IN THE LAND CLAIMS COURT OF SOUTH AFRICA

Held at **RANDBURG** **CASE NUMBER**: **LCC119/2010**
before Loots AJ
Decided on: 17 August 2012

In the case between:

JOHN BUTI MATLADI on behalf of the **MATLADI FAMILY**	1st Applicant

and

ANGLO RAND HOLDINGS LTD	1st Respondent
RESILENT PROPERTIES (PTY) LTD	2nd Respondent
PEERMONT GLOBAL (TUBATSE) (PTY)	3rd Respondent
GILLYFROST 56 (PTY) LTD	4th Respondent
GREATER TUBATSE LOCAL MUNICIPALITY	5th Respondent
THE REGIONAL LAND CLAIMS COMMISSINER OF LIMPOPO	6th Respondent
ALL TITLE HOLDERS OF VARIOUS PORTIONS OF LAND IN THE FARM LEEUVALLEI 297 KT	7th Respondent
GEDEELTE 19 VAN DIE PLAAS LEEVALLEI CC	8th Respondent

JUDGEMENT

LOOTS AJ:

[1] The applicant has applied for leave to appeal against a judgment that I delivered on 16 January 2010. In my judgment I dismissed an application by the applicant for an interdict to prevent any further development on land which is subject to a claim lodged by his late mother in terms of the Restitution of Land Rights Act 22 of 1994 (the Act). The interdict was claimed in terms of section

6(3) of the Act. I will deal with each of the grounds upon which leave to appeal is sought, as set out in the applicants Notice of Application for leave to appeal and echoed in the Applicants Heads of Argument.

Finding that section 11(7)(aA) notices were given by the 1st to 4th respondents

[2] The applicant takes issue with my finding that these notices were given. Section 11 of the Act provides that if the commissioner having jurisdiction is satisfied that the provisions under 11(1) of the Act are met, the commissioner "shall cause notice of the claim to be published in the *Gazette* and shall take steps to make it known in the district in which the land in question is situated."

Section 11(7)(aA) provides:

> "(aA) no person may sell, exchange, donate, lease, subdivide, rezone or develop the land in question without having given the regional land claims commissioner one month's written notice of his or her intention to do so, and, where such notice was not given in respect of-
> (i) any sale, exchange, donation, lease, subdivision or rezoning of land and the Court is satisfied that such sale, exchange, donation, lease, subdivision or rezoning was not done in good faith, the Court may set aside such sale, exchange, donation, lease, subdivision or rezoning or grant any other order it deems fit;
> (ii) any development of land and the Court is satisfied that such development was not done in good faith, the court may grant any order it deems fit".

[3] In paragraph [20] of the judgment, I held that a letter dated 25 April 2007 addressed by the attorney acting for the first to fourth respondents to the Regional Land Claims Commissioner: Mpumulanga is evidence that notice as contemplated in section 11(7)(Aa) of the Act was given. The applicant argues that the letter dated 25 April 2007[1] cannot be evidence that section 11(7)(aA) notices were given for the reasons set out in the paragraphs which follow.

[4] First, the applicant contends that this letter cannot suffice because it was written only on behalf of the 1st respondent, Anglo Rand Holdings Ltd, and not on behalf of the 2nd to 4th respondents. In the founding affidavit it is alleged that,

1 Annexure "RB9" to the opposing affidavit made on behalf of the 1st to 4th respondents.

to the best of the deponent's knowledge, the second to fourth respondents are subsidiaries of the 1st respondent. In response to this allegation the deponent to the to the opposing affidavit made on behalf of the 1st to 4th respondents denies that the 2nd and 3rd respondents are subsidiaries of the 1st respondent and states that '[t]he First to Fourth Respondents are independent companies, which are involved in business dealings with each other on an equal footing.' While the letter mentions only the name of the 1st respondent, it refers to all the portions of land owned by the 1st to 4th respondents which are in issue. The founding affidavit identifies the portions of land owned by 1st to 4th respondents by referring to the allegations made in an affidavit deposed to in case number LCC 157/2008. The attorney who wrote the letter acts for all four companies. I am satisfied that this constituted adequate notice to the Regional Land Claims Commissioner.

[5] Secondly, the applicant contends that the letter was addressed only to the Regional Land Claims Commissioner for Mpumalanga (RLCC Mpumulanga) and not to the Regional Land Claims Commissioner for Limpopo (RLCC Limpopo). I dealt with this in paragraph [11] of the judgment, where I explained that the land at issue was previously within the boundaries of the Mpumulanga province, but, as a result of redemarcation of the boundary, it now falls within the Limpopo province. There is no evidence before the court as to when the redemarcation took effect, but it was the RLCC Mpumulanga who gazetted the claim and interested parties were never notified that responsibility for the claim had been transferred to the RLCC Limpopo. Notice to the RLCC Mpumulanga in 2007 accordingly suffices.

[6] Thirdly, the applicant contends that the purpose of the letter was to try to promote settlement of the claim, not to give notice in terms of section 11(7)(aA). The letter did suggest the early settlement of the claim, but it also specifically states the following in bold print at the end of the letter: '**Note that this letter also serves as a Notice in terms of Section 11(7)(aA) of the Restitution of Land Rights Act, (Act 22 of 1995).**

[7] The applicant further argues that the letter was superseded by events, which it lists, that expressly showed that the intention expressed in the letter to develop the land was opposed. None of the events listed in paragraphs 1.1.3.1 to 1.1.3.9 of the application for leave to appeal derogates from the fact that notice in terms of section 11(7)(aA) of the Act was given to the Regional Land Claims Commissioner who published the claim in the Government Gazette, and that the Regional Land Claims Commissioner failed to respond to such notice.

[8] The applicant takes issue with my finding that the requirements for an interim interdict had not been met.

Finding that the Applicant's *prima facie* right was open to doubt

In paragraph 4 of the application for leave to appeal it is submitted that:

> "the Court erred and/or misdirected itself in that it failed to take account of the existence and contents of the Court order of 6 June 2011 which expressly confirmed that the applicant and his siblings have the right to claim the rights lost by their late mother on the subject land and, in particular that the issue as to whether the applicant is entitled to restitution of such rights and the extent of same remains in dispute between the parties."

In paragraph 5 it is stated that:

> "[t]he Court erred and/or misdirected itself in not recognising the fact that in terms of the consent Court order the issue as to the fact that rights were lost was resolved in favour of the Applicant and no longer in dispute, and further that the nature of the rights lost were also recognised by the Respondents and thus hardly in dispute."

Paragraph [9] of the judgment records that on 6 June 2011:

> "the parties reached a settlement agreement in terms of which it was agreed that the Acting Regional Land Claims Commissioner would refer the claim to the Land Claims Court for adjudication within two months. Further, in terms of that agreement, the respondents conceded that the claim was lodged by the late Elizabeth Moteno as an individual person, not on behalf of a community, and her direct descendants were identified. The parties also agreed that the following issues remained in dispute:
>
> 1. The rights and extent thereof lost by the late Elizabeth Moteno.
> 2. The land involved.
> 3. Whether restitution and/or compensation should be granted and the extent thereof."

[9] The submissions referred to in paragraph [8] above do not correctly reflect the consent order made on 6 June 2011. All that was conceded by the 1st to 4th applicants (who are the 1st to 4th respondents in that case) was that the claim was lodged by the late Elizabeth Molteno. It was expressly agreed by the parties that the rights and extent thereof lost by the late Elizabeth Molteno were still in dispute. If the rights are in dispute then they are open to doubt.

[10] The right upon which the applicant relies in claiming an interdict is the right to restitution of the land in issue. This court, in *Blaauwberg Municipality v Bekker and Others*, held the following:

> "[t]he interim Constitution and the Restitution of Land Rights Act only provide a right to 'claim' or 'enforce' restitution, in other words, a right to engage in a process. A substantive right to a particular form of restitution only comes into existence when the Court makes a restitution order." [2]

There is no way that the consent order of 6 June 2011 can be interpreted as establishing beyond doubt the applicant's right to restitution of the land.

Finding that the balance of convenience favoured the respondents

[11] A court considering an application for an interim interdict exercises a discretion in deciding whether the balance of convenience favours the applicant or respondent. In land restitution matters, the court must have regard to the factors set out in section 33 of the Act. Dodson J in *Singh v North & South Central Local Councils*[3] held that the purpose of the Act is to provide restitution but also to:

> "achieve restitution in a way which is in harmony with the public interest, including the need for the development of the country as a whole. Thus restitution may take a variety of forms, including awards other than the physical restoration of the precise rights in land which were originally lost. Section 34 of the Act... specifically envisages the exclusion of the restoration option where this is in the public interest."

The Court must accordingly balance the "need to address the injustices of the past

2 [1998] 1 All SA 88 (LCC) par 34 at 104-e. See also *Pillay v. Taylor-Burke Projects (Pty) Ltd & Others* LCC 119/1999.
3 [1999] 1 All SA 350 (LCC) para [111]

in relation to land rights…with the broader public interest and the need for development, on the other." This balancing act recently came under the scrutiny of the Supreme Court of Appeal in *King Sabata Dalindyebo Municipality v Kwalindile Community.*[4] In that case the court approved the late Judge President Bam's decision that the right to restitution of the land in question should yield to the interests of the community served by the applicant. What was before the court in *Singh* and *King Sabatha* was an application in terms of section 34 of the Act for an order that the land should not be restored to the claimant. The factors to be taken into account by the court in a section 34 application and a section 6(3) application are the same.[5] The Supreme Court of Appeal in *King Sabatha,* upheld the finding that the interests of the Mthatha Community outweighed the applicant family's interest in restitution of the land.

Finding that applicant has not made out a case for an interdict in terms of section 6(3) of the Act

[12] The requirements for an interdict in terms of section 6(3) of the Act are set out in paragraphs [17] and [18] of the judgment. Compliance with the requirements is considered in paragraphs [19] to [24]. The finding that the applicant has not made out a case for relief in terms of section 6(3) has been fully motivated.

Contention that the 5th respondent was required obtain an order in terms of section 34 of the Act

[13] The argument that the municipality should have obtained an order in terms of section 34 of the Act is simply not supported by the provisions of that section. Section 34(1) provides:

> "[a]ny national, provincial or local government body may, in respect of land which is owned by it or falls with its area of jurisdiction, make application to the

4 (537/2011) [2012] ZASCA 96 (1 June 2012).

5 See s 33 of the Act.

> Court for an order that the land in question or any rights in it shall not be restored to any claimant or prospective claimant".

This provision is permissive, not peremptory. If it was the intention to impose a positive duty, Parliament would have used the word "must" or "shall."

Contention that the 5th Respondent failed to consult with interested and affected parties

[14] The applicant asserts that I erred in not finding that the authorization and approval of developments by the 5th Respondent was unlawful because it failed to consult with interested and affect ted parties, particularly the applicant. It has not been factually established that the 5th Respondent did not consult with interested and affected parties. To the contrary, the applicant's own founding affidavit refers to a public meeting concerning the developments and a copy of the minutes of such meeting are annexed.[6]

Costs

[15] The applicant also applies for leave to appeal against the costs order, which was "no order as to costs". The applicant submits that the 5th respondent (the Municipality of Burgersfort) should have been ordered to pay the costs. It is well-established that the general rule applied in the Land Claims Court is that no order of costs is made unless there is good reason to make such an order.[7] However, the risk of an adverse costs order against a party who puts forward ill-founded claims and defences remains.[8] The municipality has not put forward an ill-founded defence. In opposing the applicant's claim the municipality went to great lengths to provide the court with detailed relevant information, with

6 Paragraph 18 of the founding affidavit and annexure D thereto.
7 See *Malangu v De Jager* 1996 (3) SA SA 235 (LCC) 246H – 247H; *Hlatshwayo and others v Hein* [1997] 4 All SA 630 (LCC) 639E- 644C; *Singh v North Central and South Central Local Councils* [1999] 2 All SA 350 (LCC); *Department of Land Affairs v Witz* 2006 (1) SA 86 (LCC) at 102.
8 *Hurenco Boerdery (Pty) Ltd v Regional Land Claims Commissioner, Northern Province* 2003 (4) SA 2003 (4) SA 280 (LCC) & *Misiza v Director-General, Department of Land Affairs* 2002 (3) SA 839 (LCC) 845H.

reference to its impressive *Spatial Profile*. I accordingly find that there is no prospect of a higher court making an order of costs against the Municipality

[16] Having considered the grounds upon which leave to appeal is sought, I do not believe that another court would come to a decision different from mine. Accordingly, I am not persuaded that there are reasonable prospects of an appeal succeeding.

Order

a) The application for leave to appeal is dismissed.
b) No order is made as to costs in respect of the application for leave to appeal.

ACTING JUDGE C E LOOTS

For the applicant
D Ntsebeza SC and G Shakoane instructed by *T M Serage Attorneys*
For the 1st – 4th & 8th respondents
A F Arnoldi SC and *J J Botha* instructed by *Steenkamp Broekman Inc*
For 5th respondent
M C Erasmus SC and W T B Ridgard instructed by *Noko Maimela Attorneys*
For 6th respondent
T Seneke instructed by *State Attorney*