IN THE LAND CLAIMS COURT OF SOUTH AFRICA

HELD AT MTHATHA

REPORTABLE **Case Number: LCC66/07**

Date of Hearing: 06 October 2008

Date of Judgement: 26 March 2010

In the matter between:

KING SABATA DALINDYEBO MUNICIPALITY Applicant

And

MONWABISI MORRIS NJEMLA Respondent

In re:

MONWABISI MORRIS NJEMLA Respondent

And

KSD MUNICIPALITY & 6 OTHERS Respondents

Application for rescission:

JUDGMENT

BAM JP

[1] The applicant seeks the rescission of the cost portion of the order granted in favour of the respondent against it (the applicant) and others on the 2nd October 2007. The grounds upon which the application is premised are two-fold.

[2] In the first place, the applicant's submission is that it has subsequent to the granting of the order of October 2007, been established that the respondent lacked *locus standi* to bring the application which earned him success in the main application including granting of costs in his favour. This is because, while in that application the respondent purported to be representing the KwaLindile Community, such a mandate has been repudiated by that community as having ever existed.

[3] In the second place, the respondent has, according to the applicant, himself repudiated the jurisdictional base upon which the order in his favour was granted. Whereas the order was granted in terms of the Restitution of Rights Act No 22 of 1994 as amended, (Restitution Act) the respondent has since made a complete turn around and, in effect, supports the position for which the applicant was *inter alia*, ultimately mulcted with a cost order.

[4] In these circumstances, the applicant maintains, the grounds exist for this court, in terms of the common law, to assume its inherent jurisdiction to rescind the costs order in the interests of justice[1].

[5] The application for rescission is vigorously opposed by the respondent and both grounds are contested. On the issue of *locus standi* the respondent points out that up till the granting of the order on 2 October 2007, his authority was never

[1] The rescission was originally sought in terms of Rule 64 read with section 35(11) of the Restitution Act of the Land Claims Court which was abandoned

challenged and any subsequent developments in this regard cannot affect the court's discretion at the time.

[6] On the issue of repudiating and back-tracking the jurisdictional base upon which the orders were granted, the respondent contends that, seeing that this court has not yet furnished the reasons for the granting of the orders, the basis for granting the cost order in his favour may be totally unrelated to the land claim and, therefore, not necessarily anchored upon the Restitution Act. Besides, the contention that the act did not apply was signalled in heads of argument on his behalf prior to the granting of the orders and might also be gleaned even from his founding affidavit in the main case.

[7] It is not correct that the respondent's *locus standi* was not challenged prior to the 2 October 2007. It was alleged: However it is correct that this court did not see its way clear in finding that Njemla lacked *locus standi* merely because a resolution in proof of his mandate had not been produced. As regards the subsequent turn of events such as the community's decision to instruct and identify a different set of representatives, these do not suffice to nullify a mandate that the respondent might have had before the 2 October 2007. I am, therefore, of the view that the respondent cannot have his costs order rescinded on this ground and no further reference to it will be made in this judgment.

[8] As regards the jurisdictional base upon which the respondent's original application in the main action was based his response is argumentative and vague and, therefore, unconvincing and unacceptable.

[9] The application for rescission has its source upon certain orders and directions given by this court upon granting an *interim interdict* relief sought by the respondent (Njemla) and the dismissing of a review application brought by the applicant (KSD). These are set out in full below for ease of reference together with the "preface notes" to them in order to encapsulate the background and context:

> "**IN THE LAND CLAIMS COURT OF SOUTH AFRICA**
>
> **CASE NUMBER: LCC67/07**
> **MTHATHA**: Bam JP
>
> In the matter between
>
> **MONWABISI MORRIS NJEMLA** Applicant
>
> **And**
>
> **KSD LOCAL MUNICIPALITY AND 6 OTHERS** 1st Respondent
> **LADNMARK MTHATHA (PTY) LTD** 2nd Respondent
> **CAPE GARNET PROPERTIES 118 (PTY) LTD** 3rd Respondent
> **MEC FOR LOCAL GOVERNMENT & TRADITIONAL AFFAIRS, EASTERN CAPE** 4th Respondent
> **EASTERNCAPE PROVINCIAL GOVERNMENT** 5thRespondent
> **EASTERN CAPE REGIONAL LAND CLAIMS COMMISSIONER** 6th Respondent
> **MINISTER OF LAND AFFAIRS** 7th Respondent
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> **PREFACE NOTES TO ORDERS**
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[1] The King Sabata Dalindyebo (KSD) Municipality is the registered owner of the remainder of erf 912 in Mthatha in the extent 1740 7900 hectares donated to it by the Eastern Cape Government in 1997.

[2] The KSD Municipality is the 1st respondent in case number LCC66/07 and is the applicant in case number LCC66/07.

[3] Case Number LCC66/07 was brought before the above court by Notice of Motion received on the 30th May 2007 as an urgent application.

[4] In terms of directions given on the 06 June 2007 the court granted condonation *exparte* for non compliance with rules prescribed for ordinary applications as prayed for in terms of paragraph 1 of the Notice of Motion.

[5] On the 25 May 2007 a notice in terms of the Restitution of Land Rights Act of 1994 of the 'Act' had been published in the government gazette Notice 646 of 2007 at the instance of the 6th respondent in case number LCC66/07.

[6] The discovery of the publication in the government gazette prompted the KSD Municipality to launch an urgent review application for setting aside, withdrawal or amendment of the notice mentioned in the above paragraph. The review application as recorded as case number LCC69/07.

[7] All participating parties agreed to a consolidation of the two matters and a new date of hearing was set down to hear both matters simultaneously on the 5th and 6th July 2007.

[8] On the 14th August 2007, and before judgment could be given, the 2nd respondent, who had earlier entered appearance , successfully applied to intervene in terms of Rule 13(1) and a new date of hearing was set down for the 31st August 2007.

ORDERS

Having heard counsel during all 3 days of hearing and having perused all the papers filed in both matters, the following orders are issued.

LCC66/07

A. (i) The *interim interdict* prayed for in paragraph 2.1 of case number LCC66/07 is granted and in immediately operative pending finalisation of serious and consultative negotiations with all

parties concerned before 30 November 2007. This does not concern any of the respondents who neither supported nor opposed the application

(ii) In the event of the negotiations contemplated in paragraph 1 reaching an impasse, on or before 30 November 2007, the 1st respondent KSD is granted leave, if so advised, to make an application in terms of section 34 of the Restitution of Land Rights Act No. 22 of 1994 as amended.

(iii) The respondent opposing the application jointly and severally, the one paying the other to be absolved.

LCC6907

B.

(i) The relief sought in paragraphs 2 and 3 of the Notice of the Notice Motion in case Number LCC69/07 is dismissed. The respondent (RLCC) is, nonetheless ordered to republish the an amended notice in terms of section 11(1)(d) of the 'Act' that is suitably specific and intended to clear any confusion that may arise from any inept descriptions in the claim forms. The notice must clearly establish a link between the property being development as being the property under claim. Such a Notice is to be published before 15 November 2007, after consultation with KSD Municipality and steps must be taken to make the district of KSD Municipality. This order does not concern any of the respondents who neither supported nor opposed the review proceedings.

(ii) No order as to costs is made.

Written reasons for the above orders are being assiduously formulated from a massive volume of submissions and affidavits and will be available to the parties upon completion.

Given this Tuesday 2nd October 2007.

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REGISTRAR: LAND CLAIMS COURT"

[10] It is obvious from the above that, not only were the applications brought before this court in recognition of its exclusive jurisdiction over the Restitution Act but also that, in both parts of the consolidated cases (LCC66/2007, 69/2007), the Regional Land Claims Commissioner is cited as a respondent.

[11] The respondent had been awarded the costs in consequence of a successful urgent application he had lodged against the applicant and others for an interim interdict restraining them from developing land known as the remainder of erf 912 Umthatha pending finalisation of the land claims over the property.

[12] The above application was lodged and succeeded in terms of the Restitution Act. This appeared to be well understood by the respondent and was articulated by him in several paragraphs[2] of his founding and replying affidavits. One such example at paragraph 11.35 of his founding affidavits where he states

> "11.35 However, I am advised by my attorneys and verily believe that the instant application is an application to preserve the *status quo* pending finalisation of the of the aforementioned land claims and it is only this honourable court that has jurisdiction to hear this application and no other court as dictated in section 22 of the Restitution of Land Rights Act aforesaid"

[13] The application for the interim interdict was promptly opposed by the KSD municipality, also in terms of the Restitution Act, precisely on the land upon which development was taking place was part of the land being claimed by the KwaLindile Community as represented by the respondent.

[14] The applicant went further and subsequently lodged a review application against the Commission for publishing in the gazette that the land under development

[2] Paras11.22-11.25; 11.29;12.3, 13.2 of the founding affidavit
Paras 13;16; 16.3 ; 26 of replying affidavit

was being claimed. The respondent (Njemla) joined the Commission in opposing the review in these words:

> "The evidence given by ADAM in the affidavit of the Landmark to the effect that NJEMLA has not established that the land on which the developments commenced is subject of a land claim by his community is not based on any facts other than speculation. It stands against the annexure to the claim by Lwalindile to the effect that the land on which the Enkululekweni Ministerial Complex and the Holiday Inn are built was curved out of Kwalindile and was grazing land. The KSDLM itself makes a bald denial that the land on which there is development is part of the claim by Kwalindile Community. This denial itself is sufficiently gainsaid by the annexure to the claim form. The KSDLM admits that ENKULULEKWENI has always been part of erf 912. Landmark also admits that the land on which there is development is a portion of erf 9123." The gazette means that no more development should take place on the land in question as dictated by section 11 of the Restitution of Land Claim Act. The 1st respondent had appropriately and timeously been warned in annexure"MMN4" to my founding affidavit in this application about the unlawfulness of its conduct of continuing to pursue development of the land in question in the face of our land claim, at its peril, it preferred to ignore the warning."

[15] It is true that the respondent (Njemla) also evoked the provisions and stipulations of the Deed of Delegation, the Land Administration Act and the *Interim* Protecting Informal land Rights Act as part of his arsenal to re-inforce his challenge to the development of the land in issue. However, this court does not have jurisdiction over these instruments and could not even deal with them as incidental to its jurisdiction before the question of the validity of a claim over the land had been determined.

[16] It was, therefore, with some surprise and amazement that, in a late supplementary heads of argument filed with the court there appeared a submission (ignored at the time) that the land upon which the development was taking place was never dispossessed and, therefore, could not fall under the jurisdiction of the Restitution Act.

[17] I also, subsequently ignored, ignored, as being unethical, a direct communication between the respondent's legal representative and the court, after judgment on the applications had been reserved, to the effect that the land fell outside the jurisdiction of the commission. Neither the late heads nor the unethical communication had any impact upon the orders given on the 2 October 2008.

[18] Even the letter marked "E" from the respondent's legal representative brought to my attention in the present applicants founding affidavit amazed me. However I treated all these as the furious threats of one legal representative to another and no us legal significance. In my view, the reply to the letter from the applicants' legal representatives' parts in letter "F" should have put an end to the matter.

[19] I cannot however ignore the contention that the land lying outside and around the fenced Enkululekweni Ministerial Complex (i.e. the land on which development was interdicted) when it comes in a sworn affidavit from the respondent himself. It

comes from the horse's mouth in the application for the interdict and it tells me that I erred in granting the *interdict*.

[20] I am professionally, bound in these circumstances, to accept that I erred indeed in issuing the *interim interdict* for it was not within my jurisdiction to do so. I am also professionally bound to accept the word of the prime mover to the application because at that stage it had not infact been precisely established whether the particular land was under claim hence the injunction that he commission was to republish an amended notice to establish a link between the property being developed as being the properly under claim.

[21] The revelation, on the part of the respondent himself, that the properly being developed was never dispossessed, has turned the whole *interim interdict* order upon its head and, in view of the fact that it was based entirely in the belief that the contrary situation might prevail, it has to be reversed.

[22] It now appears that this court did not have jurisdiction at all and not just because the applicant asserted it, but because the *fons et origo* of that application himself asserts the same. It is still a mystery to this court why the respondent opposed the review application and also why, once it had "revisited" its earlier stance, the respondent had not then abandoned the order for the *interdict* in it's entirety and tendered costs.

[23] As the interdict was *interim*, it lapsed automatically upon the parties failing to resolve the question of the land claim as of 7 December 2007. The only part of it which still remains alive is the costs order which is the subject of this application. It cannot, in fairness and in the interests of justice, be that the respondent can be allowed to retain the costs awarded to him despite his obvious “somersault’.

[24] It also seems clear to me that in this particular case the provisions of the Restitution Act may have been used merely as a stepping stone to halt the development on the disputed land and thereby gain a foothold exclusively to bargain for a stake in the development having jettisoned the attentions of both the applicant as well as the commission for land claims.

[25] My acceptance that the entire order for the *interdict* was given an error in this particular case must not be interpreted to mean that I accept that the land was infact never dispossessed as claimed by the respondent, nor that it is not under claim as the applicant asserted in its review application. That is an issue to be finally determined when, and if, the validity of a land claim over the land is decided.

[26] It is common cause and Ms Da Silva, on behalf of the applicant, has conceded that the court cannot rely on any provisions in its own rules such as Rule 64 or on Rule 42 of the High Court or upon Section 35(11) of the Restitution Act for the relief sought.

[27] However, it was contended by her that, on the facts of the present case, the court should assume its inherent powers of rescission under the common law. To this end she quoted the principles enunciated in the cases of *Childely Estate Stores*[3]; *Nyangiwe v Moolman NO*[4] and *Mtethwa V Mthethwa*[5].

[28] I am satisfied that there is authority that the court may assume its inherent jurisdiction to rescind in the interest of justice. In the instant case it would be manifestly inequitable and not in the interest of justice to implement the costs order given against the applicant. Indeed the costs order is the only portion still alive in the temporary *interdict* in case LCC66/07 on the 2 October 2007 order.

[29] In the result the following orders are granted –

Orders

1. Condonation of the applicant's non-compliance with the time frameset out in rule 64(2) of the Rules of the Land Claims Court.
2. Rescinding and setting aside paragraph A(3) being the costs order handed down on 2 October 2007

[3] 1924 OPD 163
[4] 1993 [2] SA 508 (TK)
[5] 2001[2] SA 193 TPD @198 C-E

3. Annulling execution of any warrants of execution issued pursuant to the costs order handed down on 2 October 2007.

4. Directing the respondent to pay the costs of this application.

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F C BAM

Judge President of the Land Claims Court

APPEARENCES

For the Applicant: *Adv Da Silva* instructed by *Dambuza Mnqandi Inc*

For the Respondent: *Mr Tshiki* instructed by *Tshiki & Sons Inc*.