IN THE LAND CLAIMS COURT OF SOUTH AFRICA

CASE NUMBER: LCC147/08

RANDBURG

Before: Bam JP

Decided: 14 December 2010

In the matter between

KING SABATA DALINDYEBO MUNICIPALITY	**Applicants**
And	
KWALINDILE COMMUNITY	**First Respondent**
ZIMBANE COMMUNITY	**Second Respondent**
BATHEMBU COMMUNITY	**Third Respondent**
MINISTER OF AGRICULTURE & LAND AFFAIRS	**Fourth Respondent**
REGIONAL LAND CLAIMS COMMISSIONER: EASTERN CAPE	**Fifth Respondent**
LANDMARK MTHATHA (PTY) LTD	**Sixth Respondent**
CAPE GANNET PROPERTIES 118(PTY) LTD	**Seventh Respondent**
PROUD HERITAGE PROPERTIES 119(PTY) LTD	**Eighth Respondent**
UWP CONSULTING (PTY) LTD	**Ninth Respondent**
WHIRLPROS 46 (PTY) LTD	**Tenth Respondent**

JUDGMENT

BAM JP

[1] This application is essentially one launched in terms of *Section 34* of the Restitution of Land Rights Act No22 of 1994 ("the Act"). This Section detracts partially from the core purpose of the Act itself in that it allows specially 'for an order that the land in question or any rights in it shall not be restored to any claimant or prospective claimant'[1]

1 Fn.1 section 34(i) of the 'Act'

[2] The core purpose of 'the Act' is, in the mean time, 'to provide for the restitution of rights in land to persons or communities dispossessed of such rights after 19 June 1913, as a result of past racial discriminatory laws and practices,'[2]

[3] The circumstances in which the court may grant such an order are (i) if it is made by any national, provincial or local government body in respect of land which is owned by it or falls within its area of jurisdiction; (ii) if the court is satisfied that it is in the public interest that the rights in question should not be restored to any claimants; and (iii) the public or any substantial part thereof will suffer substantial prejudice unless such order is made before the final determination of any claim.

[4] The applicant, in this case, is admittedly a local government structure being the municipality and the owner of the land in question which falls within its area of jurisdiction. It is whether it is in the public interest and whether the public or any substantial part of the public will suffer substantial prejudice if the order is not granted that are in dispute.

[5] To this, otherwise straight forward application, the applicant has simultaneously launched and superimposed a declaratory and three review applications which do not sit well with each other or with the Section 34 application. At this point let the 'amended Notice of Motion' of the applicant speak for itself:

> **"**Take notice that King Sabata Dalindyebo Municipality (the applicant) will, on a date to be specified by the Registrar of this Honorable court, seek an order:
>
> 4. That when the claim of the first, second and third respondents in respect of any land situate in the town of Mthatha, including the Remainder of Erf 912 Mthatha (the land), is finally determined, the rights in the land or any portions of the land shall not be restored to any successful claimant;
>
> 5. Alternatively to paragraphs 1 and 4 above, declaring that, notwithstanding the claims lodged in respect of the land, the applicant is entitled to develop the land;
>
> 6. That the decision of the fifth respondent to accept and publish in the Daily Dispatch Newspaper and/or the Government Gazette that a claim has been lodged in terms of the Restitution of Land Rights Act, 1994 (Act 22 of 1994) (the Restitution Act) by the first respondent insofar as it relates to the Remainder of Erf 912 Mthatha and various other erven

2 Pre-amble to 'the Act'

situation in the city of Mthatha, as listed in the said notice, be declared or reviewed and set aside;

7. That the failure of the fifth respondent to withdraw the publication of the claim insofar as it relates to the said properties, or to amend the said publication by removing the properties mentioned in the said notice from the list of properties allegedly claimed by the first respondent be reviewed and set aside;

8. Directing the fifth respondent to withdraw the Notice published in the Daily Dispatch Newspaper and/or the Government Gazette in respect of the claim lodged by the first respondent insofar as to relates to the Remainder of Erf 912 Mthatha and various other erven situation in the city of Mthatha.

9. That any of the respondents opposing this application pay costs thereof only in the event of such opposition; and

10. That this Honourable Court grant such further and/or alternative relief as seem to it meet.**"**

[6] The resulting prolixity of the prayers in the Notice of Motion, coupled with the consequent desultory contents of the founding and supplementary affidavits, have had the effect of diverting the focus of the contesting parties on to peripheral combat zones unrelated to Section 34 requirements.

[6.1] I will deal firstly in detail with the Section 34 application and then only briefly with the superimposed declaratory, review applications and the alternative prayer.

THE LAND IN QUESTION

[7] The land in question is described in the Notice of Motion as the 'Remainder of Erf 912 Mthatha.' It is not clear from the founding affidavit or from the papers which specific areas the Remainder of Erf 912 Mthatha encompasses. There is no map in the papers depicting its boundaries and physical features. Nor is there anything that portrays or illustrates the arrangements, components of any structures, open fields, streets, thoroughfares, aqueducts and dams. An aerial photograph demarcating the area sought for non restoration would have been immensely helpful. The founding affidavit has, nevertheless, painted a useful but suburban biased description in the following terms:

"**Current set up of Mthatha**:

29. The city of Mthatha, which is now completely urbanized, comprised various suburbs which are *inter alia,* Sidwadwa View, Myezo park, Southridge, Fortgale, Nduli Cresent, Southernwood, Ikwezi location, Ngangelizwe, Nothcrest, Hillcrest and Ncambedlana, all within the jurisdiction of the applicant. These suburbs consist of thousands of privately owned and developed erven for which the respective owners hold title deeds. The property prices of the land in Mthatha are in the millions in the affluent suburbs and over R20 000.00 in the income residential areas.

30. Mthatha, being the capital city of the former (sic) Transkei, comprises a thriving CBD and industrial area known as Vulindlela Heights, which continue to develop on a daily basis.

31. The city has schools, hostels, hotels, guest houses, medical clinics, taxi ranks, shopping centers, stores, railway lines, pump stations, police station, offices, courts of law, banks and other public facilities, including a golf course and a recreational park."

[8] It should be added that the N2 still cuts through the centre of the city of Umthatha and that the city is surrounded on all sided by a very extensive rural hinterland. It is common cause that during 1998 the *Remainder of Erf 912* Umthatha was transferred to the applicant measuring 1740,400 hectors in extent.

[9] **THE RESPONDENTS**

i) The first respondent is the **Kwalindile Community**. It is claimant to various portions of land situated on the Remainder of Erf 912 Mthatha. It opposes the application on the grounds that it would subvert and frustrate its rights, in terms of the constitution and 'the Act,' to restitution, by truncating the relief to which it is entitled.

ii) The second respondent is the **Zimbane Community.** It has laid a claim to vast tracks of undeveloped and unserviced land that is part of the Remainder of Erf 912. It is not seeking restoration to itself of the city of Umthatha but a stake and participatory benefits in any and every development undertaken within the tracks of undeveloped and unserviced land it is claiming.

iii) The third respondent cited is the **Bathembu Community** but did not participate in the action.

iv) The fourth respondent is the Minister of Agriculture and Land Affairs (now the Minister of Rural development and land Reform) was cited in its official capacity and represented jointly with the fifth respondent. She (as she was) is cited only as far as she may have an interest in the relief claimed.

v) The fifth respondent is the Eastern Cape Regional Land Claims Commissioner. She opposes the application mainly on the grounds that the development plans contemplated by applicant fail to address or demonstrate that they would be in the interest of the respondent rural communities who, after all, form a dominant sector of the public of the land in question. She does, however, accept that it is not feasible to order restitution of developed properties. More importantly, in her report, in terms of the Section 34(2) of the 'Act', requiring her to investigate and report on the desirability of the application, she submits it is not desirable. And that more evidence of an expert nature is needed to determine whether any envisaged projects are in the public interest.

vi) The sixth respondent is **Landmark Mthatha (Pty) Ltd**. It concluded a lease agreement with the applicant for the development of a shopping centre and commenced development on Remainder of Erf 912 unaware that there was an unresolved land claim upon the land. The company, nonetheless, supports the Section 34 application but not the alternative prayer in terms of paragraph 2 of the Notice of Motion. Advocate Coetsee SC, on behalf of the sixth respondent, indicated that it would abide the decision of the court and did not participate in the proceedings. However, he elected to file heads of argument for which the court is grateful and has derived much benefit.

vii) The seventh respondent is **Cape Gannet Properties 118 (Pty) Ltd** a company which also concluded a long term lease and development agreement with the applicant over 25 proposed subdivisions of the Remainder of Erf 912. It supports the section 34 application aswell as the review applications but not

prayer 2 unless amended. Advocate Pammenter SC representing the company has submitted heads of argument from which the court has derived much benefit.

viii) The eighth respondent is **Proud Heritage Properties 119 (Pty) Ltd**. It did not participate in the proceedings.

ix) The ninth respondent is **UWP Consulting (Pty) Ltd** and also did not participate in the proceedings and filed a notice to abide the court's decision.

x) The tenth respondent is **Whirlprops 46 (Pty) Ltd**. It holds long term leasehold rights over a Erf 18647 Umthatha which falls under Erf 912 Umthatha. It has no objection to relief being granted in terms of section 34 of the Act but sees no need to join the applicant in the review applications. It seeks an order that the fifth respondent should pay its costs. Advocate Pammenter SC represented the company and submitted heads of argument from which the court has derived much benefit and is grateful.

[11] **THE BACKGROUND**

The current applications are direct sequel to the urgent application brought during 2007 by one, Njemla, purporting to have received a mandate to do so from the First Respondent – the Kwa-Lindile Community. In that application, Njemla prayed for an *interim interdict* against the present applicant (KSD) and the present 6th respondent (Landmark Mthatha (Pty) Ltd and other respondents to restrain them from developing portions of land known as remainder of Er 912, Mthatha. The immediate response of the KSD municipality (the applicant) was an urgent counter application to review and set aside the decision by the commission (4th respondent) to publish a notice in the gazette that the Kwa-Lindile community was laying claim to the rest of the Remainder of Erf 912 Umthatha.

[12] The *interim interdict* prayed for by Njemla was granted to be operative with immediate effect pending finalization of serious and consultative negotiations with all the parties. The counter review application by KSD municipality (the applicant) was dismissed. It

had become obvious that, particularly the municipality and the commission, had misconceived their roles as public servants and were taking points and exploiting technical loopholes against each other instead of co-operating in the spirit of co-operative governance.

[13] It was hoped that out of the 'serious and consultative negotiations' the two public bodies, in particular, would hammer out creative ways of engaging with all affected parties and reach consensus on how the unilaterally commenced developments could, nonetheless, be harnessed also to address service deliveries and benefits to adjoining communities including the poorer urban and rural sectors represented by the 1st and 2nd respondents in this application. This, afterall, is what is contemplated and stated as the vision and mission of the Act - 'to promote equity for victims of dispossession particularly the landless and rural poor'[3]

[14] The mountains went into labour and did not even produce the proverbial mouse. The negotiations broke down. In the order granting the *interim interdict*, it had been stated that in the event of the negotiations reaching an impasse, the KSD municipality was granted leave, if so advised, to make an application in terms of section 34 of the Act and hence the present application.

[15] **The Public interest**. In choosing to pursue the present application in terms of section 35 of the Act, the applicant has demonstrated a drastic and laudable change of mindset and attitude from the one adopted when it imprudently entered into potentially lucrative agreements with developers well aware of pending and possible claims upon portions of the land in question. In this application it has had to make a valiant effort to convince the court that granting the application would be in the 'public interest'.

[16] The term 'public interest' is not defined in the Act. It is not an easy concept with an exact meaning and is susceptible to narrow aswell as expansive connotations depending on the particular circumstances of any given case. In the present case the starting point, in this regard, is simply that 'public interest' is that which is in *the interest and benefit of the community or communities served by applicant municipality on the land in*

3 Mission statement in the Act.

question. The claimant respondents are included in this group irrespective of the validity of their claims. Should their claims be successful they will, of course, still be entitled to 'just and equitable redress' if the 'public interest' supersedes their constitutional right to restitution.

[17] It should be made clear, at the outset, that the acceptance of the above definition of 'public interest', as that which promotes the interests and benefit of communities of the land in question, then the developments, unilaterally agreed upon between the applicant and the 6th -10th respondents, do not measure up as being in the 'public interest' **in their present formats**. They were designed primarily to promote entrepreneurial pursuits of a few with minimal or peripheral outcomes to the communities served by the applicant particularly those with present and prospective claims to the land such as the First and Second Respondent.

[18] The applicant, in its affidavits, but not in its heads of argument, nonetheless, seeks to proclaim as being significantly in the 'public interest' the setting up of a retail complex, a casino and an upper class suburb. I do not agree. As I pointed out in the paragraph above, their **present format**, particularly in the shareholding, was not conceived or designed with any 'public interest' notions in mind.

[19] The much stronger argument in favour for the 'public interest' test submitted on behalf of the applicants is, not so much in the structure of the interdicted developments, but in the reality enunciated by this court (per MeerJ) in *Nkomazi Municipality v Ngomane Community* and Ors[4] at paragraph [29]

> "29. Then there is the reality that restoration of land within the towns could well require, as envisaged by ninth respondent, townspeople to be expropriated of their houses, the expropriation of schools, churches, parks and other facilities, as cold occur also in respect of the numerous businesses, industries and other economic activities in the town. Major social disruption, the avoiding whereof is advocated at section 33(d) of the Restitution Act, would be inevitable"

[20] Indeed, it appears to me that the intention of the legislature in enacting section 34 preventing restitution is, among others, precisely to avert the chaos that would follow

4 [2008] Jol 21379 (LCC)

were established cities and settlements suddenly carved up piecemeal into as many separate and disparate pieces and portions as these were claims.

[21] For the rest the applicants, surprisingly, spend a great deal of time and space attacking the perceived weakness in the merits of the claims themselves as if section 34(1) applied with greater force if the claimants or prospective claimants had more or less prospects of success on the merits. The determination of the validity or otherwise of the claims is a matter for adjudication by the court in due course. These remarks apply also to the review applications which have been superimposed upon the section 34(1) application which permits a ruling by the court on restoration *before final determination of a claim* (emphasis mine).

[21] **The opposing Respondents**

Ms Gabriel, on behalf of the first respondent, avers that it was incumbent on the applicant to demonstrate with evidence why and how the 'public interest' would best be served by the specific developments which are the key drivers to the application. In her view the applicant has failed to do so. On the other hand, the first respondent's land claim is critically important, is embedded in the Constitution and the Act and simply cannot be left out of the enquiry into where the 'public interest' lies. The First respondent community is, afterall, according to her, a significant sector of the public which the applicant serves. I agree wholeheartedly with these views. However, I do not agree that the curtailment of the First respondent's rights to restitution implies that their claim cannot and will not be dealt with as contemplated in the Act and in due course. The truncation of the First respondent's rights is only in respect of restitution and they would still be entitled to other forms of 'equitable redress' in terms of the Act if the claim is granted. This is exactly the curtailment envisaged in a section 34 application always provided the 'public interest' and the 'prejudice' tests have been fulfilled.

[22] The second respondent's position seeks, in the first instance, restitution of such portions of the land it claims as have not been developed. In the second instance consultation, participation and sharing in all forms of developments and projects within portions of the subject land in compliance*, inter alia,* with the tenants as set out, not only in terms

of the Act and the Constitution but also of the ministerial delegations that sanctioned the donation of the land to the applicant. It is clear form its founding affidavit that it harbours a deep mistrust in the applicant's ability to deliver in terms of the letter and the spirit of the above enactments or in the 'public interest.' This position is encapsulated, in part, in paragraph 11.3 of its founding affidavit.

> "11.3 The Zimbane Community, is not seeking restoration to itself of the city of Mthatha, and properties that are private hands. The community is aiming at being a partner in development and not the opposite."

It is clear to me that the opposition of the 2nd respondent is fundamentally against the perceived propensity on the part of the applicant to 'go it alone' when it comes to repeating the fruits (forbidden or otherwise) of development. In the circumstances, the 2nd respondent would rather that the undeveloped portions of land that it claims be restored to itself so that it may independently canvas, advertise and negotiate tenders on those portions. An attempt will be made in the orders to be given to address these particular concerns.

[23] The most serious and damaging apposition to the application(s) emanates from submissions made on behalf of 4th and 5th respondents. Apart from her answering affidavit and submissions the 5th respondent is, in terms of section 34 (2) obliged to investigate and submit a report to the court on the desirability of making an order that the land in question shall not be restored. Instead she submitted a report to the court emphatically on the undesirability of making such an order. The gravamen of her argument in opposing the section 34 application is that the claimants are entitled to the restoration of those parts of Remainder of Erf 912 which have not yet been developed. Further more, that feasibility is not a bar to the restoration of such portions and so, in terms of the Act, the case law and the Constitution, the primacy of restitution has been recognized notwithstanding the other forms of equitable redress that are available.[5]

---

5 *Khosi Community Lohatla v Minister of Defense* 2004 [5] S A 494 @ 505
Mphela and Others v Engelbrecht & others 2005 [2] All SA 135 (LCC) @ 184
Mphela v Haardoornbult Boerdery CC 200 [4] S A 488@ 501 Par [32]
Section 25 (7) The Constitution Act 108 of 1996

[24] Advocate Mbenenge SC, on behalf of the applicants, did not seek to support the 'public interest' requirement on the basis of the *interdicted* development agreements. The emphasis of his submissions, in this regard, were similar to those that won the day in the *Khosi* and particularly in the *Nkomazi* judgments. These are to the effect that even the partial restoration of portions of an established metropolitan city such as Mthatha would seriously disrupt and disintegrate the city's stability and development. The converse argument that follows is that the 'public interest' would be served by granting the order for non-restoration. I am entirely in agreement with this logic.

[25] Consequently, I find that it would be in the 'public interest' not to restore to any claimants any portion of the land within the jurisdiction of the applicant and constituting remainder of Erf 912 Mthatha. I find that it would, indeed, not be in the 'public interest' to restore or even reserve or excise any portion of the city as that could lead to chaos and possible upheaval resulting from competing claims to the city. The overlapping of claims might lead to serious problems causing to inter-community tensions and strife.

[26] **The public or any substantial part thereof will suffer substantial prejudice**. This requirement is, in this case, corollary to the 'public interest' threshold in that what has been shown to be in the 'public interest' will be prejudicial to that public if not granted. I accept the applicant's submissions that failure to grant the order could stifle or slow down development within the subject land due to uncertainty in the outcome of claims to the detriment of its entire communities. Financial institutions would be reluctant to provide any financial assistance, even where claimants consent to such development, to the detriment or substantial prejudice of many including the 1st and 2nd respondents. It is, furthermore, common knowledge that the finalization of land claims is often a very long process. I am satisfied that the public, or any substantial part thereof, will suffer substantial prejudice unless the order is granted. Accordingly, the section 34 application is to be granted.

[27] However, given the poor track record of the applicant in complying with the

spirit and the letter of the Delegations, the Constitution and the Act in the unilateral awarding of tenders to the 6th – 10th Respondents, the application will be granted subject to conditions to be set out presently.

[28] The conditions to be laid down seek to address particularly the concerns convincingly articulated in the opposing affidavits on behalf of the 1st, 2nd and 5th respondents. In addition, this court has, *mero motu*, taken judicial notice of the high levels of corruption, factionalism and greed that have assailed our national and local government structures such as might lead to chaos and social upheaval if not subjected to scrutiny and transparency.

[29] This finding makes it unnecessary to deal with the superimposed review applications or the declaratory. Suffice to opine that the submissions made in respect of the review applications invariably enter into the realm of the validity of the claims. That is the function to be adjudicated upon by the court once a fully researched claim has been referred to it in terms of section 14 of the Act. It is only then that the merits of the claims can be contested. Furthermore, in view of the application having been granted submissions are premature and will only be relevant when, and if, the court considers them.

[30] It is unnecessary to deal with the alternative prayer now that the main application has been granted. Its implementation, if still being pursued, will also be subject to the conditions to be laid down in respect of the granting of the main application.

ORDER:

The following order is made in terms of section 34(5)(C) of the Act.

i) The Remainder of Erf 912 Mthatha shall not be restored to any claimant or prospective claimant.

ii) All the prayers seeking the withdrawal, review and the setting aside of publication of notices in the Daily Dispatch and the Government Gazette by the 5th respondent are dismissed.

iii) The resumption and the initiation of all development projects upon any portion of the Remainder of Erf 912 Mthatha by the applicant shall only proceed with the full transparent and exhaustive consultation with the 4th, 5th and present and prospective claimant respondents.

iv) Developers and prospective developers must ensure that whatever agreements reached with the applicant in respect of Remainder Erf 912 Mthatha are in compliance with paragraph (iii) of this order and should revise and re-structure such agreements accordingly. They must also ensure compliance with the spirit and letter of the Delegation, the Constitution and the Act on the part of the applicant and the 4th & 5th Respondents.

v) The applicant and the 4th and 5th Respondents are ordered and are expected to take their responsibilities to the public seriously and take the initiative and lead in reaching consensus. They should jointly research projects and lay down the criteria for the advertising and acceptance of tenders for developments on the Remainder of Erf 912 Mthatha.

vi) There is no order as to costs.

JUDGE PRESIDENT F C BAM

I concur

_____

VIRGINIA GCOTYELWA MKAZA

Assessor

APPEARANCES

For the Applicant:

Adv S.M Mbenenge SC , Adv H Havenga & Adv AM Da Silva Instructed by *Mnqandi Inc.* in *Mthatha*

For the 1st Respondent:

Adv A. Gabriel Instructed by *Magigaba Inc*. in *Durban*

For the 2nd Respondent:

Adv P.G. Beningfield Instructed by *Nongogo Nuku Inc*. in *East London*

For the 4th & 5th Respondent:

Adv R. Vahed & Adv T. Seneke Instructed by the *State Attorney* in *East London*