IN THE LAND CLAIMS COURT OF SOUTH AFRICA

CASE NUMBER: LCC70/00

Held **in Randburg** on 6 August 2004
before **Moloto J**

Decided on : 31 August 2004

In the matter between:

SIMON VILAKAZI	Applicant
and	
HELMUT AUGUST ADOLF KLINGENBERG N.O	First Respondent
IRMGARD HANNA KLINGENBERG N.O	Second Respondent
EDMUND ALBERT BöHMER N.O	Third Respondent
DIRECTOR GENERAL, DEPARTMENT OF LAND AFFAIRS	Fourth Respondent
LEGAL RESOURCES CENTRE	Fifth Respondent

JUDGMENT

MOLOTO :

[1] This is an application for leave to appeal against two judgments of this Court handed down, respectively, on 22 June 2004 and 30 July 2004. The grounds on which such leave to appeal is sought are set out as follows:

> "Kindly take notice that the abovementioned applicant hereby applies for leave to appeal to the Supreme Court of Appeal;
>
> 1 against the whole of the judgment and order (" the first judgment and order") made by the Honourable Judge Moloto in this court on 18 June 2004 (the reasons in respect of which were handed down on 22 June 2004), including the order as to costs, on the grounds that the learned Judge erred in:
>
> 1.1 not finding that:
>
> 1.1.1 the order of this court handed down on 23 February 2004 ("the original order") was null and void *ab origine*;
>
> 1.1.2 accordingly the court had the power, without the court invoking any power/s under Rule 64, to declare that this was the position;

1.1.3 it was appropriate for the court so to declare;

1.1.4 accordingly the court should, without the court invoking any power/s under Rule 64, grant an order so declaring, alternatively an order rescinding the original order; alternatively

1.2 not finding that the provision of rule 64(2) prescribing that any party seeking the rescission of an order may do so only upon an application delivered within 10 days from the date upon which he or she became aware of the order:

1.2.1 is *ultra vires* section 32 of the Restitution of Land Rights Act 22 of 1994 as amended ("the Act"), alternatively is invalid as constituting unreasonable delegated legislation, alternatively is invalid as being unconstitutional; alternatively

1.2.2 insofar as such provision relates to order which are void form inception, is *ultra vires* section 32 of the Act, alternatively is invalid as constituting unreasonable delegated legislation, alternatively is invalid as being unconstitutional,

and accordingly falls to be struck from the rule in question. Alternatively such provision is to be read as not applying to applications for the rescission of orders which are void from inception;

1.3 not finding that:

1.3.1 the applicant had made out a case in the applicant's affidavits for condonation of his failure to file his application for rescission of the original order within ten days of such order coming to his knowledge;

1.3.2 the issues arising in respect of the applicant's case for condonation had been fully canvassed in the papers;

1.3.3 the respondents had not sought leave to file a fourth set of affidavits challenging any of the allegations made by the applicant in the replying affidavits;

1.3.4 it was accordingly appropriate, in the light of the applicant's counsel's application made from the bar in respect of condonation, for the court to grant condonation; alternatively

1.4 dismissing the application, as opposed to granting leave to the applicant to deliver a substantive application for condonation and further granting leave to supplement the founding affidavit and postponing the application for such purposes;

1.5 <u>insofar as costs is concerned</u>

1.5.1 not finding that the court had no power, alternatively it was inappropriate for the court to grant an order that the applicant pay the costs of the first, second and third respondents in the light of the fact that the respondents' counsel had not sought an order or argued that it was appropriate for such order to be granted, and or the learned Judge misdirected himself in this regard;

1.5.2 not finding that the learned Judge was *functus officio* and accordingly had no power to make any order as to costs on 22 June 2004, alternatively any order as to costs in conflict with the tenor of the order made on 18 June 2004 (namely to the effect that no order as to costs was made);

1.5.3 not finding that the order as to costs made on 22 June 2004 did not constitute an omission as contemplated in rule 64;

1.5.4 not finding that the said order as to costs constituted a punitive costs order, and/or the learned Judge misdirected himself in this regard;

1.5.5 not finding that the circumstances present did not justify such a costs order and/or the learned Judge misdirected himself in this regard;

1.5.6 in finding that there were exceptional circumstances present in the case at hand [which were such as to justify an order for costs to be made], and/or the learned Judge misdirected himself in this regard;

2 Alternatively to 1 above

against the part of the first judgment and order in terms of which the court in terms of the reasons for judgment of the court dated 22 June 2004 purported to add to the order made on 18 June 2004 by directing to the effect that the applicant was ordered to pay the costs of the first, second and third respondents, on the grounds set out in paragraph 1.5 above;

3 against the whole of the judgment and order ("the second judgment and order") handed down by the learned Judge in this court on 2 July 2004 in terms of which the learned judge refused to grant an order declaring the original order to be null and void, or to refer such issue to evidence, and in terms of which the learned Judge refused to grant a stay of the original order pending the outcome of the referral to evidence contemplated above, including the order as to costs (the proposed appeal in relation to the order on the merits is being brought in the alternative to the appeal, on the merits as referred to in 1 above; the proposed appeal in relation to the costs being brought in any event) on the grounds that the learner Judge erred:

3.1 *mutatis mutandis*, in the respects set out in each of paragraphs 1.1 and 1.2 above;

3.2 in not finding that the material set out in paragraph 3.1 to 3.47 of the replying affidavit did not constitute new matter, alternatively in not finding that substantial portions, alternatively portion, of such material did not constitute new matter;

3.3 in not finding that even if the material in question was to be regarded as new matter it was not appropriate, in the circumstances, for such material to be struck out but rather that it was appropriate to allow such material to stand, particularly having regard to the fact that any new matter constituted material which was by its nature not contentious by its nature, and having regard further to the fact that the said respondents had not sought leave in the alternative to their application to strike out the material in question to deliver a fourth set of affidavits in response to such material; alternatively

3.4 in not finding that even if the material in question was to be regarded as new matter it was not appropriate for such material to be struck out in the circumstances but rather that it was appropriate to allow such material to stand and to grant the first, second and third respondents leave to deliver a fourth set of affidavits in response to such material;

3.5 in not finding that the applicant had made out a proper case for condonation and for rescission and in not granting condonation and rescission of the original order, alternatively an order directing that the question of such rescission be referred to evidence;

3.6 insofar as costs is concerned, *mutatis mutandis* as set out in paragraph 1.5 above;

4 against that part of the second judgment and order relating to costs, *mutatis mutandis* on the grounds as set out in paragraph 1.5 above."

[2] At the hearing of the application on 6 August 2004 the following further grounds of appeal were added:

"1 By the addition after paragraph 1.4 of the following:

1.4A not granting an order in terms of prayer 2 of part A of the notice of motion alternatively not making such an order pending a fresh application to be brought for condonation and rescission;

2 By the addition at the end of paragraph 1.5.2 (before the semi-colon) of the following:

And/or that rule 64(1) was *ultra vires* Section 35(11) insofar as rule 64(1) permits a court *mero mutu* to act in terms of such rule."

[3] There is no need to deal with the extensive grounds of appeal. The reasons for dismissing each application are given in the respective judgments and I do not wish to add any further reasons. I am of the view that, given the grounds on which the applications were dismissed, the orders are not appealable, as they do not finally dispose of the matter. The applicant has to exhaust his remedies in this Court before approaching a higher Court. I am not satisfied that there are reasonable prospects of another court coming to a different conclusion to the one this Court came to.

In the premises the application is dismissed with costs.

_____

JUDGE J MOLOTO

For the applicant :
Adv Dison instructed by *Michael Popper Attorney,* Johannesburg

On behalf of the 1st, 2nd and 3rd respondents:
Adv Dreyer, instructed by *Cox & Partners*, Vryheid