

IN THE LAND CLAIMS COURT OF SOUTH AFRICA

Held in CAPE TOWN on 30 October 2003
before **Moloto J**

CASE NO: LCC 37/03

Decided on: 25 November 2003

In the matter between:

MACCSAND CC

First applicant
(first respondent in the main application)

UNICITY OF CAPE TOWN

Second applicant

NATIONAL HOUSING BOARD

Third applicant

DEPARTMENT OF LAND AFFAIRS

Fourth applicant

COMMISSION ON THE RESTITUTION OF LAND RIGHTS

Fifth applicant

MINISTER OF ENVIRONMENTAL AFFAIRS & PLANNING

Sixth applicant

DEPARTMENT OF MINERAL & ENERGY AFFAIRS

Seventh applicant

THE REGISTRAR OF DEEDS

Eighth applicant

THE SURVEYOR-GENERAL

Ninth applicant

and

THE MACASSAR LAND CLAIM COMMITTEE

Respondent
(applicant in the main application)

JUDGMENT

MOLOTO J:

[1] The applicant (first respondent in the main application) brought two applications -

(a) for leave to appeal to the Supreme Court of Appeal against -

- (i) the whole of the order and judgment of this Court respectively dated 28 August 2003 and 22 September 2003 granting an interim order and costs; and
 - (ii) the whole of the judgment and order of this Court dated 26 September 2003 that the resumption of the mining of Erf 1197, Macassar ("Erf 1197"), by the first respondent is in contempt of the interim order granted by this Court on 28 August 2003; and
- (b)
- (i) to vary part of the order of this Court dated 29 August 2003;
 - (ii) to rescind the order granted by this Court on 26 September 2003 that the resumption of the mining of Erf 1197, Macassar ("Erf 1197") by the first respondent is in contempt of the interim order granted by this Court on 28 August 2003;
 - (iii) granting the first respondent condonation for the failure to comply with the time periods of this Court to the extent necessary and allowing this application to be heard as one of urgency; and
 - (iv) granting the first respondent the costs of this application, including the costs of two counsel, only in the event of this application being opposed and only against such party or parties as oppose this application.

The application to vary and rescind was brought "conditionally" in the event the application for leave to appeal was not successful.

In order not to unnecessarily burden the record on appeal I prepared two separate judgments for the two applications. I deal in this judgment with the application for leave to appeal.

Application for leave to appeal

The application for leave to appeal is too long to repeat here. The lengthy list of grounds of appeal can be found in the notice of application for leave to appeal.

In dealing with this application it will be convenient to separate the two orders granted on 28 August 2003 and 26 September 2003.

Order of 28 August 2003

Although numerous grounds of appeal are listed in the application for leave to appeal, only a few were argued. Mr Rose-Innes, for the applicant, stated though, that this did not mean that the other grounds were abandoned. The grounds which were argued in court were -

(1) non-joinder of parties

It was argued that the application stood to be dismissed because certain parties who have an interest in the subject matter of the interdict application were not joined. Examples of these were certain people and organizations from the Macassar area and who/which had rights in the land in dispute.

(2) a *prima facie* right

Under this heading it was argued that no *prima facie* right, entitling the respondent (applicant in the main application) to an interim interdict, had been established.

(3) irreparable harm

As part of the requirements for the grant of an interim interdict, an application for such interim relief has to show, among others, that the applicant would suffer

irreparable harm, unless the interim relief was granted. It was argued *in casu* that such irreparable harm had not been established in the main application.

(4) Appealability of an interim order

It was contended for the applicant that the interim order granted on 28 April 2003 had the effect of being a final order, in that it disposed finally of the dispute between the parties. This submission was strengthened, so the argument went, by the fact that an order for costs was also granted.

The reasons for my findings are contained in the judgment which I handed down on 22 September 2003 and I have nothing more to add. I stand by such reasons. I have read counsels' heads of argument and listened to oral argument. I am not persuaded that, on the abovementioned grounds of appeal and the many others not argued in Court, there is a reasonable possibility that another court might come to a different finding from the one that this Court came to. Accordingly, I am not satisfied that the applicant has prospects of success on appeal.

Order of 26 September 2003

In respect of the order of 26 September 2003, this Court had ordered that -

- “(1) The notice of application for leave to 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.”

Although the notice of application for leave to appeal is against the whole of the judgment and order of this Court, no submissions were made in respect of paragraph (1) of the abovementioned order. Argument was proffered only on the issue relating to contempt. It was argued that inasmuch as the applicant had believed that its application for leave to appeal was valid and therefore had the effect of suspending the operation of the interim interdict, the resumption of mining on erf 1197 was without the requisite *culpa* for contempt of court. I am persuaded that there is a reasonable possibility that another court might come to a different finding regarding

whether, by resuming mining operations, in the circumstances of this case, the applicant acted in contempt of Court. However, to the extent that this application for leave to appeal incorporates leave to appeal against the finding that the earlier application for leave to appeal was a nullity *ab initio*, it cannot, in my view succeed.

Order

(1) Judgment and order of 28 August 2003

Application for leave to appeal is dismissed with costs.

(2) Judgment and order of 26 September 2003

- (a) Application for leave to appeal against the finding that the earlier application for leave to appeal was null and void *ab initio* is refused with costs.
- (b)
 - (i) the applicant is granted leave to appeal to the Supreme Court of Appeal against only the order of this Court that the mining of erf 1197, Macassar, after 28 August 2003 was in contempt of Court.
 - (ii) costs of this application are costs in the appeal.

JUDGE J MOLOTO

On behalf of the applicant :

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

On behalf of the respondent:

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