THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

CASE NO: 439/2002
Reportable

In the matter between

MASHAU RASHAVHA
APPELLANT

and

HJ VAN RENSBURG
RESPONDENT

CORAM: Mpati DP, Mthiyane, Brand, Lewis JJA and Mlambo AJA

HEARD: ***20 NOVEMBER 2003***

DELIVERED*: 28 NOVEMBER 2003*

Summary: Condonation for late filing of appeal refused: application of sections 8(4) and 10(3) of the Extension of Security of Tenure Act 62 of 1997.

JUDGMENT

LEWIS JA

LEWIS JA

[1] The appellant, formerly a farm worker employed by the respondent, appeals against a decision of the Land Claims Court confirming a magistrate's order of eviction from her dwelling on the farm hired by the respondent. She is one of four farm workers, all appellants in the court *a quo*, sought to be evicted by the respondent from the farm Sandfontein, which is some 20 kilometres away from Louis Trichardt and 12 kilometers from Maelula, both in the Northern Province. The appellant is the only one of the four appellants who now pursues an appeal to this Court, which she does with the leave of the Land Claims Court. The appellant's case is based on the provisions of the Extension of Security of Tenure Act 62 of 1997.

[2] The appellant seeks condonation for the late filing of her notice of appeal. The grant of condonation is opposed by the respondent who argues that the delay of the appellant in lodging an appeal, the absence of a proper explanation for the delay, and the lack of merit in the appellant's case warrant an adverse order. It is necessary to deal with the history of the litigation between the parties briefly before determining any of these issues.

[3] The appellant was retrenched by the respondent in October

1998. Her right to reside on the farm terminated in December 1998. The respondent applied in terms of the Act for an order of eviction against the appellant. The appellant and her co-workers resisted the application. They were represented throughout the legal proceedings. In terms of s 9(3) of the Act a probation officer, Mrs Lombaard, filed a report setting out the results of the investigations she had made into the circumstances of the farm workers in respect of whom the eviction was sought. I shall return to this report, in so far as it concerns the appellant, later in this judgment. In January 2001 the Chief Magistrate in Louis Trichardt granted the eviction orders.

[4] The orders came before Moloto AJ, in the Land Claims Court, on automatic review. He confirmed those in respect of the farm workers other than the appellant. In her case, Moloto AJ referred the order back to the Chief Magistrate for him to consider whether s 8(4) of the Act was applicable to her, and whether the probation officer had considered the weight of various factors sufficiently. I shall deal with the provisions of s 8(4) later. Suffice it to say for the moment that the court considered the section to be inapplicable, and granted another eviction order, to come into effect on 30 April 2001.

[5] The appellant and her co-workers who had been ordered to vacate the farm applied for leave to appeal against this order. The application came before Moloto AJ, who held that the proper court to hear the appeal was the Land Claims Court. His finding in this regard was upheld in the decision of the Court (per Gildenhuys AJ, Meer AJ concurring) now under appeal before this Court. There was no argument that this decision as to jurisdiction was incorrect either before the Court *a quo* or this Court. The Land Claims Court dismissed the appeals of all four appellants before it, and gave leave only to the appellant to appeal further to this Court.

[6] It is important to note that the grant of leave was made on the basis that another court might reach a different conclusion in respect of the balancing of the comparative hardship to the appellant as a result of the eviction, on the one hand, and to the respondent, if he were to be deprived of possession of the dwelling on the other hand. The Court expressly held that there was no reasonable possibility of another court making a different finding in respect of the application of s 8(4). Despite this, the grounds of appeal lodged by the appellant were based on the assertion that the Court had erred in its interpretation of s 8(4), as were the

arguments advanced to this Court by counsel for the appellant. I shall revert to this matter later.

[7] The appellant, having been given leave to appeal, failed to comply with the rules governing the time within which to lodge a notice of appeal. Leave to appeal was granted on 29 January 2002. The notice of appeal should thus have been lodged by 1 March (that is within one month: rule 7, Supreme Court of Appeal Rules). It was lodged only on 8 May 2002. The application for condonation was served on the respondent only on 22 August 2002, and lodged with this Court on 4 September 2002. The appellant was thus substantially out of time. Part of the explanation given for this delay was that the appellant's attorney had considered that it might be 'expedient and convenient' to await the outcome of the applications for leave to appeal lodged by the other appellants against the decision of the court *a quo.* However, in her application for condonation, signed on 29 April, but served and lodged only some months later, as detailed above, the appellant stated that she had received no information about the other appellants' applications and had thus been advised to consult senior counsel on the application of s 8(4) of the Act.

[8] Counsel, Ms Cassim, was not immediately available, hence the further delay. Once the notice of appeal had been drawn, however, and advice taken, further delay was caused by the attorney's correspondent in Bloemfontein. No explanation at all was advanced for that further delay and this Court was advised from the Bar that the Bloemfontein correspondent had refused to provide an affidavit explaining the failure to lodge the notice of appeal and the application for condonation.

[9] The appellant has been ill-served by her legal advisers. The attorney's reasons for waiting to draw a notice of appeal are not acceptable. The delay is inexcusable. And the failure on the part of the Bloemfontein correspondent attorney to explain the additional delay is to be deplored. However, the appellant is an illiterate, impecunious and uneducated woman with no knowledge of the workings of the legal system. In my view she should not be refused condonation solely on the ground that her legal advisers were negligent in the performance of their work.

[10] Generally, the most important, although not necessarily the decisive, factor to be taken into account in determining whether condonation should be granted is the prospect of success on

appeal. (See *Finbro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein* 1985 (4) SA 773 (A) at 789C-E; cf *Darries v Sheriff, Magistrate's Court, Wynberg* 1998 (3) SA 34 (SCA) at 41B-D). I turn therefore to a consideration of the merits of the appellant's case. As already indicated, leave to appeal to this Court was granted on the basis that the weighing-up of the hardship caused to the appellant by the eviction from her home on the farm against the interests of the respondent was a sensitive and difficult task and that another court might find that the appellant should have been allowed to remain on the farm in order to avoid the hardship caused to her.

[11] The respective rights of the parties are governed by sections 8 and 10 of the Act. It is necessary to set out the relevant provisions in these sections at some length.

Section 8 provides:

> 'Termination of right of residence
>
> (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.

. . . .

(4) The right of residence of an occupier who has resided on the land in question or any other land belonging to the owner for 10 years and-

(a) has reached the age of 60 years; or

(b) is an employee or former employee of the owner or person in charge, and as a result of ill health, injury or disability is unable to supply labour to the owner or person in charge,

may not be terminated unless that occupier has committed a breach contemplated in section 10 (1) (a), (b) or (c): Provided that for the purposes of this subsection, the mere refusal or failure to provide labour shall not constitute such a breach.

. . . .

(6) Any termination of the right of residence of an occupier to prevent the occupier from acquiring rights in terms of this section, shall be void.'

[12] As indicated earlier, it is section 8(4) on which the appellant has based her appeal. Ms Cassim argued that the section should be interpreted in line with the spirit and purpose of the Act, which is to protect farm dwellers from eviction and to change patterns of land tenure in South Africa. The Act, which forms part of the land tenure reform programme of the State, is itself founded on s 25(6) of the Constitution (Act 108 of 1996). The subsection provides that '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 comparative redress'.

[13] On that basis, Ms Cassim submitted that one should not give too narrow a construction to the words in s 8(4)(a). Although the appellant was not yet 60 when her right to reside on the farm terminated, one should take into account the length of her service and residence on the farm (some 20 years), and that, on the assumption that the appellant was 58 (or even possibly 59) when her services were terminated, the requirements of s 8(4)(a) were met, such that she could not be evicted. Sixty, it was argued, on a generous and purposive construction of the Act, included 58 and 59. Counsel was unable to suggest where the cut-off point should be.

[14] The argument is absurd, and was rejected in clear terms by the court of first instance and by the Land Claims Court. The words of s 8(4)(b) are clear. There is no need to resort to an interpretation of a section, generous, purposive or otherwise, where there is no uncertainty as to its meaning. The appellant, in order to rely upon the section, would have had to show that at the time when the eviction was sought, she had resided on the farm for 10 years and

was at least 60 years old. That she could not do.

[15] A different argument, not itself a ground of appeal, nor traversed in the heads of argument for the appellant, but raised during the hearing of the appeal, was that the respondent had deliberately terminated the appellant's employment in order to prevent her from acquiring any right to reside in terms of s 8. If this were the case, then s 8(6) would apply: the termination of the right of residence of the appellant would have been of no effect. However, the appellant could point to nothing in the evidence to show that there was any such intention. The respondent had terminated the employment of several employees and reduced the size of the workforce on the farm. There was no evidence of any conduct on the part of the respondent to show that he had terminated the appellant's services in order to prevent her from acquiring a right to remain on the farm. On the contrary: he had offered her a different variety of work on a temporary basis, and implicit in his offer was that her right to remain on the farm, in her dwelling, would continue. She had declined the offer of different work.

[16] It is not necessary to resort to artificial and unsubstantiated

arguments in relation to the Act in order to give effect to the requirements in s 8(1) that any termination of an occupier's right of residence should be just and equitable. The basis upon which the Land Claims Court considered the appeal against the eviction order is s10(3) of the Act, which takes into account considerations of fairness and equity in so far as both occupiers and property-right-holders are concerned. Section 10(3) reads:

'If –

(a) suitable alternative accommodation is not available to the occupier within a period of nine months after the date of termination of his or her right of residence in terms of section 8;

(b) the owner or person in charge provided the dwelling occupied by the occupier; and

(c) the efficient carrying on of any operation of the owner or person in charge will be seriously prejudiced unless the dwelling is available for occupation by another person employed or to be employed by the owner or person in charge,

a court may grant an order for eviction of the occupier and of any other occupier who lives in the same dwelling as him or her, and whose permission to reside there was wholly dependent on his or her right of residence if it is just and equitable to do so, having regard to-

(i) the efforts which the owner or person in charge and the occupier have respectively made in order to secure suitable alternative accommodation for the occupier; and

(ii) the interests of the respective parties, including the comparative hardship to which the owner or person in charge, the occupier and the remaining occupiers shall be exposed if an order for eviction is or is not granted.'

[17] The Land Claims Court considered that the 'threshhold'

requirements under subsections 10(3)(a),(b) and (c) had been met in this case. Suitable alternative accommodation had not been found by the appellant within nine months from the date of the termination of her right to reside on the property. The respondent had made the accommodation available to the appellant. It was needed for the respondent's seasonal employees.

[18] The Court thus moved to a consideration of subsections (3) (i) and (ii). There was no evidence that the appellant or the respondent had made efforts to find suitable alternative accommodation. The parties had made insufficient averments in this regard. However, the probation officer who reported on the circumstances of the appellant in terms of s 9(3) of the Act considered that although it would be difficult for the appellant to leave the farm, her immediate family lived in Maelula, supported her in any event, and that she could live with them. The court of first instance had considered that it would be 'fair and equitable' for the appellant to move to Maelula to stay with her family, who would support her and take care of her. The Land Claims Court accepted this finding, taking into account the right of the respondent to the full use of the property hired by him. He should not be compelled to accommodate erstwhile employees, said that Court, 'unless the

hardship, conflict or social instability which their eviction might lead to, outweighs his right to unrestricted tenancy'.

[19] Gildenhuys AJ also took into account the fact that by the time the appeal was heard in the Land Claims Court, the respondent had already been deprived of the use of the dwelling occupied by the appellant for some three years after her employment had been terminated. He considered too that the responsibility of caring for the appellant was more appropriately to be borne by her family than the respondent. He concluded, therefore, that the hardship which the appellant might suffer if evicted from the farm would not be so great that it should 'override the property rights of the respondent'.

[20] In my view, both the court of first instance and the Land Claims Court had proper regard to the requirements of justice and equity in s 8(1) of the Act, and to the comparative hardship test in s10(3)(ii). There is no merit in the argument that the balance of the interests of the parties was not given due consideration or that the interests of the appellant outweighed those of the respondent. Accordingly, there is no prospect of success on appeal.

[21] From the affidavits in the application for condonation it appears that the appellant has already left the farm and is living in Maelula with family. It is accordingly not necessary to change the order of the court *a quo* in relation to the date when the appellant must vacate the dwelling on the farm.

[22] Condonation for the late filing of the appeal is refused with costs, including the costs relating to the appeal.

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C H Lewis

Judge of Appeal

Concur:

Mpati DP
Mthiyane JA
Brand JA
Mlambo AJA