IN THE LAND CLAIMS COURT OF SOUTH AFRICA

(Held in Cape Town)

Matter heard on: 31 July 2014

Matter decided on: 10 October 2014

Case No: LCC64/2014

In the matter between:

THE GENADEDAL TRANSFORMATION COMMITTEE	First Applicant
PJ THEUNISSEN	Second Applicant
P ADENDORFF	Third Applicant
EDG SMITH	Fourth Applicant
G P JURIES	Fifth Applicant
FHJ MAGERMAN	Sixth Applicant

and

THEEWATERSKLOOF MUNICIPALITY	First Respondent
MINISTER OF HUMAN SETTLEMENTS,	
WESTERN CAPE GOVERNMENT	Second Respondent
THE MINISTER OF RURAL DEVELOPMENT	
AND LAND REFORM	Third Respondent

JUDGMENT

Canca AJ:

INTRODUCTION

[1] This is an application for a declaratory order that the first and second respondents are in breach not only of a settlement agreement that was made an order of the Western Cape High Court on 22 October 2008 (the "2008 Court Order") but also of certain sections of the Transformation of Certain Rural Areas Act 94 of 1998 ("TRANCRAA"). In addition, the applicants seek an order interdicting the first and second respondents from alienating, encumbering or diminishing any portion of a rural area known as Genadendal or doing anything to assist in alienating, encumbering or diminishing land in Genadendal. Finally, the applicants also seek an order compelling the first respondent to comply with the 2008 Court Order. The application is brought in terms of TRANCRAA and the Restitution of Land Rights Act 22 of 1994(the "Restitution Act"), including sections 22(1)(cA) and 22(2)(a)&(b) thereof.[1]

THE PARTIES

[2] The first applicant is The Genadendal Transformation Committee,(" the Transformation Committee"), an association which represents the members of the Genadendal community ("the Community") who occupy land known as Genadendal Farm 39 ("Genadendal").

[3] The second applicant, Paulus Johannes Theunissen, an adult male businessman, is the chairperson of the Transformation Committee and a resident of Genadendal.

[4] The third, fourth, fifth and sixth applicants, P Adendorff, EDG Smith, GP Juries and FHJ Magerman, respectively, are adult male residents of Genadendal and members of the Transformation Committee.

[5] The first respondent is the Theewaterskloof Municipality, a local municipality duly established in terms of the Local Government: Municipal Structures Act 117 of 1998, read with the Province of the Western Cape Provincial Notice 189/2003, published in the Western Cape Provincial Gazette No 6021 on 28 May 2003, with its principal place of business at 6 Plain Street, Caledon.

[6] The second respondent is the Minister of Human Settlements, Western Cape Government cited herein in his capacity as the administrator of rural areas in the

[1] The purpose of TRANCRAA is set out under the heading, LEGISLATIVE FRAMEWORK, and that of the Restitution Act in paragraph 22 hereunder. The provisions of sections 22(1) and 22(2)(b) of the Restitution Act are set out in paragraphs 19 & 24 below.

Western Cape which are predominately inhabited by members of the Coloured population group.

[7] The third respondent is the Minister of Rural Development and Land Reform cited herein in his capacity as the holder, in trust, of that portion of Genadendal falling outside a township area.

LEGISLATIVE FRAMEWORK

[8] The two acts which apply to the authority exercised in rural areas such as Genadendal are the Rural Areas Act (House of Representatives), Act 9 of 1987 ("the Rural Areas Act") and TRANCRAA.

[9] The Rural Areas Act was promulgated in 1987 to provide for the control, improvement and the development of the rural areas and settlements which were reserved for the benefit of members of the Coloured population.

[10] TRANCRAA, which repealed large portions of the Rural Areas Act, allows, among others, for the transfer and control of township land in those rural areas to and by a municipality. TRANCRAA also allows, in section 3, for a transformation process that results in land outside a township area devolving to an entity or entities that will control such land for and on behalf of communities such as those living in Genadendal.

BACKGROUND FACTS

[11] Genadendal is a rural area in the Overberg District and is situated approximately 30 km north of Caledon.

[12] A transformation process, in terms of TRANCRAA, aimed at vesting land in Genadendal in an entity to be controlled by the Community is currently underway.

[13] The first applicant launched an application in the Western Cape High Court in 2007 to review certain actions by the first respondent regarding the transformation process. Following mediation, the parties entered into a settlement agreement on 17 October 2008 which was made an order of Court on 22 October, 2008.

[14] Given the conclusion I have arrived at in this judgment, it is not necessary to set out the terms of the settlement agreement.

THE FIRST AND SECOND RESPONDENTS' DEFENCES

[15] The first and second respondents opposed the relief sought by the applicants on various grounds which, given the conclusion I have reached, I do not consider necessary to set out herein. The first respondent also argued *in limine* that this Court does not have the jurisdiction to grant the relief sought by the applicants. It is convenient to first deal with the preliminary issue of condonation and then the first respondent's jurisdiction point argued *in limine*.

CONDONATION

[16] The first respondent failed to file its answering affidavit within the timeframes set out in a directive I had issued and applied, at the commencement of the hearing, for condonation for the late filing of that affidavit.

[17] The condonation application was not opposed nor did the late filing cause prejudice or affect the administration of justice. I therefore granted the condonation

POINT *IN LIMINE*- Jurisdiction

[18] The first respondent contends, among others, that this Court's powers are limited to those given to it in terms of statute and that for purposes of this matter, the powers are those set out in section 22 of the Restitution Act.

[19] In terms of section 22(1) of the Restitution Act this Court has exclusive jurisdiction in respect of the following matters:

> *"(a) to determine a right to restitution of any right in land in accordance with this Act;*
> *(b) to determine or approve compensation payable in respect of land owned by or in the possession of a private person upon expropriation or acquisition of such land in terms of this Act;*
> *(c) to determine the person entitled to title to land contemplated in section 3;*

(cA) at the instance of any interested person and in its discretion, to grant a declaratory order on a question of law relating to section 25(7) of the Constitution or to this Act or any other law or matter in respect of which the Court has jurisdiction, notwithstanding that such person might not be able to claim any relief consequential upon the granting of such order;
(cB) to determine whether compensation or any other consideration received by any person at the time of any dispossession of a right in land was just and equitable;
(cC) to determine any matter involving the interpretation or application of this Act, or the Land Reform (Labour Tenants) Act, 1996 (Act No. 3 of 1996), with the exception of matters relating to the definition of "occupier" in section 1 (1) of the Extension of Security of Tenure Act, 1997 (Act No. 62 of 1997);
(cD) to decide any constitutional matter in relation to this Act or the Land Reform (Labour Tenants) Act,19996 (Act No.3 of 1996);
(cE) to determine any matter involving the validity , enforceability, interpretation or implementation of an agreement contemplated in section 14(3), unless the agreement provides otherwise;
(d) to determine all matters which require to be determined in terms of this Act."

[20] Mr Katz, for the first respondent, argued that, as the interdictory relief sought by the applicants was aimed at securing compliance with TRANCRAA, this Court lacked jurisdiction because TRANCRAA fell outside the grounds listed in section 22(1) of the Restitution Act.

[21] Mr Ackermann, for the applicants, in reply contended that this Court finds its authority in the Constitution of the Republic of South Africa (which, at section 25, mandates broad equitable redress in land matters), as well as in sections 22(1)(cA) and 22(2)(b) of the Restitution Act which grants this Court wide jurisdictional powers.

[22] The Constitution does not refer to this Court at all, and therefore cannot be directly relied upon to establish the extent of its jurisdiction. This Court only deals with some aspects of land reform, and only when it has specific legislative authority to do so. In terms of its preamble, the Restitution Act is intended 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 racially discriminatory laws or practices; to establish a Commission on Restitution of Land Rights and a Land Claims Court;…"* Therefore, this Court, under the Restitution Act, only has jurisdiction to deal with issues relating to land restitution and land restitution means the restoration of a right in land or equitable redress. According to its definition, equitable redress means "*any equitable redress, other than the restoration of a right in land, arising from the dispossession of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices, including-*
(a) the granting of an appropriate right in alternative state-owned land;

(b) the payment of compensation."

[23] TRANCRAA, on the other hand, is, according to its preamble, intended to "*provide for the transfer of certain land to municipalities and other legal entities; the removal of restrictions on the alienation of land;..."* Therefore, although TRANCRAA may deal with land reform, it does not deal with land restitution. It is also noteworthy that section 25(7) of the Constitution uses the term equitable redress in the context of land restitution and it is clear from the definition of "equitable redress" that the term relates to land restitution only. Consequently, I am of the view that the jurisdiction given to this Court to adjudicate on land restitution issues under the Restitution Act cannot be extended to include jurisdiction to adjudicate on non-restitution issues under TRANCRAA.

[24] Mr Ackermann also relied on section 22(2)(b) of the Restitution Act which grants this Court jurisdiction to

> "*deal with all the ancillary powers necessary or reasonably incidental to the performance of its function, including the power to grant interlocutory orders and interdicts".*

[25] In support of this submission, Mr Ackermann referred me to *Nchabeleng v Phasha (1997) 4 ALL SA 158 (LCC)* where at paragraph 15 the Court held that it is expressly mandated to have regard to the requirements of equity and justice. The applicants were therefore entitled to approach this Court because the application was about equitable redress which has a broad meaning and refers to any equitable redress, Mr Ackermann further contended.

[26] The Court in *Phasha supra* held that it had the jurisdiction to grant an interim interdict pending the final determination of a land claim. The facts in *Phasha*, however, are distinguishable from those in the current matter. The applicants are not asking for restitution of a right in land. *Phasha* was decided within the four corners of the Restitution Act. It is, for that reason, not binding authority in a matter involving TRANCRAA. The functions of this Court are conferred by statute. Inasmuch as the Restitution Act allows this Court to grant orders for equitable relief, it is for equitable relief as defined in that Act, to be granted only in circumstances set forth in the Restitution Act. It does not cover the relief claimed in this matter.

[27] Mr Ackermann further argues that this Court has the requisite jurisdiction to grant a declaratory order in terms of section 22(1)(cA) of the Restitution Act because TRANCRAA, he contended, involves, among others, the restitution and restoration of a right in land dispossessed after 19 June 1913 as a result of past discriminatory laws. I cannot find any support in law for that argument nor did Mr Ackermann cite any authority in support of that contention. Moreover, the difficulty Mr Ackermann faces is that section 22(1)(cA) of the Restitution Act only refers to matters involving "*a question of law*". Section 22(1)(cA) of the Restitution Act which is quoted in paragraph 19 above bears repeating here. The relevant parts section 22 (1) of this Act read as follows:

"*There shall be a court of law to be known as the Land Claims Court which shall have the power… -*

(cA) at the instance of any interested person and in its discretion, to grant a declaratory order on a question of law relating to section 25(7) of the Constitution or this Act or to any other law or matter in respect of which the Court has jurisdiction…"

[28] A crucial aspect of this application is to determine whether or not certain sections of TRANCRAA and the 2008 Court Order have been breached. That manifestly would involve questions of fact and not law.

[29] In the light of the above, I find that section 22(1)(cA) of the Restitution Act does not assist the applicants in their cause. Even if I am wrong in concluding that the issue to be decided does not fall within the provisions of section 22(1)(cA) of the Restitution Act, the applicants still have to overcome the first respondent's second line of attack on this Court's lack of jurisdiction.

[30] The first respondent also contends that part of the relief sought by the applicants is consequent upon a finding that the first respondent is in breach of an order of the Western Cape High Court. Absent good and sufficient reasons by the applicants why the 2008 Court Order cannot be enforced by that Court's own processes, this Court lacks the power to enforce or to give effect to an order of that Court, so Mr Katz argued. In support of this submission, Mr Katz referred me to *Bannatyne v Bannatyne (Commission for Gender Equality as Amicus Curiae*) 2003 (2) SA 363 (CC) at paras 20 and 23; *Komsane v Komsane* 1962 (3) SA 103 (C) at 104 E-F and *Cilliers et al in Herbstein and Van Winsen's "The Civil Practice of the High Court of South Africa*" 5th edit. Vol 2 pp 1104-1106.

[31] The applicants concede that the Western Cape High Court is able to enforce its own order but contend that this Court has concurrent jurisdiction with a High Court

on matters pertaining to security of tenure and the acquisition of land rights. The issue to be decided here is ancillary to and arises from a claim for land restitution contained in the transformation process set out in TRANCRAA, Mr Ackermann contended.

[32] The flaw in this contention was correctly pointed out by Mr Katz. Most of the relief sought by the applicants is aimed at securing compliance with the terms of the 2008 Court Order. It is therefore immaterial whether or not this Court would have had jurisdiction to grant the relief contained in the 2008 Court Order had the first applicant chosen to approach this Court in 2007. The fact that the first applicant chose to approach the Western Cape High Court, and not this Court, has the effect, in my view, based on the authorities listed in paragraph 30 *supra,* that this Court does not have the jurisdiction to enforce or to give effect to an order granted by another Court. See also *Mkwanazi v Bivane Bosbou (Pty) Ltd and Another* [1999] 1 All SA 59 (LCC) at paragraph 3 where it is stated that "*This Court is a creature of statute. It has no jurisdiction beyond what is given to it in terms of a statute, expressly or by implication. It has no power, except possibly in review proceedings (which these proceedings are not), to declare anything done under the order of another court to be unlawful. If the plaintiffs want to attack such an order, they must institute appeal or review proceedings in a court of competent jurisdiction, which court may, in appropriate cases, be this court."* This Court, being a creature of statute, will therefore only have jurisdiction to adjudicate on any particular issue if such jurisdiction is granted in terms of an Act of Parliament, such as the Restitution Act, the Labour Reform (Labour Tenants) Act 3 of 1996 and the Extension of Security of Tenure Act 62 of 1997.

[33] Mr Ackermann also contended that since this Court has the status of a High Court, it also has the inherent power to regulate its own process. I cannot agree. The inherent power to regulate their own process is bestowed by section 173 of the Constitution only on the Constitutional Court, the Supreme Court of Appeal and High Courts. This Court has no inherent jurisdiction. Furthermore, no Court enjoys "*original jurisdiction conferred by a source other than the Constitution"* See SA *Broadcasting Corporation Ltd v National Director of Public Prosecutions* 2007 (2) BCLR 167 (CC) at par [88].

[34] High Courts may, under section 169 of the Constitution, decide –

"(a) any constitutional matter except a matter that –

(i) only the Constitutional Court may decide; or

(ii) is assigned by an Act of Parliament to another court of a status similar to a High Court; and

(b) any other matter not assigned to another court by an Act of Parliament."

Other Courts may decide any matter determined by an Act of Parliament but there is no Act of Parliament which determines that the matters at issue in the present case must be decided by this Court. Consequently, they must be decided by a High Court.

[35] For all the reasons set out above, I find that the first respondent's point *in limine* is well made. This Court does not have the jurisdiction to hear this matter and the application consequently falls to be struck from the roll.

COSTS

[36] It is trite that this Court does not, as a general rule, award costs to the victorious party unless there are special circumstances that warrant such an award. See *Hlatswayo and Others v Hein* 1999 (2) SA 834 (LCC) at 844F -850 A where Dodson J sets out the reasons for this practice.

[37] This Court has also held that special circumstances warranting a cost order will be found to exist where "…*there has been impropriety in the manner in which the litigation was undertaken or where the conduct of the parties has been vexatious or frivolous*". See *Rica Piggery and Abattoir (Pty) Ltd v Dirello* (LCC 07/R2010). 9 June 2010,(2010) ZALCC 21 at paragraph (10).

[38] Both the first and second respondents urged me to award costs against the applicants with the first respondent arguing strongly that this application was an abuse of process of this Court.

[39] I find that there are no special circumstances that would justify a costs order against the applicants in this matter.

[40] For the reasons set forth above, I make the following order:

1. The application is struck from the roll.

2. There is no order as to costs.

Canca AJ

Acting Judge of the Land Claims Court

Appearances:

For the applicants:

Mr. LW Ackermann

Instructed by Elton Shortles Attorneys, Worcester.

For the First Respondent:

Mr Anton Katz SC

with him Ms M Adhikari

Instructed by Fairbridges Attorneys, Cape Town.

For the Second Respondent:

Mr A. Bhoopchand

Instructed by Marais Muller Yekiso Inc. Cape Town.