

IN THE LAND CLAIMS COURT OF SOUTH AFRICA

Held at **RANDBURG** on 9 April 2002
before: **MOLOTO AJ**

CASE NUMBER: LCC 39/01

Decided on: 19 April 2002

In the matter between:

MSIZA, M P

Applicant

and

**THE DIRECTOR GENERAL FOR THE
DEPARTMENT OF LAND AFFAIRS**

First Respondent

JOOSTE, J B

Second Respondent

UYS, J

Third Respondent

UYS, D C

Fourth Respondent

JUDGMENT

MOLOTO AJ:

[1] This is an application for an order for:

- “1. a mandamus ordering the First Respondent to refer the Applicant’s application for an award of certain rights in terms of Chapter III of the Land Reform (Labour Tenants) Act 3 of 1996 to the Land Claims Court within twenty (20) days of the date of this order;
2. further and or alternative relief;
3. costs of suit against the First Respondent.”

[2] Although there were other respondents to the application, the order sought was against the first respondent only. The role played by the other respondents will become apparent later in the judgment. For now, suffice it to say only the first respondent opposed the application.

[3] On the day of hearing, 9 April 2002, the first respondent conceded prayer 1, and contended with respect to prayer 3, that each party pays its own costs. The applicant, on the other hand, made a verbal application for costs on the scale as between attorney and client. I granted prayers 1 and 3 as prayed in the notice of motion, that is, I refused the application for costs on a scale as between attorney and client. My reasons follow hereunder.

Background

[4] The applicant lodged an application in terms of section 17(1) of the Land Reform (Labour Tenants) Act¹ (the “Act”) with the first respondent on 4 November 1996. To date the first respondent has not finalised the application or referred it to Court. The present application was launched on 9 July 2001. The respondents at the time were the Director-General for the Department of Land Affairs, Jan Blackie Jooste and Johan Uys respectively as first, second and third respondents. The first respondent opposed the application on several grounds, the main ones being that the applicant had not correctly identified the affected land,² that the applicant was not a labour tenant within the meaning of that term as defined in the Act, that the capacities in which the second and third respondents were cited as well as the ownership of the affected land were disputed.

[5] The applicant brought an interlocutory application on 8 October 2001 to join the fourth respondent. The fourth respondent is a co-trustee with the third respondent of a trust called Dee Cee Trust, the current owner of the affected land. They are the only trustees of Dee Cee Trust. The following facts were also revealed in the affidavit in support of the interlocutory application:

- (a) that the affected land used to be owned by one Sarlina Gertruida Jooste, since deceased, who in her life-time was the second respondent’s spouse. On her death in 1996, the affected land was transferred to her daughter, Maria Elizabeth Jooste, subject to a personal usufruct in favour of the second respondent. Maria Elizabeth Jooste, in turn transferred the affected land to the Dee Cee Trust on 5 September 2000.

1 Act 3 of 1996, as amended.

2 See section 1 of the Act for the definition of “affected land”.

- (b) that the correct description of the affected land is not Groenfontein as had originally been alleged, but remaining extent of portion 4 of the farm Rondebosch 403 JS in the district of Middelburg, Mpumalanga Province; and
- (c) that the applicant employed a land surveyor to draw a diagram of the affected land which was attached to the affidavit in support of the interlocutory application.

[6] The first respondent opposed the interlocutory application but filed no answering affidavit. At the hearing of the interlocutory application on 2 November 2001, the first respondent sought a postponement of the application to enable him to verify the title deeds annexed to the affidavit in support of the interlocutory application. The application for a postponement was refused. The title deeds were clear and there was nothing that could not be verified there and then. The joinder application was granted.

The issues

[7] The matter was then set down for hearing of the main application. At the hearing of the main application, Mr Moosa, on behalf of the first respondent, conceded prayer (1) but contended that each party must pay its own costs. The applicant's attorney, Miss Thakor, for the first time, prayed from the bar for costs on an attorney and client scale. The issue of costs was then argued. Miss Thakor submitted that the first respondent ought to pay costs on the scale as between attorney and client because the first respondent had been negligent. What follows are the arguments in support of that submission and the first respondent's answers.

- (a) The first respondent became aware of the correct description of the affected land on 8 October 2001 when the interlocutory application was launched. In that application the ownership of the affected land and the reasons for citing the other respondents were also clarified. Yet the first respondent still refused to refer the section 17(1) application to Court. Mr Moosa's answer that the first respondent first became aware of the correct description of the affected land on either 9 November 2001 or in January 2002 is just not supported by the evidence. This Court heard the interlocutory application on 2 November 2001, and the affidavits filed in support thereof are abundantly clear on these issues. The first respondent did not so much as try to dispute the factual averments in those affidavits.

In addition, it is common cause in the main application that negotiations at a settlement, in which the first respondent's officials participated, took place on at least two occasions, namely 10 December 2001 and 15 March 2002. On both occasions, and in correspondence dated 9 November 2001 from the applicant's attorneys, the issue of referring the section 17(1) application to Court by consent was raised with the first respondent, to no avail. It was so raised because all factual disputes, including the description of the land, had been resolved.

- (b) Section 17(2) and 37 of the Act enjoin the first respondent to assist the parties to obtain relevant information for purposes of the section 17(1) application. They provide as follows:

“17(2) On receiving an application in terms of subsection (1), the Director-General shall-

...

(d) call upon the owner by written request, to furnish him or her within 30 days-

- (i) with the names and addresses of the holders of all unregistered rights in the land in question, together with a copy of any document in which such rights are contained, or if such rights are not contained in any document, full particulars thereof;
- (ii) with any documents or information in respect of the land in question and the rights in such land as the Director-General may reasonably require.”

and

“37 The Director-General shall take reasonable steps to ensure that, at the request of interested parties to applications lodged or to be lodged in terms of section 17 (1), cadastral and other technical information is made available.”

Both these sections are peremptory. Had the first respondent acted in terms of them, the following facts could have emerged sooner than they did:

- (i) that the owner of the land had been the second respondent's late wife, and that ownership had since been transferred to her daughter, Maria Elizabeth Jooste, subject to a usufruct to the second respondent.
- (ii) that the said Maria Elizabeth Jooste had transferred the affected land to the Dee Cee Trust.

These facts would have provided the applicant with correct information much sooner and enabled him to prosecute his application with alacrity. If the relevant information was not furnished, the first respondent would have been armed with the sanctions prescribed in section 17(8). Section 17(8) reads:

- “(8) Should the owner, without good reason, fail to give to the Director-General any information or documents requested in terms of subsection (2) (d) within 30 days of receipt of a written request-
- (a) the Court may order him or her to do so;
 - (b) the Court may make an order for costs against him or her; and
 - (c) he or she shall be liable for any loss which the Director-General or the applicant or any person may suffer as result of such failure, and the Court may, on application by the affected person concerned, give judgement against him or her for such loss.”

Also a simple search in the Deeds Office would have revealed the ownership of the affected land and the interest the second respondent had in it. It was mentioned in Court that the applicant has had several different lawyers representing him before his current lawyers. It should have been obvious to the first respondent that the applicant had encountered problems, specifically with the matters mentioned in section 37. Instead, far from giving any of the abovementioned assistance, the first respondent disputed the averments of the applicant.

Mr Moosa’s contention that until the first respondent was aware of the correct description of the land, he was justified in resisting the applicant’s application, simply does not hold. That attitude, on the part of the first respondent, demonstrates just how negligently and irresponsibly the first respondent went about his duties. I dare say the first respondent’s handling of the applicant’s case was subversive of the Act. For the same reasons, the contention advanced on behalf of the first respondent that, the perception by the applicant that the opposition of the application was vexatious is wrong, cannot stand. It was not just a perception. The opposition of the application was indeed vexatious.

- (c) The attorneys for the second respondent wrote a letter to the first respondent on 12 February 1997 in which they deny that the second respondent is the owner of the affected land and that the applicant was or is a labour tenant. This was an opportunity for the first

respondent to investigate further the ownership of the land and the second respondent's relationship with it. A few probing questions would soon have either elicited the desired answers in terms of 17(2)(d) or exposed the second respondent to the sanctions prescribed in section 17(8). But the first respondent chose to ignore his statutory duties, and went against the provisions of the Act by opposing the application.

- (d) It was further contended on behalf of the first respondent that, although the first respondent became aware of the correct facts relating to the ownership and description of the affected land either on 9 November 2001 or in January 2002, he did not refer the section 17(1) application to Court because settlement negotiations between the applicant and the rest of the respondents were in progress.

This is no answer to the question. These settlement negotiations relate to the section 17(1) application, not the mandamus application. Settlement negotiations had been attempted long before these dates with the applicant's father, according to the first respondent's answering affidavit, and had failed. Besides, as I have pointed out above, the Act, at sections 17(2) and 17(8), prescribes that if no responses to the first respondent are furnished within 30 days, the first respondent must refer the application to Court upon request by one of the parties.³ Alternatively he must refer the application if the landowner's offer is rejected by the applicant and one of the parties requests such referral. The applicant requested such referral on 30 March 2001. To date the first respondent has not referred the application. Therefore, the fact of settlement negotiations should not have stood in the way of the peremptory provisions⁴ of the Act and prevented a referral to the Court. In any case, the fact that up to the date of hearing of the application the applicant was still insisting on the application being heard is indicative of the fact that, up to that date the settlement negotiations had not been successfully concluded. Therefore, the first respondent should have referred the application, particularly because officials of the first

3 Section 17(6).

4 Section 17(6) of the Act provides:

“If the owner does not inform the Director-General within the period referred to in subsection (4) that he or she admits that the applicant is a labour tenant, the Director-General shall, at the request of either party, refer the application to the Court.”

respondent had been involved in those settlement negotiations and therefore aware of the progress made or lack of it.

- (e) Miss Thakor further contended that, due to the first respondent's attitude, the applicant had to bring witnesses who, if the matter were to be referred to oral evidence, would testify to some or all of the issues that the first respondent disputed. She further argued that, because the witnesses are Zulu-speaking and not conversant with either English or Afrikaans, an interpreter had to be engaged. Accordingly she asked that the costs to be awarded, should include the costs of those witnesses as necessary witnesses and the costs of the interpreter. To this argument, Mr Moosa responded that, this matter being an application and not an action and the application having not been referred to oral argument, there was no necessity for bringing such witnesses and interpreter to Court. Notwithstanding the obstructive behaviour of the first respondent to the applicant's case, and the fact that the applicant was being prudent in bringing the witnesses and interpreter to Court, I am not satisfied that this is a proper case for punishing the respondent with these special costs. The reason, in my view, is that these are motion proceedings to be determined on the papers. The matter has not been referred for oral evidence and the applicant gave no notice of intention to apply that the matter be so referred.
- (f) Finally, it remains to address Mr Moosa's contention that, because the applicant had not given notice of his intention to ask for costs on a higher scale, he should therefore not be awarded costs on that higher scale. Miss Thakor argued that, as soon as counsel for the first respondent conceded the merits, she gave him verbal notice of her intention to ask for costs on a higher scale and that such notice, given as it was on the morning of the hearing of the case, was sufficient. I was not satisfied that this was sufficient notice as envisaged by the learned author⁵ on the subject. In my view such notice should be sufficiently long to enable the opponent to prepare to meet the claim for a higher scale of the costs. I do not agree that the notice given by the applicant was sufficiently long.

5 Cilliers *Law of Costs* 3rd ed (Butterworths, Durban 1998) at para 4.10 and Cilliers "Costs" in Joubert (ed) *Law of South Africa* 1st Reissue, Vol 3, Part 2, (Butterworths, Durban 1997) at para 322.

Besides, this Court has, in a number of judgments,⁶ decided that since it deals with social legislation, it will not ordinarily award costs. Costs are awarded in fairly exceptional circumstances. I was satisfied that an award of costs on a party and party scale is sufficient admonishment of this Court's displeasure at the handling of this matter by the first respondent.

ACTING JUDGE J MOLOTO

For the applicant:

Ms A Thakor of the Legal Resources Centre, Pretoria.

For the first respondent:

Adv E I Moosa instructed by the State Attorney, Pretoria.

⁶ See for example *Skhosana and Others v Roos t/a Roos se Oord and Others* 2000 (4) SA 561 (LCC), [1999] 2 All SA 652 (LCC) at para [30]; *Valley Packers Co - Operative Limited v Dietloff and Another* [2001] 2 All SA 30 (LCC) at para [13].