

IN THE LAND CLAIMS COURT OF SOUTH AFRICA

Held at **RANDBURG** on 12 & 13 June 2012
before **Mpshe AJ**
Decided on: 31st July 2012

CASE NUMBER: LCC18/2008

In the case between:

**THE TRADITIONAL AUTHORITY OF BAPO BA
MOGALE COMMUNITY**

Applicant

and

**THE MINISTER OF AGRICULTURE AND LAND
AFFAIRS**

1st Respondent

**THE CHIEF LAND CLAIMS COMMISSIONER FOR
GAUTENG & NORTH WEST**

2nd Respondent

DAVID NONBERT RAMOHANOE

3rd Respondent

THE BAKWENA BA MOGOPA COMMUNITY

4th Respondent

WESTERN PLATINUM LIMITED

5th Respondent

MPO HILDA TLHAPI

6th Respondent

JUDGEMENT

MPSHE AJ:

Introduction

This is an application to make final an interim interdict granted by the court on 6 March 2008.

Parties

Applicant is the traditional authority established in terms of the North West Traditional Leadership & Governance Act 2 of 2005. The applicant is the administrator of the Bapo Ba Mogale Community within the Brits Magisterial district. The applicant is in control and

administration of the land under claim by third respondent. The first respondent is the Minister of Agriculture & Land Affairs in whose jurisdiction matters regarding land issues reside.

Second respondent is the Land Claims Commissioner for the provinces of Gauteng and North West. The second respondent is charged with receiving and processing of land claims.

Third respondent lodged a land claim on behalf of the Wonderkop Land Claim Committee and is chairperson thereof.

Fourth respondent is the community under the headmanship and control of the applicant.

Fifth respondent is a mining business concern cited as an interested party with its business situated on the land under claim.

Sixth respondent is a member of the fifth respondent under the rulership of the applicant.

Background

[1] On the 13 February 2008 the applicant launched an application against the respondents for the following relief:

1. "That in terms of rule 34(1)(a) of the rules of this court the times for delivery of a notice of appearance and affidavits are dispensed
2. That the First and Second Respondents are hereby interdicted and restrained from taking any steps to further the process of the restitution to the Third Respondent of Portions 1, 3, 4, 5 and 6 of the farm Wonderkop 400 JQ District Odi North West Province and/or any of the portions thereof (the Property), in terms of the Restitution of Land Rights Act No. 22 of 1994 (the Act) and /or transferring the Property to the Third Respondent or any other person or legal entity pursuant to the claim lodged by the Third Respondent in terms of the Act.
3. That the rule *nisi* is issued calling on all the respondents to show cause on a date fixed by the Presiding Judge why the interdict set out in paragraph 2 above should not act as an interim interdict and order pending the final outcome of the application to be brought by the Applicant as set out in paragraph 4 below.
4. Within 30 days of the grant of the order in terms of paragraph 3, the Applicant is to bring an application for review of the decision of the Second Respondent to approve the claim of the Third Respondent to the Property in terms of the Act and/or further alternative relief and costs. Should the application referred to in paragraph 3 not be brought timeously, the interdict in paragraph 2 shall fall away.
5. Further or alternative relief.
6. Costs of this application".

[2] The respondents entered appearances to participate, but only fourth respondent filed answering affidavits.

[3] The application was launched as a result of a visit to the applicant by two officials of the second respondent, the Chief Land Claims Commissioner for Gauteng and North West provinces.

[4] It emerged that the purpose of the visit by the two officials was to inform the applicant about a land claim lodged by the third respondent on the 23rd December 1997. The land claimed is Portion 1, 3, 4, 5 and 6 of the farm Wonderkop (the Property).

[5] During the visit it was confirmed that the claim was successful and would be transferred to the Wonderkop Land Claim Committee at the end of March 2008. The said property measuring 619 9545 hectares and constituting 55% of the total property controlled by the applicant would then be given to claimant community. This meeting/visit took place on 11 December 2007.

[6] The applicant was then given a document referred to as the *Research Report on the Property Wonderkop 400 JQ* situated in the Bojanala District of Rustenburg in the North West Province.

[7] The urgent application served before my brother the late Bam JP (as he then was). As a result of negotiations among the parties a court order was granted on 6 March 2008. It is important to quote the order in whole for reasons that will be evident later on:

“By agreement between the parties, it is ordered that:

1. In terms of Rule 34(1)(a) of the Rules of this Court, the times for the delivery of a notice of appearance and affidavits are dispensed with and this application is heard as a matter of urgency.
2. The first and second respondents are hereby interdicted and restrained from;
 - 2.1 taking any steps to further process the restitution to the third respondent of Portions, 1, 3, 4, 5 and 6 of the Farm Wonderkop 400JQ District ODI North West Province and any of the portions thereof (the Property), in terms of the Restitution of Land Rights Act No. 22 of 1994 (the Act), save for the purpose and only for the purpose of the referral under section 14 of the Act as set out hereunder; and
 - 2.2 transferring the Property to the Third Respondent or any other person or legal entity

pursuant to the land claim gazetted in terms of section 11(1) of the Restitution of LAND Rights Act, Act 22 of 1994 (“the Act”) under Government Gazette No.668/2005 in respect of the property.

3. The interdict set out in paragraph 2 of this order shall act as an interim interdict and order pending the final outcome of the Regional Land Claims Commissioner for Gauteng and North West referring the land claim gazetted in terms of section 11(1) of the Restitution of Land Rights Act, Act 22 of 1994 (“the Act”) under Government Gazette No. 668/2005 in respect of Portions 1, 3, 4, 5 and 6 of the Farm Wonderkop 400, Registration Division J Q to this Honourable Court in terms of section 14(1) and (2) of the Act, read with rule 38 of this Honourable Court’s Rules by no later than 7 April 2008 and such referral to furthermore comply with paragraph 4 below.
4. By no later than 7 April 2008
 - 4.1 the second respondent shall have done all things necessary to comply with the provisions of section 14 of the Act and shall have certified that the conditions set out in section 14(1) of the Act have been met;
 - 4.2 the claim referred to this Honourable Court by the Second Respondent shall be accompanied by the documents required under section 14(2) of the Act;
 - 4.3 the claim referred to this Honourable Court by the Second Respondent shall clearly and concisely identify the Community and its members on whose behalf the claim is gazetted as aforesaid was made, when precisely the Community was dispossessed (and if on more than one occasion, when each occasion occurred), precisely what racially discriminatory laws or practices resulted in such dispossession (and in each instance, if more than one), from which land such Community was dispossessed, what the nature of the act of dispossession was and where the Community was removed.
 - 4.4 The second respondent shall produce and provide copies to all other parties hereto of all documents in its possession relevant to the claim in issue, including all correspondence, reports, recommendations and submissions which are in its possession or under its control and where the privilege is claimed to identify the document and state the basis upon which such privilege is claimed. Furthermore, such documents are to include all those relevant to the second respondent’s decision that the second respondent was satisfied that the provisions of section 11(1) of the Act were complied with and all documents and correspondence regarding all steps and decisions taken by the second respondent subsequent to all its aforesaid decision to date hereof in relation to the

- aforesaid claim which the aforesaid Section 11(1) Gazette Notice relates
5. Should the second respondent fail to comply with the order contained in paragraphs 3 and 4 by 7 April 2008 as aforesaid, then the second respondent shall within 10 days from 7 April 2008, serve on all the parties and file an application to this Court;
 - 5.1 seeking an extension on good cause shown of the period within which to comply with the order contained in paragraph 3 and 4 and;
 - 5.2 failing such application, any party shall be obliged to show cause within a further ten day period why the interim interdict in paragraph 2 should not be made final.
 6. The identity of second respondent is amended wherever the same appears by substituting the word "Chief" with the word 'Regional'."

[8] The second respondent filed the referral in terms of section 14(1)(2) of the Restitution of Land Rights Act, Act 22 of 1994 (the Act) on 18 April 2008. Albeit late, it was in compliance with contents of paragraph 3 of the court order. The rest of the processes were followed as prescribed by the Act.

Matter Before this Court

[9] On 10 September 2009, the applicant initiated an application by notice of motion for the following orders:

- “1. that the interim interdict and order granted by this Court on 6th March 2008 is made final, and that the First and Second Respondent’s are finally interdicted and restrained from
 - 1.1 taking any steps to process the restitution to the Third Respondent of portions one, three, four, five, six of the farm Wonderkop 400 JQ district ODI North West Province 9the Property), and any portions of the Property, in terms of the Restitution of Land Rights Act No. 22 of 1994;
 - 1.2 transferring the Property or any part thereof to the Third Respondent or any other person or legal entity pursuant to the land claim gazette in terms of section 11(1) of the Restitution of Land Rights Act No 22 of 1994 under Government Gazette no. 668/2005 in respect of the Property.
2. that the Second, Third and Sixth Respondents pay the costs of this application jointly and severally, the one paying the other absolved.”
3. that the second, third and sixth respondents pay the costs of thee application which led to the granting of the interim interdict and order dated 6 March 2008 as claimed in the Notice of Motion relating thereto and as argued on 6 March 2009.
4. Further or alternative relief.”

[10] This matter was served and argued before my late brother the late Bam JP (as he then was). The matter was heard on 19 October 2010; 11 and 12 August 2011; and 20 September 2011, and judgment was reserved. Unfortunately my brother the late Bam JP passed on before delivering judgment.

[11] This application was then served before me and argued before me on 12 and 13 June 2012.

[12] On 12 June 2012, the applicant argued a point in *limine* directed against the second respondent's participation in the current application. I gave a ruling and committed to giving reasons for my ruling as I herein do.

[13] The applicant's point in *limine* was to the effect that the second respondent should not participate in this application before me because the cause of the application is as a result of the third respondent's actions and the second respondent's participation herein is to be restricted to the issue of costs only. This cannot be correct.

[14] Rule 26(1) (a) & (b) of this court provides as follows:

Right to participate in cases:

- 1) A Party that-
 - (a) Has initiated a case as described in rule 23;
 - (b) Has filed a notice of appearance in accordance with these rules;"
- 2) Only a participating party in a case is entitled to-
 - (a) deliver and file documents;
 - (b) have documents delivered to him or her;
 - (c) participate in any procedures before the hearing;

The second respondent had documents served on him and vice versa. The second respondent participated in all proceedings before the hearing in both the initial urgent application and the current.

[15] It is important to note the relief sought is predominantly against the second respondent. This is clear from prayers 1, 1.1, and 1.2 of the notice of motion. It would be absurd to suggest that the second respondent is to fold his/her arms and watch his/her legal right argued and be affected by the results¹ whilst not allowed to

¹ *Haroum v Garlick* 2007 [2] 627 C

participate in the litigation.

The second respondent clearly has a direct and substantial interest in both the subject matter and the outcome of the application and it would be ludicrous if its participation therein were to be barred. The point in *limine* accordingly cannot be upheld. These are my reasons for the ruling on the point in *limine* raised by the applicant.

Rationale for this application

[16] Mr Eiser for the applicant submitted that the *interim* order granted on 6 March 2008 should be made final as the third respondent had withdrawn his land claim: thereby ending the matter, and making it possible for the *interim* order to be made final.

[17] The applicant relies on various correspondences between the legal representative of the applicant and the third respondent as well as the version of the deponent Zolile Abel Dlamini in the founding affidavit. I have to quote the relevant correspondence leading to this application:

Letter from the Wonderkop Land Claims Committee to Savage Jooste & Adams Attorneys dated 6th May 2009: Re: withdrawal of Case LCC WONDERKOP 400JQ

(i) “ After a meeting held between the Land Claims Committee of Wonderkop and the newly appointed administrator for the Bapo Ba Mogale Tribe on the 4th May 2009, it was resolved:

1. that the case at the Land Claims Court be withdrawn with immediate effect
2. that Uyser Attorneys to communicate with Savage, Jooste, Adams Attorneys about the withdrawal.
3. That the costs incurred be forwarded to the Wonderkop Land Claims Committee for discussion with the administrator, by the representative attorneys being Savage, Jooste and Adams”.

Letter from Savage Jooste & Adams Attorneys to Eiser & Kantoor attorneys dated 12th May 2009:

(ii) “Kindly note that we have been informed by our client that the Land Claims Committee of Wonderkop have instructed yourselves that they will no longer be proceeding with the matter in the Land Claims Court. We thus consider the matter to be finalized and will now proceed to close our file.”

Ex Parte Beukes v Bekker 1998 [1] ALL SA 34
Department of Land Affairs v Goedgelegen Tropical Fruits 2007 [6] SA 199 (CC) @ paragraph 68

Extract from the Founding Affidavit of Zolile Abel Dlamini

- (iii) “7.7 I have met with the leaders of the Wonderkop Community who confirm that the claim is not being proceeded with.

8.8 In terms of FA6 the Third and Sixth Respondents withdrew their claim following from the First referral, which withdrawal has been confirmed.

9.1 The Applicant accordingly submits there is no referral before this Court and, therefore, there is no dispute between the Applicant and anyone else in terms of the Restitution of Land Rights Act, for adjudication by this Court.”

[18] Counsel for the applicant argued that the correspondence and paragraphs from the founding affidavit demonstrate that the referral had been withdrawn. Counsel for the respondents disputes the interpretation and state the land claim is not withdrawn

[19] I am called upon to find that the claim lodged by the third respondent has been withdrawn and that consequently the interim interdict can be made final. I will not make any finding as sought, but will give the analysis of the correspondence referred to in [17] above. The reason(s) for not making such a finding will be evident in due course. I hasten to state herein that the decision I shall arrive at will not be based on the withdrawal or otherwise of the claim.

[20] Perusal of letter dated 12th May 2008 from Savage Jooste & Adams suggests that the claimants, Wonderkop Committee, have decided not to proceed with the claim. It does not suggest, as argued by counsel for the applicant that the claim has been withdrawn. The letter dated 6th May 2008 from Wonderkop Land Claims Committee does not disclose any withdrawal. This letter instead records a resolution taken to withdraw. Again, it does not state unequivocally that the claim has been withdrawn. The founding affidavit falls to be understood and interpreted in the same way as the aforesaid letters.

[21] Mr Shakoane for the second respondent and Mr Mojapelo for the third respondent, argued that a withdrawal may only be done under Rule 27 to the rules of this court. After much protracted submissions it was agreed by the parties that the third respondent representing the Wonderkop Land Claims Committee is not an “initiator” and thus rule 27 is not applicable. I will let the matter rest there.

Circumstances under which interim order may be made final

[22] The requirements laid out in *Setlogelo v Setlogelo*² must be established by an applicant in order to succeed in obtaining a final interdict are trite. These are:

- “(a) a clear right;
- (b) an injury actually committed or reasonably apprehended; and
- (c) the absence of similar or adequate protection by any other ordinary remedy.”

As set out in *Lipschitz v Watrus No*³, a clear right “must establish a ‘legal right’ vesting in the applicant”. In this case, the applicant now requesting a final *interdict*, must demonstrate to the court that he has a clear, substantive, and enforceable legal right to the final interdict. Applicant has not shown that the claim has actually been withdrawn and has not established a clear right to the interdict he seeks.

[23] The applicant has failed to establish the second requirement for the granting of the final interdict. He has not shown an injury actually committed or reasonably apprehended. On the contrary it is common cause that the terms of the interim order granted by Bam JP on 6 March 2008, have been complied with. The applicant has in the circumstance suffered no injury or damage, nor can apprehend same.

[24] In addition to failing to meet the requirements for a final *interdict*, the issue in this case is moot. The mootness doctrine is applicable to cases where there is no longer an “existing controversy or [an existing] prejudice or threat of prejudice,” basically to any case where the underlying issues in dispute have been resolved.⁴

In *President of the Ordinary Court Martial N O v Freedom of Expression Institute*, it was held that case is found to be moot only when there is no active controversy between the parties, and it is also not relevant to society as a whole.⁵ Furthermore, Oliver JA and Howie JA have interpreted section 21A of the Supreme Court Act as asking “will the judgment or order have a practical effect or result?”⁶ In this matter before this court there is no active controversy as the interim interdict has been complied with. By granting or denying a final interdict, this court will not be deciding an issue relevant to the parties nor to society as a whole. In essence, a grant or denial will have no practical effect.

2 1924 AD 221 @ 227

3 1980 [1] SA 662 [T] @673 D

4 Stuart Woolman, *et al. The Constitutional Law of South Africa* [2nd edition 2012] 7-18

5 1999[4] SA 682 CC

6 *Premier, Provinsie Mpumalanga en 'n Ander v Groblersdalse Stradsraad*, 1998[3]1 SA 1136, 114D-F SCA; & *Western Cape Education Department & Another v George*, 1998[3] SA 77, 84D-E SCA

[25] It is trite that in making an *interim interdict* final, a court is confined to the contents of the court order providing for the interim interdict. The essence thereof is that the court has to assess compliance with the interim order. It cannot be correct as argued by Mr Eiser that the court is allowed to consider factors outside the interim order to grant a final order. I note that the withdrawal of the claim was not an aspect canvassed in the granting of the *interim* order.

[26] In the light of all the above I am of the opinion that the application stands to be dismissed.

Costs

[27] The applicant filed an application on an urgent basis on 13 February 2008 (1st application) as a result of the attitude of the second respondent duly represented by its two officials. The matter was not argued, but settled whereupon an interim interdict ensued. The evidence is clear that the property was to be transferred to Wonderkop Committee in the near future despite non-compliance with section 2 of the Act. The applicant had to act as it did to protect the interest of the community.

Having considered the evidence and the submissions, I make the following order:

Order

1. The application is dismissed.
2. The 2nd respondents shall pay the costs of the first application culminating in an *interim* order dated 6 March 2008.
3. I make no order as to costs regarding this application.

ACTING JUDGE M J MPSHE

For the applicant

Mr Eiser instructed by *Eiser & Kantoor, Pretoria.*

For the respondents

Adv G Shakoane for the 1st and 2nd Respondent, *Johannesburg*

Adv M Mojapelo for the 3rd Respondent, *Pretoria*