

IN THE LAND CLAIMS COURT OF SOUTH AFRICA

CASE NUMBER: LCC26/10

CAPE TOWN

Before: Bam JP, Mpshe AJ

Decided: 19 May 2011

In the matter between

SADIEK SADIEN
EBRAHIM SADIEN

1st Applicant
2nd Applicant

And

JAZZ SPIRIT 12 (PTY) LTD

1st Respondent

YAMIV (PTY) LTD (in liquidation)

2nd Respondent

HEIN BADENHORST

3rd Respondent

THE REGISTRAR OF DEEDS

4th Respondent

RE: APPLICATION FOR DISCOVERY

JUDGMENT

MPSHE AJ

[1] On the 2 March 2011 first, second and third respondents launched a discovery application in terms of Rule 46(9)(a) of this court. This application was on an urgent basis. It is to compel the 1st and 2nd applicants to make further discovery on oath, within 10 days of the order being granted.

[2] In support of this application is an affidavit sworn to by the respondents' Attorney of record, Mr Johannes Petrus Du Plessis to which are various annexures.

[3] This court issued relevant directives pertaining to the setting down and final argument of the application. This application was argued on the 03 May 2011..

[4] The relief sought by the respondents is as follows:

- “ 1. Compelling the applicants to make discovery on oath, within ten days hereof, of the following documents which the said Respondents believe are or were in their possession or under their control and which are relevant to the issue in this matter.-
 - 1.1 Any and all documentation supporting the *locus standi* of the applicants (and all persons who stand to benefit from any resultant order) as required by section 2(10) of the Restitution of Land Rights Act 22 of 1994 (“the Restitution Act”)
 - 1.2 All relevant documentation and correspondence relating to:
 - 1.2.1 All of the applications and/or requests by all the claimants to the Land Claims Commissioner (“the LCC”) AND FOR THE Regional Land Claims Commissioner (“ the RLCC”) to change their claims from that of ‘individual claims’ to a ‘family claim’;
 - 1.2.2 All relevant documentation relating to the time and manner in which the decision(s) was (were) made by the LCC and /or the RLCC to condone and/ or accede to the claimants’ change of claim from that of individual claimants to a ‘family claim’; and
 - 1.2.3 The statutory provisions in the Restitution Act and/or any Rules promulgated thereunder, if any, that provide for the submission of a so-called ‘family claim’ together with the minutes of all meetings of all the officials concerned with making any decision as well as all written memoranda, notes and reports relating to any decision.
 - 1.3 All supporting documentation regarding every family member of the ‘Sadien Family’ that stands to benefit from this ‘family claim’
 - 1.4 All documentation and correspondence to and by the LCC and /or RLCC relating to the application by the claimants to change their claim from on for “*Alternative State Land* to the “Restoration of Remainder Erf 2274 Constantia” (“the property”) as well as all documents , including minutes of meetings, notes and/or reports by any official in taking a decision relating thereto together with all decisions and the reasons advanced and relied upon.
 - 1.5 Any and all records of correspondence and documentation of attempts by the LCC and /or RLCC to secure alternative state land and why and how such land was considered and rejected. In particular, records of correspondence and related documentation in respect of each of the following identified state properties in the Constantia area and the reasons why they failed to be considered appropriate for the purposes of settlement of the Applicants’ claim;
 - 1.5.1 Erf 142 Constantia (off Brommersvlei Road) held by RSA under T12412/1996 measuring 8.9113 ha;
 - 1.5.2 Erf 1783 Constantia (Weltevreden Road) held under T22942/1967 by RSA measuring 2,6403 ha;
 - 1.5.3 Erf 3110 Constantia (Strawberry Lane) held under T27158/1971 measuring 3, 5509 ha; and
 - 1.5.4. Erf 1061 Bergvliet (Ruskin Road) held by RSA under T23258/1967 measuring 3, 8708 ha.
 - 1.6 Any and all documentation and correspondence regarding the substantiation of the opinion by the LCC that the relief currently sought by the Applicants is the most feasible solution, together

with all notes, memoranda, minutes of meetings and the decisions taken with regard thereto.

- 1.7 Any and all documentation and correspondence substantiating the opinion of the LCC that this claim is incapable of being settled or of being resolved by way of either mediation or negotiation, and any record of correspondence indicating that they have attempted to settle this claim in any way.
- 1.8 All records and documentation upon which the LCC and the applicants may rely in support of their allegation of lack of good faith by any or all the competent authorities involved in the approvals of the development plans of the property, as well as any such documents reflecting on the conduct demonstrating any act of bad faith by any of the said respondents.
- 1.9 Any and all supporting documentation supporting the opinion of the LCC and the applicants that the planning approvals authorized by the relevant departments and authorities were granted unlawfully and without any merit and in particular any documentation relating to:-
 - 1.9.1 Whether (or not) the State Attorney and the applicants consulted the relevant departments and/or authorities before forming the opinion that the approvals were granted unlawfully;
 - 1.9.2 The steps that the LCC and/or RLCC and/or the applicants took in ascertaining whether (or not) the approvals were done unlawfully;
 - And
 - 1.9.3 the State Attorney's instruction to the applicants' experts to investigate the opinion of the LCC and/or authorities were unlawfully influenced in some way by any of the said respondents in granting the approvals;
- 1.10 Any and all documentation and records substantiating one or more of the following grounds of the review as required by section 6 of the Promotion of Administrative Justice Act No.3/2000("PAJA"), namely:-
 - 1.10.1 that the administrator who took the action-
 - i) was not authorized to do so by the empowering provision;
 - ii) acted under a delegation of power which was not authorized by the empowering provision; or
 - iii) was biased or reasonably suspected of bias
 - 1.10.2 That the mandatory and material procedure or condition prescribed by an empowering provision was not complied with;
 - 1.10.3 That the action was procedurally unfair;
 - 1.10.4 That the action was materially influenced by an error of law;
 - 1.10.5 That the action was taken :-
 - i) for a reason not authorized by the empowering provision
 - ii) for an ulterior purpose or motive;
 - iii) because irrelevant considerations were taken into account or relevant considerations were not considered;
 - iv) because of the unauthorized or unwarranted dictation of another person or body;
 - v) in bad faith; or
 - vi) arbitrary or capriciously;

- 1.10.6 That the action itself:-
- i) contravenes a law or is not authorized by the empowering provision; or
 - ii) is not rationally connected to
 - (a) the purpose for which it was taken
 - (b) the purpose of the empowering provision;
 - (c) the information before the administrator; or
 - (d) the reasons given for it by the administrator;
- 1.10.7 That the action concerned consists of a failure to take a decision;
- 1.10.8 That the exercise of the power of the performance of the function authorized by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; or
- 1.10.9 That the action is otherwise unconstitutional or unlawful
- 1.11 Any and all supporting documentation of the advertisement(s), as required by the Act, of all for individual claims to the Remainder of Erf 22274, Constantia, before they were purportedly consolidated into a 'family claim'.
- 1.12 All records and documentation of all immovable property owned at any time by the five original Sadien brothers (the original owners).
- 1.13 All records and documentation relating to the financial position of the original owners at the time of the sale of the property.
- 1.14 Any and all documentation and reports as to why the LCC and/or RLCC is of the opinion that it would be feasible, and beneficial to either party, to remove the existing infrastructure on the property which is valued in excess of R25M.
- 1.15 Any and all correspondence, emails, reports, notes and memoranda between Ms Jennifer Williams and Mr Daniel Malan Jacobs in or about March 2003.
- 1.16 Any and all correspondence between LCC and or the RLCC and the legal representatives of the late Magmoed Sadien relating to the remainder erf 2274 Constantia and the claims for restitution in respect thereof.
- 1.17 Any and all documentation by, from or relating to JJ Hofmeyer and Son (Pty) Ltd and/or Mr Hablutzet regarding the sale and the financing thereof, transfer, or otherwise of the property (in any or all of its descriptions prior to being known as Remainder Erf 2274 Constantia).

[5] The founding affidavit demonstrates the process followed by the respondents to secure access to documentation relevant to the man application. The sum total of this affidavit is the frustration encountered in the path of securing documents for the respondents in preparation for trial

[6] I do not intend dealing with this affidavit in its entirety.

- [7] Perusal of paragraphs 13 to 14 of the Founding Affidavit reveals the rationale for this application. I quote the relevant paragraphs hereunder as follows:

“1.3 I disagree strongly with the manner in which Mr Rivett-Carnac and myself have been denied access to the relevant documents and therefore require the applicants to make a discovery thereof and to provide us an opportunity to gain access to the aforementioned relevant files and documentation.

1.4 I humbly submit that given the wide ranging attack of the applicants on the validity of the authorization granted to the first respondent by the competent authorities to develop the property it has become necessary to be fully prepared on all of the documents which applicants intend to rely for their contentions that the respondents (and /or the relevant authorities) have acted unlawfully and/or in bad faith with regard to the claims for restitution on the property. To this end the categories, documents that are relevant have been listed in the notice.”

[8] **The law**

Rule 46(9) (a) reads:

- (a) any party may apply to the court-
for an order that a party that was required to make discovery under sub rule (1), make further discovery if the prior discovery is insufficient and incomplete. (My underlining)

The documentation sought to be discovered cover a wide range of issues. Closer scrutiny of relief sought demonstrates, in my mind a *prima facie* relevance to the main application and the interdict therein.

- [9] In *Moulded Components & Rotomoulding South Africa (Pty) Ltd v Coucorakis & Another* 1979 [2] SA @ 457 the court held that the rules are there to regulate the practice and procedure of the court in general terms and strong grounds would have to be advanced to persuade it to act outside of the powers provided for the specifically in the Rules. Its inherent powers must be exercised sparingly. The court will come to the assistance of an applicant outside the provisions of the rules when the court can be satisfied that justice cannot be properly done unless relief is granted to the applicant. Held further, in granting the application, that the court should impose suitable conditions relative to the inspection so as to protect the respondents as far as might be practicable. (My underlining).

The purpose of discovery is indicated in the case of *Durbach v Fair Way Hotel Ltd*

1949[31] SA 1081 S-R @ 1083 as follows:

“to ensure that before trial both parties are made aware of all documentary evidence that is available. By this mean the issues are narrowed and the debate of pints which are incontrovertible is eliminated.”

It is trite that discovery assists the court to arrive at a just determination of the issues speedily, thereby saving costs.

[10] The applicants did not argue that the documents sought to be discovered are not necessary and irrelevant, neither do applicants deny that respondents have not been put in possession of documents they seek.

[11] In opposition to the application applicants raise a procedural defence.

[12] Mr Jacobs for the respondent argued that Rule 46(9) (a) of the rules of this court have not been complied with.

[13] Counsel contended that Applicant had not obtained leave of the court first and that the notice requiring discovery was not served. I am in agreement with this argument. However, much as I agree with counsel and that the point is well taken, this defense is not fatal to the application. It is the practice of this court not to be entangled in technicalities.

[14] The sub-rule contemplates a situation in which prior discovery has been demonstrated to be insufficient or incomplete. It does not lend itself to the request of each and every conceivable document presumed to exist in the case but only to such documentation, if available, as will enable litigants to ‘formulate and articulate their defences’.¹

[15] It would appear that the sub-rule as indicate *supra* presupposes knowledge of what was discovered prior to the application under Rule 46(9) (a). The court could not find any indication of documents previously discovered in order to determine the insufficiency or incompleteness thereof.

[16] The application was triggered off by a perceived discrepancy when comparing

¹ *Ingledeu v Finanial Services Board* 2003 (4) SA 584 (CC)

documentation obtained from State Attorney to that to be found in the files of the Commissioner.

- [17] The sub-rule does not cater for the discovery of documents not linked to what was discovered before. The rule does not cater for the discovery of documents to prove each and every allegation. That is the role of evidence.
- [18] I find it difficult to accept that every incident or action taken or even mentioned must, as of necessity, be backed up by documentation.
- [19] In illustration of the above I refer *inter-alia* to prayer 1.2, 1.6, to the application which reads:
- “1.2 All relevant documentation and correspondence relating to:
- 1.2.1 All of the applications and/or requests by all the claimants to the Land Claims Commissioner (“the LCC”)/ AND FOR THE Regional Land Claims Commissioner (“ the RLCC”) to change their claims from that of ‘individual claims’ to a ‘family claim’;
- 1.2.2 All relevant documentation relating to the time and manner in which the decision(s) was (were) made by the LCC and /or the RLCC to condone and/ or accede to the claimants’ change of claim from that of individual claimants to a ‘family claim’; and
- 1.2.3 The statutory provisions in the Restitution Act and/or any Rules promulgated thereunder, if any, that provide for the submission of a so-called ‘family claim’ together with the minutes of all meetings of all the officials concerned with making any decision as well as all written memoranda, notes and reports relating to any decision.”
- [20] This application lacks specification. The documentation sought is not clearly defined. The respondents sought to lay some specification to the documents sought. This was done by alluding to the incidents or events that might have occurred. However, despite all these attempts I find vagueness in the application.
- [21] It would seem that the existence or otherwise of the documents to be discovered is based on, *inter-alia*, suspicion, presumption or even inferences. That crucial existing documents have been deliberately withheld. I am not persuaded that it is so².
- [22] In illustration of paragraph 21 *supra* I refer *inter-alia* to paragraph 9 of the founding

² Continental Ore v Highveld Steel and Vanadium Ltd. 1971 (4) SA 589 (a) 598 F-G

affidavit and 11.2 of the replying affidavit. Where the following appears:-

9 Furthermore, and in preparation for the upcoming hearing, a provisional appointment had been set up by the Respondents' valuer, Mr. Steyn Rivette-Carnac ("Mr. Rivett-Carnac") with Mr. Hablutzel (the erstwhile auctioneer for the property) and myself on 08 February 2011 in order to ascertain whether there was any further relevant documentation or information on the books of JJ Hofmeyr (the auctioneers of the property) other than that which the Applicants' valuer had uncovered previously, and which might be of assistance to the Court in making an informed decision.

11.2 It was Adv. Krige and not Hablutzel himself who prohibited me from speaking to him, and more importantly, to ascertain whether he might have further relevant documentation relating to the case at hand. At the time that an appointment was set up with Mr Hablutzel, I was unaware that the Applicants intended calling him as a witness. In any event, as stated in paragraph 9 of my affidavit filed on 2 March 2011, the purpose of the event was "to ascertain whether there was any further relevant documentation or information on the books of J J Hofmeyr.....other than that which the Applicants' valuer had uncovered previously....".

[23] Much has been said about the interview with Hablutzel. Perusal of both the founding and replying affidavit does not reveal that certain specific documents were being sought from Hablutzel. It was an attempt to enquire as to the existence or otherwise of documents. This whole saga, in my mind, has no place in the provision of the sub-rule.

Prejudice if application is refused.

[24] It needs to be remembered that this application was launched after the trial had already commenced. This means that respondents had a lot of information enabling them to commence with the trial.

[25] I have no doubt that certain of the evidence so far led has satisfied some of the relief sought neither do I doubt that evidence still to be tendered may respond to the relief

sought.

[26] I, therefore, conclude that no prejudice will befall the respondents.

[27] It is patently clear from the record, that the respondents are able to formulate and articulate their defences with what has already been discovered, albeit informally, and that which was supplied in the reply to further particulars.

In the circumstances, it follows that I would order that the application be dismissed with not order as to costs.

Consequently I would order as follows:

- i) Application is dismissed
- ii) No order as to costs.

J.M MPSHE
ACTING JUDGE

I concur and it is so ordered.

F.C BAM
PRESIDING JUDGE

