

IN THE LAND CLAIMS COURT OF SOUTH AFRICA

CASE NUMBER: LCC70/00

Held in **Randburg** on 18 June 2004
before **Moloto J**

Decided on : 22 June 2004

In the matter between:

SIMON VILAKAZI

Applicant

and

HELMUT AUGUST ADOLF KLINGENBERG N.O
IRMGARD HANNA KLINGENBERG N.O
EDMUND ALBERT BÖHMER N.O
DIRECTOR GENERAL, DEPARTMENT OF LAND AFFAIRS
LEGAL RESOURCES CENTRE

First Respondent
Second Respondent
Third Respondent
Fourth Respondent
Fifth Respondent

JUDGMENT

MOLOTO :

[1] This is an application for the rescission of an order of this Court made by consent. The ground for the application is that the attorney representing the applicant at the time the consent order was made, did not have a mandate to settle the matter in the terms contained in the consent order. I dismissed the application on 18 June 2004 and following are my reasons therefor.

[2] The parties, through their legal representatives, settled their dispute and filed an application for a consent order in the following terms: -

“WHEREAS the parties have negotiated a Settlement;

AND WHEREAS the parties seek a Court Order in terms of their Settlement;

NOW THEREFORE the parties, duly represented by their legal representatives who hereby confirm that they are properly mandated to sign this Consent order on behalf of their respective clients, do hereby wish to record the prayers of the Court Order that they have consented to as set out hereunder:

1.

- 1.1 That the Applicant, all his family members, associates and all other persons occupying the remaining extent of the farm Mantonga 44, situate in the Registration Division H.U., formerly of the Transvaal, (“the Farm”) through their association with the Applicant, are ordered to vacate the said farm, together with all their belongings by not later than the 31st JULY 2003.
- 1.2 That in the event of the Applicant and/or his said family members, associates and other persons referred to in prayer 1 above, failing to comply with the Order in prayer 1 above, the Sheriff of Piet Retief is hereby ordered, to evict the Applicant, all his family members, associates and all persons occupying the farm through their association with the Applicant, from the farm on 16 AUGUST 2004 or as soon as possible thereafter.
- 1.3 That the Applicant is hereby ordered to remove all livestock belonging to the Applicant or any of his family members or associates, from the farm by not later than the 31st MAY 2004, failing which the sheriff of Piet Retief is hereby ordered to remove such livestock and to impound such livestock at the nearest pound to the farm, to be taken into custody and dealt with by the Pound master in accordance with the relevant and applicable Pound Ordinance or other legislation.
- 1.4 That in the event of the Applicant failing to comply with the Order in prayer 1.3 above, all costs incurred by the First, Second and Third Respondents on the scale as between attorney and client, as well as all costs incurred by the Sheriff of Piet Retief to enforce the said prayer, shall be paid by the Applicant.
- 1.5 That in the event of the Applicant and/or his family members, associates or other persons occupying the farm through their association with the applicant failing to comply with the Order in prayer 1.1 above, the Applicant shall be responsible for the first, Second and Third Respondents’ legal costs of this Application, to be taxed on the scale of the High Court tariff as between party and party, including all necessary costs that the First, Second and Third Respondents may have to incur to evict the Applicant, his family members, associates and all other persons occupying the farm through their association with the applicant and all their belongings in terms of prayer 1.2 above, including Sheriff’s fees.
- 1.6 But for the Cost Orders contained in prayers 1.4 and 1.5 hereof, each party shall pay its own legal costs in respect of these proceedings.

2.

The parties hereby agree to approach the above Honourable Court with a request to grant an Order in terms of this Consent Order either by way of telephone conference or in open Court on Monday, 23 February 2004.”

[3] On 23 February 2004 the prayers set out in the application were made order of Court.

[4] On 2 June 2004 and being represented by new attorneys, the applicant launched this application to set aside the consent order. On the heading of the application the attorneys who acted for the applicant during settlement negotiations were cited as the “fifth respondent”. Following a pre-trial conference on the further conduct of the proceedings, the applicant filed an application to join his former attorneys and the matter was set down for hearing on Friday 18 June 2004.

[5] At the hearing of the matter, Mr Shepstone, for the applicant, conceded that citing the applicant's former attorneys on the heading of the application was a mistake. What was intended was that the said attorneys be made aware of the allegations against them, so that they should respond thereto, should they wish to. The joinder application was accordingly withdrawn.

[6] The first, second and third respondents (to whom I shall collectively refer as "the trust"), had raised in their answering affidavit two defences *in limine* against the main application (rescission application), namely: -

- (1) that the application was out of time and there was no application for condonation of the late filing of the application; and
- (2) estoppel.

[7] For the first point *in limine* the trust relied on rule 64 of the rules of this Court. The rule provides that: -

- “(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.
- (2) Any party seeking the rescission or variation of an order in terms of section 35(11) or (12) of the Restitution of Land Rights Act or in terms of subrule (1) may do so only upon -
 - (a) application delivered within ten days from the date upon which he or she became aware of the order; and
 - (b) good cause shown for the rescission or variation.
- (3) Any party applying under this rule must deliver notice of his or her application to all parties whose interests may be affected by the rescission or variation sought.”

[8] The applicant stated among others, the following in his replying affidavit: -

“I am advised that my legal representative will, at the hearing of this matter, apply, insofar as this may be necessary, for condonation for the late bringing of this application.”

[9] Based on this statement, Mr Shepstone contended that rule 64 is not applicable because the order sought to be rescinded did not contain “an ambiguity or patent error or omission”.

Alternatively, if it was found that the rule was applicable, so the argument went, then application for condonation was made from the bar.

[10] I do not agree with the proposition that rule 64 is not applicable. I do so for the following reasons: -

- (1) The rule is subject to section 35(11) of the Restitution of land Rights Act¹ (“the Restitution Act”). Section 35(11) is wider than the “ambiguity or a patent error or omission” mentioned in Rule 64(1). It states: -

- “(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;
 - (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.

[11] Rule 64(2) prescribes that any party seeking rescission may do so only upon application delivered within ten days from the date upon which he or she became aware of the order. The applicant became aware, on his version of events, of the order on 31 March 2004. He brought the application to set aside the order on 2 June 2004, unaccompanied by an application for condonation of the late bringing of the rescission application. He was made aware of this by way of an *in limine* point in the trust’s answering affidavit. In his replying affidavit he stated that a condonation application would be made, should it be necessary. The application for condonation was first made at the hearing, from the bar. An application for rescission brought out of time will not be entertained unless there is an application for condonation. The applicant held the view that there was no need for an application for condonation, unless “insofar as it may be necessary.” An application for condonation must show good cause. There is no affidavit in support of the

1 Act 22 of 1994, as amended.

condonation application, giving reasons why the application was brought out of time. I was, therefore, not satisfied, when the application for condonation was made from the bar, that good cause had been shown for the grant of the application.

[12] The trust prayed for costs on an attorney and client scale, including the wasted costs occasioned by the joinder application. Mr Bracher, appearing for the fifth respondent (the party sought to be joined) indicated that that party sought no order for costs. This Court has adopted the practice of not awarding costs in these matters as they relate to social issues, unless under exceptional circumstances. The circumstances of this case are somewhat exceptional, almost justifying a punitive costs order. Although such a punitive costs order was asked for by the trust, I was not addressed on the point. I omitted to deal with the question of costs when I gave the order. To rectify that omission, I add the following order to my order of 18 June 2004 :

“The applicant is ordered to pay the costs of the first, second and third respondents on the scale as between party and party.”

JUDGE J MOLOTO

For the applicant :

Adv Shepstone instructed by *Michael Popper Attorney*, Johannesburg

On behalf of the 1st, 2nd and 3rd respondents:

Adv Dreyer, instructed by *Cox & Partners*, Vryheid

On behalf of the 5th respondent:

Mr P Bracher of *Deneys Reitz Attorneys*, instructed by the *Legal Resources Centre*, Johannesburg