IN THE LAND CLAIMS COURT OF SOUTH AFRICA
HELD IN RANDBURG

Case Number: **LCC 168/2008**

HEARD: 11 May 2010

DECIDED: 12 May 2010

In the matter between:

NEELA RAJBUNSEE	Applicant
and	
REGIONAL LAND CLAIMS COMMISSIONER	
KWAZULU – NATAL	First Respondent
MINISTER OF PUBLIC WORKS	Second Respondent
DESEGAN NAICKER	Third Respondent

JUDGEMENT

MIA AJ:

[1] The present matter is an application to review the failure of the first respondent, the Regional Land Claims Commissioner Kwazulu-Natal (hereafter the "RLCC"), to refer the land claim of the applicant's deceased husband to this court in terms of Section 14 of the Restitution of Land Rights Act No 22 of 1994 (hereafter the "Restitution Act"). Further applicant requested an order that the first respondent certify the claim in

terms of section 14(1) (b) or 14 (1) (d) of the Restitution Act and to refer it to this Court in terms of section 14(1) forthwith. The applicant also requested costs on an attorney and client scale against the first and third respondents jointly and severally and against the third respondent de bonis propriis. The matter was opposed. The first respondent requested an order that the Minister for Human Settlement be joined in this matter as it was the Department for Human Settlement which owned the land which is the subject of the present application. On the morning of the hearing the first respondent indicated that they have no objection to an order being granted in terms prayer 1(b) of the notice of motion but that they had no instructions to agree to a costs order. The only issue to be addressed remained the question of costs. Mr. Southwood requested an order by consent per prayer 1(b) of the notice of motion. On 10 May 2010 I granted the following order by consent of the parties:

1. The first respondent is ordered to certify this claim in terms of section 14(1)(b) or 14(1)(d) of the Restitution of land Rights Act 22 of 1994 with regard to the aforesaid claim and refer it to this Court in terms of section 14 (1) of the said Act within 60 ordinary days of this order.

[2] The judgement with regard to costs was reserved. The reasons and my decision with regard to costs follow hereunder.

[3] Mr. Southwood requested an order for costs on an attorney client scale against the first respondent. It was Mr. Southwood's submission that extraordinary circumstances exist in the present matter in that exhibit "E" indicates that the matter was largely unopposed and the conduct of the first respondent shows a lack of attention to this matter. The date of lodging of the land claim is understood to be 27 May 1997. Correspondence passed between the applicant's attorney and the office of the RLCC from 30 April 2004 until 12 April 2006. A total of 11 letters were sent and one telephone call was made. This then culminated in an offer being made at the end of two years. On the 12 April 2006 Mr. Surju indicated that the offer of financial compensation was not suitable and the applicant wanted restoration. Mr. Southwood submitted further that from 2006 until 2007 a further twelve letters and a telephonic reminder was made by the applicant's attorney. The RLCC raised the question of another spouse which was addressed and did not present any obstacle to the applicant's claim. The present application was launched in November 2008. The first respondent opposed the relief requested until the date of the hearing when the applicant was informed that there was no objection to an order per prayer 1(b).

[4] Ms. Hendricks for the first respondent conceded at the outset that there were delays in the processing of the claim lodged in 1997. She requested this Court to take notice of the lack of resources which the RLCC

Kwazulu-Natal experienced which is widely known. She also drew this court's attention to the papers filed herein which indicated that the applicant's attorney objected to the third respondent dealing with the matter. This required that other staff members of the RLCC attend to this matter along with their own workload. It was further submitted that the RLCC was under the impression created by applicant's attorney that monetary compensation was requested as was applicable to many other urban claims. The RLCC endeavored to keep the applicant informed of the status of the claim and it was not correct to suggest that the RLCC did not do anything in this matter.

[5] Ms Hendricks points out that the 12 April 2006 is the first time since the claim was lodged in 1997 that the applicant indicated that restoration was required. The further delay thereafter was due to a lack of human resources and the applicant's request that the third respondent not deal with the matter. Ms Hendricks accepted that there was a delay in the matter and indicted that she had no instructions to agree to costs, she submitted however that if the court was inclined to award costs that it be on a party and party scale.

[6] Having regard to all of the facts placed before me it is apparent that there was a delay in attending to this matter. It became apparent in April 2006 that the applicant wanted restoration of the property. There is no

explanation for the delay in deciding that restoration was or not a suitable option. It is apparent now that the land is available but the basis on which the first respondent seeks to restore the land is not acceptable to the applicant. No explanation was tendered for the RLCC's failure to present the offer made three days before the hearing earlier or why they had not indicated that they did not oppose the relief requesting a referral to this Court until the morning of the hearing. Ms Hendricks conceded that she could not explain the delay in this regard.

[7] Having regard to the two general rules that the court has a discretion with regard to costs and that costs generally follow the event, the applicant has succeeded in obtaining an order as requested in the notice of motion. The first respondent has opposed this relief and filed affidavits to support their opposition. On the morning of the hearing the first respondent agreed to the relief requested. Mr. Southwood's submission is that they have no defense other than the suggestion in paragraph 9 of the opposing affidavit where reference is made to the applicant opting for compensation initially and being bound by the decision of the majority of the claimant's to opt for compensation. The Deputy Director of Legal Support avers in the opposing affidavit that the matter ought not to be referred as the applicant cannot change her mind at such a late stage and that the Minister of Human Settlement should be joined herein. This does not take into account the delay at the instance of the RLCC. I see no communication on

the pleadings related to this. Further in the event that the applicant opts for restoration and this is not possible and no agreement is reached despite attempts to mediate, the parties have recourse to this court by way of referral or by way of review. I can find no reasonable explanation for the first applicants delay in attending to this matter.

[8] The purpose of the award of costs is stated by Innes CJ as[1]

> "costs are awarded to a successful party in order to indemnify him for the expense to which he has been put through having been unjustly compelled either to initiate or to defend litigation, as the case may be. Owing to the necessary operation of taxation, such an award is seldom a complete indemnity; but that does not affect the principle on which it is based"

[9] With regard to the applicant's conduct herein the record reflects that applicant's attorney communicated a request for compensation until 12 April 2006 when the request changed to one of restoration. I cannot find any correspondence on the record nor was any related communication drawn to my attention which communicates the applicant's view that the matter could not be resolved per mediation or a request that the matter be referred. The applicant must have realised at some point from 12 April 2006 until November 2008 that resolution was not possible and requested a referral before incurring the costs of this application. In this regard the costs could have been curtailed herein.

[1] Texas Co (SA) Ltd v Cape Town Municipality 1926 AD 467 at 488

[10] In light of the above I am satisfied the costs must follow the event, however in view of the option which was available to the applicant to curtail the costs prior to coming to court I am not satisfied that such cost should be on the attorney and client scale.

ORDER

[11] The first respondent herein is to pay the costs of this application on a party and party scale.

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SC Mia
Acting Judge
Land Claims Court

APPEARANCES

For the Applicant
Advocate M Southwood SC
Instructed by J Surju Attorneys & Conveyancers (Durban)

For the Respondents
Advocate J I Hendricks
Instructed by State Attorney (Durban)