REPORTABLE

CASE NO: 676/98

In the matter between :

THEMBA WILLIAM DHLAMINI	Appellant
and	
COENRAAD T LOOCK	First Respondent
JACOBUS M VERPLOEGH	Second Respondent

Before:	**VIVIER, NIENABER, MARAIS, SCHUTZ and ZULMAN JJA**
Heard:	**23 FEBRUARY 2001**
Delivered:	**19 MARCH 2001**
	Court - Jurisdiction of Land Claims Court

J U D G M E N T

VIVIER JA

VIVIER JA:

[1] During August 1997 the respondents instituted proceedings by

notice of motion in the Transvaal Provincial Division for the eviction of the appellant from the farm Katspruit in the district of Standerton and for an order declaring that the appellant was not a labour tenant as defined in the Land Reform (Labour Tenants) Act 3 of 1996 ("the Act")

[2] The application was opposed by the appellant, and after a dispute of fact had arisen on the affidavits on the issue of whether the appellant was a labour tenant, **Preiss J** on 25 February 1998 directed that oral evidence be led on this issue.

[3] A further question then arose as to whether **Preiss J** was obliged to transfer the case to the Land Claims Court in view of the provisions of sec 13 (1A) of the Act, which had been introduced into the Act by sec 34 of the Land Restitution and Reform Laws Amendment Act 63 of 1997 and which had come into effect on 21 November 1997. Sub-section 13 (1A), quoted and dealt with more fully below, provides that if an issue "arises" in a case in a magistrate's court or a high court which requires that court to interpret or apply the Act and no oral evidence has been led, such court shall transfer the case to the Land Claims Court and no further steps may be taken in the case in such court. **Preiss J** rejected the appellant's contention that the case had to be transferred to the Land Claims Court and held that sec 13 (1A) only applies to cases in which the interpretation or application of the Act "arises" as an issue after 21 November 1997. He held that in the present case such issue arose before 21 November 1997 and accordingly referred the dispute of fact to the Transvaal High Court.

[4] At the resumed hearing oral evidence was led on behalf of both the appellant and the respondents. At the end of the case **Preiss J** held for the respondents and granted the orders sought in the notice of motion with costs. He refused leave to appeal. The appellant thereafter applied to this Court for leave to appeal and the following order was made by the two members of the Court who considered the application.

> "In terms of sec 21 (3) (c) (ii) of Act 59 of 1959 the petitions for condonation and for leave to appeal are referred to the court for consideration upon argument, which will include argument on the merits of the appeal."

The matter is now before us in terms of this order. At the hearing of the

appeal there was no appearance for the second respondent.

[5] The petition for condonation concerns the late filing of the application to this Court for leave to appeal. Leave to appeal was refused by the Court *a quo* on 10 September 1998. The application for leave to appeal was filed 22 days late on 23 October 1998. The appellant's explanation for the delay is that the application was ready for lodging as early as 14 September 1998 but was delayed by the late receipt of the Court *a quo's* judgments. A copy of the application without annexures was in the meantime served on the respondents' attorneys on 18 September 1998. In my view the delay was not inordinate and there is a satisfactory explanation for it. It is accordingly necessary to consider the appellant's prospects of success on appeal.

[6] The second respondent is the owner of the farm Katspruit, the first respondent is his tenant and the appellant resides on the farm. It is common cause that the appellant was employed on Katspruit at least from 1 September 1990 by a previous tenant and from 1 September 1994 by the first respondent. He was dismissed on 31 August 1996 and he thereafter brought unfair dismissal proceedings against the first respondent in the Agricultural Labour Court. The matter was settled on 27 June 1997 when he accepted payment of the sum of R500-00 in full and final settlement of his claims. He has since his dismissal refused to leave the farm. This led to the institution of the present proceeding in August 1997.

[7] The central issue in the Court *a quo* was whether the appellant was a labour tenant as defined in the Act. According to the definitions clause in sec 1 of the Act a labour tenant is a person -

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

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

(c) whose parent or grandparent resided or resides on a farm and had the use of cropping or grazing land on such farm or another farm of the owner, and in consideration of such right provided or provides labour to the owner or lessee of such or such other farm,

including a person who has been appointed a successor to a labour tenant in accordance which the provisions of section 3 (4) and (5), but excluding a farmworker."

[8] In the Court *a quo* the appellant's case was that the satisfaction of paras (a) and (b) of the definition was sufficient in order to qualify as a labour tenant. The Court *a quo*, however, held that paras (a), (b) and (c) must be interpreted conjunctively so that the requirements of all three paragraphs had to be satisfied before a person could qualify as a labour tenant. It was held that the appellant only satisfied para (a) of the definition, and that he did not meet the requirements of para (b) in that he had not established any right to use cropping or grazing land on Katspruit or another farm of the second respondent. At a late stage in the proceedings before the Court *a quo* the appellant applied for a postponement in order to lead evidence on para (c). The application was refused by the Court *a quo*.

[9] The Court *a quo* also rejected a further argument raised on behalf

of the appellant to the effect that the Court could not deal with the matter pending the determination of an application for an award of land or land rights which the appellant had submitted to the Director-General in terms of sec 16 of the Act.

[10] This Court has since held in *Ngcobo and Others v Salimba CC; Ngcobo v Van Rensburg* 1999 (2) SA 1057 (SCA) that paras (a), (b) and (c) of the definition of a labour tenant has to be interpreted conjunctively. The appellant consequently no longer persists with the contention advanced in the Court *a quo* and in the application to this Court for leave to appeal that the evidence led in the Court *a quo* established that he was a labour tenant.

[11] The first question for determination is whether the Court *a quo* was correct to refer the matter for oral evidence before that Court in view of the provisions of sec 13 (1A) of the Act. Sec 13 in its present form reads as follows:

> "(1) The provisions of sections 7 to 10 shall apply to proceedings pending in any court at the commencement of this Act.
>
> (1A) With the exception of issues concerning the definition of 'occupier' in section 1 (1) of the Extension of Security of Tenure Act, 1997 (Act No 62 of 1997), if an issue arises in a case in a magistrate's court or a High Court which requires that court to interpret or apply this Act and -
>
> (a) no oral evidence has been led, such court shall transfer the case to the Court and no further steps may be taken in the case in such court;
>
> (b) any oral evidence has been led, such court shall decide the matter in accordance with the provisions of this Act.
>
> (2) Any decision or order made by a magistrate's court in proceedings referred to in subsection (1) or (1A), shall in its entirety be subject to appeal to the Court if any of the grounds of appeal relates to the application or interpretation of this Act in such decision or order.
>
> (3) The Court shall have exclusive jurisdiction to hear any appeal contemplated in sub-section (2), notwithstanding the provisions of any other law to the contrary."

"Court" is defined in sec 1 of the Act to mean the Land Claims Court established by sec 22 of the Restitution of Land Rights Act 22 of 1994. (The exception referred to in the opening words of sub-sec (1A) was introduced by sec 6 of Act 11 of 2000 and does not affect the present case.)

[12] The date of commencement of the Act was 22 March 1996. As already indicated, sec. 13 (1A) was introduced with effect from 21 November 1997. Before the introduction of sec 13 (1A) the effect of sec 5 of the Act, read with sec 13 (1) thereof was that, save for proceedings pending in any other court as at 22 March 1996, only the Land Claims Court could order the eviction of a labour tenant or his or her associate. In terms of sec 5, read with sec 13 (1), such an order could also be made by any court in proceedings pending before that court on 22 March 1996, subject only to the application by such court of the provisions of sections 7 to 10 of the Act and the provision in sec 13 (3) that the Land Claims Court had exclusive jurisdiction to hear appeals against the decisions or orders of magistrate's courts.

[13] In concluding that sec 13 (1A) did not apply to the present case **Preiss J** reasoned that the use of the present tense "arises" in the sub-section indicated the legislature's intention to confine the operation of the sub-section to cases where the interpretation or application of the Act arose as an issue after 21 November 1997. He held that the present was not such a case and emphasised that the replying affidavit had been lodged on 20 November 1997 i.e. the day before the coming into effect of sec 13 (1A). He held that this made the factual dispute on the affidavits an issue which had already arisen so that it could not be said to arise after 21 November 1997.

[14] I am unable to agree with the learned Judge's reasoning. In my view the words "an issue arises" are neutral and do not necessarily import the future. An issue can be said to arise in a case from the time it is raised until judgment is given. An issue "arises" in a case when it is raised on the pleadings or affidavits. It can, however, also be said that an "issue arises" when it arises during argument or for decision at the end of the case. In the present case the factual dispute in regard to the issue of whether or not the appellant was a labour tenant still required a decision by the court at the end of the case and in this sense it can be said that it was an issue arising for decision within the meaning of the words "an issue arises" in sec 13 (1A). Para (b) of the subsection in fact recognises that an issue can arise in a case after it has been raised on the pleadings or affidavits. This paragraph provides for the situation where an issue arises after oral evidence has been led in a case. In such a situation a court other than the Land Claims Court is enjoined to decide the matter. Even on **Preiss J's** construction of sec 13 (1A) therefore, the sub-section applied to the present case.

[15] There are other indications that the legislature, in enacting sec 13 (1A), intended the sub-section to apply to all cases pending at its commencement, save where evidence had already been led. The Land Claims Court was established by the Restitution of Land Rights Act 22 of 1994 which came into operation on 2 December 1994. Sec 30 (1) of Act 22 of 1994 provides that the Land Claims Court may admit any evidence which it "considers relevant and cogent to the matter being heard by it, whether or not such evidence would be admissible in any other court of law". A special court was thus created with exclusive jurisdiction to decide matters involving the interpretation or application of the Act.

[16] As indicated above, the effect of sec 5 of the Act, read with sec 13 (1), was that a labour tenant or his or her associate could only be evicted by an order of the Land Claims Court, save in proceedings which were pending at the commencement of the Act. Before the introduction of sec 13 (1A) these provisions could not prevent any court other than the Land Claims Court from interpreting or applying the Act in order to decide that a person was not a labour tenant or associate for purposes of a common law application for his or her eviction, whether such proceedings were instituted before or after the commencement of the Act. To allow such courts to continue applying or interpreting the Act would clearly be contrary to the intention of the legislature.

[17] It was to avoid this problem that sec 13 (1A) was enacted in order to deprive all other courts of jurisdiction to decide an issue requiring the application or interpretation of the Act (usually the issue of whether a person is a labour tenant or not) and to confer exclusive jurisdiction upon the Land Claims Court to interpret or apply the Act. Sec 13 (1A)

was thus clearly intended to apply to all cases pending at 21 November 1997, save those for cases where oral evidence had already been led, where practical and procedural difficulties necessitated the exception.

[18] In *Mngomezulu v Böhmer; Masondo and Others v Shawe* (an unreported judgment in cases nos 2411/1997 and 2173/1997 (N)) **McCall J** held that sec 13(1A) applied to all cases pending in a magistrate's court or high court at 21 November 1997 where the court was called upon to decide an issue which arose in the case requiring the interpretation or application of the Act. **McCall J** held that an issue can be said to arise within the meaning of sec 13 (1A) when it is formulated on the pleading or affidavits as well as when it arises for decision at the end of the case. In another unreported case, *Chris Carlyol (Pty) Ltd and Another v Sindane and Another* (case no. 15761/1997) decided in the Transvaal Provincial Division, **Du Plessis J** arrived at a similar conclusion. I am in respectful agreement with these two decisions.

[19] For the reasons given I am of the view that **Preiss J** erred in not transferring the case to the Land Claims Court, and consequently that the Court *a quo* had no jurisdiction to hear and decide the matter at the resumed hearing.

[20] I must finally deal with the argument advanced on behalf of the appellant that his pending application in terms of Chapter III of the Act for an award of land or land rights had the effect of staying all legal proceedings against him. Sec 14 of the Act, which was relied upon for the argument, provides that no labour tenant may be evicted while an application under Chapter III is pending unless the Land Claims Court is satisfied that special circumstances exist which justify such an order. The short answers to the argument are that the present proceedings were not concerned with the eviction of a labour tenant and that sec 14 is in any event no absolute bar to the institution of proceedings for the eviction of a labour tenant.

[21] In the result the following order is made:

1. Condonation is granted for the late filing of the application to this Court for leave to appeal;

2. Leave to appeal to this Court against the judgment and orders of the Court *a quo* is granted;

3. The appeal succeeds. The order of the Court *a quo* of 25 February 1998 is set aside and there is substituted in its stead an order transferring the case in terms of sec 13 (1A) (a) to the Land Claims Court;

4. All proceedings in the Court *a quo* subsequent to 25 February 1998 are set aside;

5. Costs:

(a) No order for costs is made in respect of the application for condonation;

(b) Respondents are ordered to pay the costs of the applications for leave to appeal both in the Court *a quo* and in this Court;

(c) The costs in the Court *a quo* up to the point being raised that the case had to be transferred to the Land Claims Court are reserved for decision by the latter court. The costs thereafter are to be paid by the respondents.

(d) Respondents are ordered to pay the costs of the appeal.

VIVIER JA

NIENABER JA)
MARAIS JA)
SCHUTZ JA)
ZULMAN JA) **CONCUR**