

IN THE LAND CLAIMS COURT OF SOUTH AFRICA

CASE NUMBER: LCC37/03

Held in Chambers on 16 September 2003
before **Moloto J**

Decided on : 26 September 2003

In the matter between:

THE MACASSAR LAND CLAIMS COMMITTEE

Applicant

and

**MACCSAND CC
UNICITY OF CAPE TOWN
NATIONAL HOUSING BOARD
DEPARTMENT OF LAND AFFAIRS
COMMISSION ON THE RESTITUTION OF LAND RIGHTS
MINISTER OF ENVIRONMENTAL AFFAIRS & PLANNING
DEPARTMENT OF MINERAL & ENERGY AFFAIRS
THE REGISTRAR OF DEEDS
THE SURVEYOR-GENERAL**

First Respondent
Second Respondent
Third Respondent
Fourth Respondent
Fifth Respondent
Sixth Respondent
Seventh Respondent
Eighth Respondent
Ninth Respondent

JUDGMENT

MOLOTO :

[1] This Court granted an urgent interim interdict in favour of the applicant on 28 August 2003, among others, ordering the first respondent to stop mining sand on erf 1197 Macassar, Sandvlei, pending the finalisation of the applicant's land claim of the said erf in terms of the Restitution of Land Rights Act¹ ("the Act") and costs. Reasons for the grant of the interim interdict were to follow. The first respondent stopped the mining, lodged an application for leave to appeal and recommenced mining operations before receiving the reasons.

1 Act 22 of 1994.

[2] The applicant approached the Court orally on an urgent basis, objecting to the recommencement of the mining operations, alleging that same are undertaken in contempt of the Court's order.

[3] I convened a telephone conference in terms of rule 54 of the Rules of Court. Rule 54 provides that :

“The presiding judge may decide a matter in chambers in the absence of the parties -

- (a) which is unopposed;
- (b) where the participating parties consent thereto;
- (c) in cases in which any law or these rules so provide; or
- (d) after hearing the participating parties by conference telephone call,

in cases where the presiding judge considers such procedure appropriate.”

[4] The dispute about which the telephone conference was held did not affect the other parties to the main application, hence the only parties represented were the applicant and the first respondent.

[5] The grounds on which it was contended, on behalf of the applicant, that the mining was undertaken contemptuously were that -

- (1) the application for leave to appeal was premature hence fatally defective
- (2) the notice of application for leave to appeal does not comply with rule 69(2)
- (3) the interdict, being *pendente lite*, is not appealable

Alternatively, if it is found that the application for leave to appeal is not fatally defective then

- (4) applicant prays for an order in terms of rule 65(2).

The applicant also sought costs of the objection.

[6] Counsel furnished me with written heads of argument after the telephone conference. I am indebted to them.

[7] I deal with the applicant's grounds of objection to the recommencement of mining operations.

1 Application for leave to appeal premature and null and void

It was contended on behalf of the applicant, that in as much as the application for leave to appeal was delivered before the reasons for the order appealed against were furnished, it was premature and of no force and effect.

Mr Rose-Innes, for the first respondent, submitted that subrule 69(1)(b) entitles the first respondent to lodge an application for leave to appeal before the reasons for the order appealed against are furnished. I do not agree. Such an interpretation cannot be justified from the context of the rule. It interprets the subrule in isolation. The law on interpretation requires that the interpretation be in the context of the whole.²

Rule 69 provides, with regard to the noting of appeal, that -

- “(1) A party that wishes to appeal against an order of the Court must apply to the Court for leave to appeal-
 - (a) orally at the time when the order is made by the Court, in which event that party must at the same time deal with the matters referred to in subrule (2); or
 - (b) by notice of application for leave to appeal delivered within fifteen days -
 - (i) after the order was made; or
 - (ii) after full reasons for the order were given, if the reasons were given on a later date.
- (2) The notice referred to in subrule (1)(b) must specify -

² *Coopers & Lybrand and Others V Bryant* 1995 (3) SA 761 AD at 767I; *Swart en & Ander V Cape Fabrix (Pty) Ltd* 1979 (1) SA 195 (A) at 202c.

- (a) the findings of fact and law appealed against;
 - (b) whether the whole or part only of the order is appealed against, and if part only, which part;
 - (c) the grounds on which leave to appeal is sought; and
 - (d) the court to which leave to appeal is sought.”
- (1) The meaning contended for on behalf of the first respondent would simply make nonsense of subrule 2. An appeal or application for leave to appeal before reasons are furnished will just not comply with the requirements of subrule 2. Subrule 2 is peremptory. Therefore, in order that subrule 2 be complied with subrule (1)(b)(i) must be read to mean that the notice of application for leave to appeal shall be delivered within fifteen days after the order was made and reasons given. The words “and reasons given” must be added. When read in the context of the whole rule, it makes sense to add those words. It is a rule of interpretation to interpret in such a way as to give effect to the legislation rather than render it nugatory.
- (2) Subrule (1)(b)(i) is similar in wording to subrule 1(a). Subrule 1(a) permits oral application for leave to appeal when the order is made, but the application “must” deal with the matters referred to in subrule 2. Once again to be able to deal with the matters referred to in subrule 2, the words “and reasons given” must be read into the subrule after the word “made”, otherwise the rest of the subrule cannot be complied with. The only difference between subrule 1(a) and subrule 1(b)(i) is that the former caters for oral application while the latter caters for application on notice. So that a party may choose to apply orally when the order is made (and reasons given) or on notice, within fifteen days after the order was made (and reasons given). In either case, subrule 2 must be complied with. The only situation which envisages reasons being given later than the giving of the order is in subrule 1(b)(ii), suggesting that in the case of subrules 1(a) and 1(b)(i), it is assumed that the reasons are given contemporaneously with the order.

2 The notice of application does not comply with rule 69(2)

The notice of application for leave to appeal reads as follows:

“TAKE NOTICE that the First Respondent hereby applies for leave to appeal to the Supreme Court of Appeal, against the order of Moloto J dated 28 August 2003.

TAKE NOTICE FURTHER that leave to appeal is sought on the following grounds:

- 1 The Court erred in granting an interdict against the First Respondent preventing it from continuing to mine sand from Erf 1197, Macassar, pending the finalisation of a claim for restitution of Erf 1197.
- 2 The Court erred in granting an interdict against the First and Second Respondent preventing them from attempting to rezone, rezoning or considering any land use change application or development of Erf 1197, Macassar, except with the approval of the Applicant, pending the finalisation of a claim for restitution of Erf 1197.
- 3 The Court erred in making a costs order against the first Respondent.”

A notice of appeal must comply with the rule that provides that grounds of appeal specifying the findings of fact, or rulings of law appealed against should be stated.³ That rule, *in casu* is rule 69(2), which, as I have already pointed out, is peremptory.

In *Van Zyl V Burger en & Ander*⁴ it was held that the fact that the judge in the Court *a quo* had to take time to formulate his reasons after he had issued the order, is no ground for an appellant to disregard the provisions of rule 49(4) (the High Court equivalent of the Land Claims Court rule 69(2)) in regard to the requisite contents of a notice of appeal. Accordingly, it was held that the notice of appeal, which failed to comply, could not be regarded as valid, as “dit was *ab initio* ongeldig en dit kan nie gewysig word nie.”

It was argued, on behalf of the first respondent, that the judgment in *Van Zyl V Burger en & Ander* does not assist the applicant. Reliance for this contention was based on the fact that although the appeal court did not regard the notice of application for leave to appeal as being in proper form, it granted the appellant condonation to file a late notice of application for leave to appeal. The application was not in proper form because it was lodged before the reasons were furnished. This argument is misplaced. The appeal court found the application not to be in proper form and fatally defective. It then granted

3 *Wassenaar V Robertson* 1945 TPD 10 at p12.

4 1966 (1) OPD.

condonation for late filing of application for leave to appeal. This confirms that the appeal court was of the view that the first application that was not proper in form, was invalid *ab initio* and could not be amended. The grant of condonation for the late filing of a new application was a matter of discretion exercised in the light of the facts of that case. *In casu*, no such condonation has been sought.

It was further contended on behalf of the first respondent that rule 69(1) is in similar terms to rule 49(1) of the High Court Rules. That it is consistent with the established approach that an appeal lies against the order and not the reasons. In this regard reference was made to *Lipschitz NO V Saambou-Nasionale Bouvereeniging* 1979 (1) SA 527 (T) at 528H - 529H. I am in agreement that an appeal lies against the order. However, the rule, certainly rule 69(1) requires that reasons (grounds of appeal) for the appeal against the order must be given. It is certainly not the reasons that the appeal lies against. I am, however, unable to see the relevance of this submission.

3 The interdict, being *pendente lite*, is not appealable

An interim interdict is not appealable. However if the interim interdict has a final and definitive effect it may be appealed against.⁵ The effect, and not the form of the interdict is the deciding factor. Mr Rose-Innes submitted that the applicant's land claim was filed in 1997 and to date it has not been finalised. It is likely to take a long time before it is finalised, yet the first respondent's first period of mining will expire in January 2005. Based on this possibility it was argued that the interdict has a final and definitive effect. I disagree. First, the delay in finalising the claim is not the dispute for which the interim order was granted. Second, the first respondent has already exercised its option to extend the mining period. Third and most importantly, the interim order granted does not dispose finally and definitively of the issue to be decided at the trial of the main action. What has to be decided in the main action is the plaintiff's claim to restitution of the right in land. If the claim succeeds, the interim order becomes final; if it fails, the first respondent will be at liberty to mine.

5 Erasmus: *Superior Court Practice* p A1-44; *Zweni V Minister of Law and Order* 1993 (1) SA 523 (A) at 534(D).

The relief granted is (a) to stop the mining and (b) to prohibit any rezoning or considering any land use change pending finalisation of the land claim. It was submitted on behalf of the first respondent that the relief granted in the interim order is very different from the relief sought in the main action, and that this difference further demonstrates the finality of the interim order. This situation, it was argued, is unlike the decision in *Cronshaw and Another V Fidelity Guards Holdings (Pty) Ltd*,⁶ where the form of the interlocutory proceedings was that “. . . of an interdict *pendente lite* in which is the very matters on which the interdict was sought would be an issue; and the balance of convenience was considered in respect of the interim period”.⁷ If the effect, and not the form, of the interim interdict is the determinant factor, then it appears to me the same issue in dispute between the applicant and the first respondent will be resolved by the main action. That issue, viewed from the first respondent’s perspective, is whether first respondent will continue to mine erf 1197. So, there does not appear to me to be any difference between the relief granted in the interim order and the relief sought in the main action. If I am wrong, and there is such a difference, then this case would be distinguishable from the *Cronshaw* case by virtue of Section 38E of the Act which authorises such an interdict for purposes of deciding the land claim. Section 38E provides:

“The Court may, during proceedings under this Chapter and subject to such terms and conditions as it may determine-

- (a) make an order-
 - (i) prohibiting or setting aside the sale, exchange, donation, lease, subdivision, rezoning or development of land to which an application relates, if it is satisfied that such sale, exchange, donation, lease, subdivision, rezoning or development-
 - (aa) defeats or will defeat the achievement of the objects of this Act;
 - (bb) was not or will not be done in good faith;”

The interim order, *in casu*, was granted in terms of this section.

6 1996 (3) SA 686 (A).

7 At 689J - 690A.

In this regard *Knox D'Arcy Ltd and Others V Jamieson and Others*⁸ would be similarly distinguishable. This latter case is further distinguishable because it dealt with the refusal, and not the grant, of an interim interdict. The refusal of an interim interdict disposes of the issues finally, but not so the grant of it.

[8] Finally, it was contended on behalf of the first respondent that the order for costs in the interim interdict is final relief. Such an interpretation does not appear to be justified. I have shown above how I do not agree that the interim order granted is final. I do not believe that it can be made final simply by an order for costs.

[9] In the result I find that the interim interdict granted in favour of the applicant is not appealable. In the light of the finding I made, it is not necessary to consider the applicant's alternative prayer.

[10] I do not agree with the submission that the fate of the application for leave to appeal should be heard at an appropriate time in due course. I do not agree because the application as it stands is null and void *ab initio* and there is no application that can await determination at a later date.

[11] Order

- (1) The notice of appeal is null and void *ab initio*.
- (2) The resumption of the mining of erf 1197 Macassar by the first respondent is in contempt of the interim order granted by this Court on 28 August 2003.

JUDGE J MOLOTO

For the applicant :

Adv L J Krige, instructed by *Rehana Khan Parker & Associates*, Cape Town

On behalf of the first respondent:

Adv Rose-Innes instructed by *BLF-Mallinicks Inc*, Cape Town