'adopt the interpretation which better promotes the spirit, purport and objects of the Bill of Rights'.[5] As in the case of the interpretation of the Restitution of Land Rights Act 22 of 1994 (the Restitution Act), which must be understood purposively because it is remedial legislation linked to the Constitution, when interpreting the LTA, 'a generous construction over a merely textual or legalistic one in order to afford claimants the fullest possible protection of their constitutional guarantees' must be preferred.[6] However, while s 39(2) of the Constitution enjoins courts to prefer interpretations of legislation that fall within constitutional bounds over those that do not, it is subject to the proviso 'that such an interpretation can be reasonably ascribed to the section'.[7]

[17] The main purposes of the LTA, according to its long title, are to provide for the acquisition of land and rights in land by labour tenants, and for security of tenure of labour tenants and those occupying or using land as a result of their association with labour tenants. The preamble to the LTA states that it was passed because labour tenancy in this country is the result of racially discriminatory laws and practices that led to the systematic breach of human rights and denial of access to land; to ensure the protection of labour tenants who are persons disadvantaged by unfair discrimination so as to promote their

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[4] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18; *AB & another v Minister of Social Development* [2016] ZACC 43; 2017 (3) SA 570 (CC) para 274.
[5] *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd & another* [2008] ZACC 12; 2009 (1) SA 337 (CC) para 45.
[6] *Department of Land Affairs & others v Goedgelegen Tropical Fruits (Pty) Ltd* [2007] ZACC 12; 2007 (6) SA 199 (CC) para 53.
[7] *Investigating Directorate: Serious Economic Offences & others v Hyundai Motor Distributors (Pty) Ltd & others In re: Hyundai Motor Distributors (Pty) Ltd & others v Smit NO & others* [2000] ZACC 12; 2001 (1) SA 545 (CC) para 23; *University of Stellenbosch Legal Aid Clinic & others v Minister of Justice and Correctional Services & others* [2016] ZACC 32; 2016 (6) SA 596 (CC) para 135.

full and equal enjoyment of human rights and freedoms; and to ensure that labour tenants are not further prejudiced.

[18] With these principles in mind, I turn to the construction of 'agricultural land' as defined in the Agricultural Land Act. The inevitable starting point is the language of the provision.[8] It states that agricultural land is any land, except land situated in the area of jurisdiction of a municipal council and various other local authorities and structures. The wording of the definition makes it clear that there is a distinction between 'any land' on the one hand, and land situated in the area of jurisdiction of a municipal council on the other. The former constitutes agricultural land, the latter not. The definition expressly excludes land situated in the area of jurisdiction of a municipality. It says nothing about land in 'any municipality which is *used for agricultural purposes or which is agricultural in character*'.[9] The definition, on its plain language, is the clearest indication that the legislature did not intend that municipal land used for agricultural purposes, should be regarded as 'agricultural land' as defined in the Agricultural Land Act.

[19] This brings me to the proviso to the definition of 'agricultural land'. The reason for its inclusion in the definition was explained in *Wary Holdings* as follows:[10]

'The introduction of the proviso into the definition of "agricultural land" was dictated by the fact that, in terms of the Transition Act, transitional councils were established resulting in the then existing "agricultural land" falling within the jurisdiction of the transitional councils and thereby becoming municipal land. It was in order to ensure (at least *pro tempore*) that "agricultural land" retained its status, despite its falling within the jurisdiction of a transitional council, that the proviso was added to the definition. The corollary thereof …. is that the intention was that the functional area of agriculture continue (at least *pro*

[8] *Natal Joint Municipal Pension Fund* fn 4 para 18.
[9] Emphasis added.
[10] *Wary Holdings* fn 5 para 56.

tempore) to repose in the Minister, including the administration of the Agricultural Land Act. No doubt it was realised by the legislature that, despite the establishment of transitional councils, it was necessary for the existence of "agricultural land", and the Minister's control and administration thereof in order to achieve the purpose of the Agricultural Land Act, to continue, so as to ensure that "agricultural land", and its productive capacity, would not be eradicated as a result of the transition to democracy. This fact was recognised by the Supreme Court of Appeal in terms of its comment that the situation would otherwise have been untenable.'

[20] The interpretation to be given to the proviso, the Constitutional Court said,

'is that the duration of the classification of land as "agricultural land" was not tied to the life of transitional councils, and that the reference therein to "land situated within the jurisdiction of a transitional council" was dictated by the factual position which then obtained and which had to be addressed, and the way that was done was … by pinpointing the stage from which land classified as "agricultural land" would remain so classified.'[11]

[21] As mentioned above, the subject property had been incorporated into the area of jurisdiction of the Witbank Municipality in 1971. From that date it was no longer agricultural land because it fell within the area of jurisdiction of a municipality. As was said in *Kotzé*:[12]

'It was submitted by the first respondent, correctly in my view, that the language of the Act must be interpreted to mean what it meant when the Act was promulgated …. Agricultural land therefore still exists for the purposes of the relevant Act. It is all land, except land that was situated within the area of jurisdiction of the structures named in section 1 of Act 70 of

[11] *Wary Holdings* fn 5 para 62.

[12] *Kotzé v Minister van Landbou en andere* 2003 (1) SA 445 (T) at 454I-455B. The relevant passage reads:
'Namens die eerste respondent is myns insiens tereg aangevoer dat die bewoording van die Wet uitgelé moet word om te beteken wat dit beteken het toe die Wet gemaak is. … Landbougrond bestaan gevolglik steeds vir die doeleindes van die betrokke Wet. Dit is alle grond, behalwe grond wat geleë was binne die regsgebied van die strukture wat in art 1 van Wet 70 van 1970 genoem word, op die laaste tydstip wat daardie strukture inderdaad nog bestaan het. Landbougrond wat as sodanig geklassifiseer is en binne die regsgebied van 'n vroeëre oorgangsraad in terme van Wet 209 van 1993 geleë is, is dus ook steeds landbougrond.'

1970, at the last point in time at which those structures actually still existed. Agricultural land that was classified as such and was situated within the area of jurisdiction of an earlier transitional council in terms of Act 209 of 1993, therefore also remains agricultural land.' (My translation.)

[22] At the last point in time of the existence of the former Witbank Municipality, the subject land was situated within the area of jurisdiction of that Municipality. As such, it was excluded from the definition of agricultural land. Immediately prior to the first election of the members of the transitional council, the subject land was situated in the area of jurisdiction of that council, but it was not classified as agricultural land.

[23] Thus, on the plain wording of the definition of 'agricultural land' in the Agricultural Land Act, having regard to its placement and purpose in the statutory scheme, the subject property is not a 'farm' as envisaged in the LTA. This plain wording is supported by the immediate context – the subject matter of the Agricultural Land Act and its purpose – to prevent the fragmentation of agricultural land into small uneconomic units, in the national interest.[13] In order to achieve that purpose, the legislature restricted the right of landowners to subdivide agricultural land; and prohibited the subdivision or sale of such land without the written consent of the Minister of Agriculture (the Minister).[14]

[24] The Minister's wide-ranging powers of regulation and control in respect of agricultural land, were summarised in *Wary Holdings* as follows:[15]

'*(a)* The Minister may "in [her] discretion" refuse an application for her consent (s (2)).

(b) The Minister also has the discretion to grant an application for her consent subject to the imposition of conditions, including conditions as to the purpose for or manner in which the land may be used (s (2)*(a)*).

[13] *Wary Holdings* fn 5 para 13, affirming *Geue & another v Van der Lith & another* 2004 (3) SA 333 (SCA).
[14] *Ibid.*
[15] *Wary Holdings* fn 5 para 13.

(c) The Minister has the power to enforce any condition so imposed (ss (3)).

(d) The Minister may also vary or cancel any such condition (ss (4)).

(e) The Minister may consider whether or not the land is to be used for agricultural purposes and, if satisfied that it will not be so used, she must consult with the relevant provincial authority before granting her consent to the application. In such cases the provincial authority has the power to determine conditions with regard to the purpose for or manner in which the land may be used, and to enforce them, or to vary or cancel them (ss (2)*(b)*, (3) and (4)).'

[25] When the purpose of the Agricultural Land Act and the extensive powers granted to the Minister under it are considered, the legislative intention in the LTA in defining a 'farm' as meaning a portion of agricultural land as defined in the Agricultural Land Act, is readily apparent – the security of tenure of labour tenants, ensuring their protection and safeguarding them against prejudice. This is entirely consistent with the purposes of the LTA. The legislature was aware of the restrictions imposed on the subdivision and sale of agricultural land by the Agricultural Land Act, and that only the Minister has the power to exclude land from the provisions of the latter Act, which would give labour tenants greater security and advance the purposes of the LTA.

[26] An interpretation that farm land does not include land in a municipality used for agricultural purposes, is further supported by the wider context of land reform. The Extension of Security of Tenure Act 62 of 1997 (ESTA), which like the LTA has its genesis in s 25(6) of the Constitution, expressly grants security of tenure to occupiers of land designated for agricultural purposes, within a township. Section 2 of ESTA provides, inter alia:

'(1) … this Act shall apply to all land other than land in a township established, approved, proclaimed or otherwise recognised as such in terms of any law, or encircled by such a township or townships, but including–

(a) any land within such a township which has been designated for agricultural purposes in terms of any law; and

(b) any land within such a township which has been established, approved, proclaimed or otherwise recognised after 4 February 1997, in respect only of a person who was an occupier immediately prior to such establishment, approval, proclamation or recognition.

(2) Land in issue in any civil proceedings in terms of this Act shall be presumed to fall within the scope of the Act unless the contrary is proved.'

[27] The legislature has thus made specific provision to secure the tenure of persons occupying land in a township (formerly undeveloped segregated urban areas which have been incorporated into municipalities and towns) designated or used for agricultural purposes. The LCC's interpretation runs counter to the definition of a 'farm' in, and the purposes of, the LTA. It also disregards s 2 of ESTA and its aims – which include security of land tenure to a particular category of beneficiary – an occupier.[16]

[28] An 'occupier' is defined in ESTA as,

'a person residing on land which belongs to another person, and who has on 4 February 1997 or thereafter had consent or another right in law to do so, but excluding–

(a) …

(b) a person using or intending to use the land in question mainly for industrial, mining, commercial or commercial farming purposes, but including a person who works the land himself or herself and does not employ any person who is not a member of his or her family; and

(c) a person who has an income in excess of the prescribed amount.'

[29] The exclusions in subsections *(b)* and *(c)* do not apply in this case. On the facts, Ms Mokwena qualifies as an occupier in terms of ESTA. She has been residing on the subject property with consent since 1992, and has been working the land herself. Indeed, counsel for the appellants, in argument before us, rightly conceded that Ms Mokwena was an occupier as

[16] *LAWSA* 2014 (2 ed) vol 14 para 127.

contemplated in ESTA. In this regard, he indicated that a settlement proposal had been made to Ms Mokwena's attorneys and the matter was postponed in order to give the parties an opportunity to attempt to resolve it. Subsequently the registrar of this Court was informed that the parties were unable to settle the matter. By reason of the conclusion to which I have come, it is unnecessary to determine the second issue.

[30] To sum up. Having regard to the meaning of 'farm' in the LTA, the context in which the definition appears and its purpose in the statutory scheme, it cannot 'be interpreted to include land which is situated within the area of jurisdiction of any municipality which is used for agricultural purposes or which is agricultural in character'. On a purposive approach, in the light of s 39(2) of the Constitution, the LCC's interpretation cannot reasonably be ascribed to the definition.[17] In this regard the dictum of Schreiner JA in *Bhana v Dönges*,[18] valid nearly 80 years ago, still holds true:

'Ultimately, when the meaning of the language in the context is ascertained, it must be applied regardless of the consequences and even despite the interpreter's firm belief, not supportable by factors within the limits of interpretation, that the legislator had some other intention.'

[31] What remains is the issue of costs. The appellants sought a costs order against Ms Mokwena. It is beyond question that she sought to enforce her right to legally secure tenure enshrined in s 25(6) of the Constitution, and given effect to in the LTA. That being so, the principle that a costs order would hinder the advancement of constitutional justice applies.[19] Further, apart from raising an important constitutional issue, this appeal relates to the proper interpretation of the LTA that is beneficial not only to the parties in this case,

[17] *Hyundai* fn 7 para 32.
[18] Footnote 3 at 664F.
[19] *Biowatch Trust v Registrar, Genetic Resources, & others* [2009] ZACC14; 2009 (6) SA 232 (CC) paras 16 and 24.

but also to all claimants for legally secure tenure, similarly situated.[20] There is accordingly no justification for an order that Ms Mokwena be directed to pay costs. The parties agreed that each party would pay its or her own costs occasioned by the postponement of the appeal on 11 May 2018.

[32] The following order is issued:

1 The appeal is upheld.

2 The order of the Land Claims Court is set aside and replaced with the following order:

'The plaintiff's claim is dismissed. There is no order as to costs.'

A Schippers
Judge of Appeal

[20] *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC) para 90.

APPEARANCES

For Appellant:	J De Beer (with R Ellis) Instructed by: Ian Bailie Attorneys, Witbank Honey Attorneys, Bloemfontein
For Respondent:	D Whittington Instructed by: AY Bhayat Attorneys, Lonehill Bezuidenhout Inc, Bloemfontein