

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 judgment and order of this Court respectively dated 22 September 2003 and 28 August 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 28 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 to vary and rescind.

Application to vary and rescind

This application has two legs, namely -

- (i) to vary the order of 28 August 2003 interdicting further mining; and
- (ii) to rescind the order of 26 September 2003 relating to contempt of Court.

In the light of the finding and order I made in the application for leave to appeal, I will not deal with the second leg of this application. What follows hereunder relates to the first leg only.

Application to vary order of 28 August 2003

The respondent (applicant in the application adjudicated on 28 August 2003) made the point that the mining of erf 1197 by the applicant would result in a “big hole” on the ground which would in turn result in the land not being suitable for the respondent. Hence, so it was further argued, this situation would exclude restoration as an option in the claim for restitution of the said erf 1197. The applicant stated then that it had an approved environment management programme (“EMP”) to deal with the rehabilitation of Macassar as the mining proceeded and on completion of mining operations. However, notwithstanding the existence of the EMP report being disputed by the respondent, the applicant did not deliver it. The order of 28 August 2003, was made on the facts before Court then, which facts excluded an EMP report. The application to vary is now supported by the EMP report and the Court is being asked to reconsider its order on the basis of this new evidence.

Section 35(11) of the Restitution of Land Rights Act¹ (“the Act”) regulates rescissions and variations of orders or judgments. It provides :

- “(11) The Court may, upon application by any person affected thereby and subject to the rules made under section 32, rescind or vary any order or judgment granted by it -
 - (a) in the absence of the person against whom that order or judgment was granted;

1 Act 22 of 1994.

- (b) which was void from its inception or was obtained by fraud or mistake common to the parties;
- (c) in respect of which no appeal lies; or
- (d) in the circumstances contemplated in section 11(5) :

Provided that where an appeal is pending in respect of such order, or where such order was made on appeal, the application shall be made to the Constitutional Court or the Appellate Division of the Supreme Court, as the case may be.”

The Rules of the Land Claims Court made under section 32 of the Act provide, in rule 64, the following with regard to variation and rescission of orders: -

- “(1) Subject to section 35(11) of the Restitution of Land Rights Act, the Court may suspend, rescind or vary, of its own accord or upon the application of any party, any order, ruling or minutes of a conference which contains an ambiguity or a patent error or omission, in order to clarify the ambiguity or to rectify the patent error or omission.”

The circumstances of this case are not the same as those contemplated in section 35(11)(a), (b) and (d). The applicant was present (represented by counsel) in the proceedings that culminated in the order of 28 August 2003; the order of 28 August 2003 was not void *ab initio*, neither was it obtained by fraud or mistake common to both parties; and an order referred to in section 11(5) had not been made.

I found elsewhere (in the judgment of 26 September 2003) that the order of 28 August 2003, being an interim order, is not appealable. Therefore, the application to vary that order stands to be determined in terms of section 35(11)(c) of the Act. As stated in the judgment of 28 August 2003, this Court was not satisfied that there was any good cause for not delivering the EMP report. In this application, this Court is still not satisfied with the explanation for not delivering such EMP report. In short, the applicant has not shown good cause for the grant of the prayer to vary the order of 28 August 2003.

Section 35(12), to which subrule 64(2) refers, states:

- “(12) The Court may, upon application by any person affected thereby, or of its own accord -
 - (a) if a person is, in the circumstances contemplated in subsection (1), registered as a preferential claimant, rescind or vary the order contemplated in that subsection;
 - (b) correct patent errors in any order or judgment.”

Sub-paragraph (a) of subsection (12) does not apply to the applicant as the applicant's circumstances are not as contemplated in subsection (1) of section 35. Similarly sub-paragraph (b) of subsection (12) is also not applicable as no patent error was shown to have been committed.

Order

The application is dismissed with costs.

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