



**IN THE LAND CLAIMS COURT OF SOUTH AFRICA**

**HELD AT RANDBURG**

**CASE NO: 98/2010**

**Before: The Honourable Rajab-Budlender AJ**

**Heard on: 22 August 2016.**

**Delivered on: 19/10/2016**

|   |                                  |
|---|----------------------------------|
| <b>DELETE WHICHEVER IS NOT APPLICABLE</b> |                                  |
| (1) REPORTABLE: YES / NO                  |                                  |
| (2) OF INTEREST TO OTHER JUDGES: YES / NO |                                  |
| (3) REVISED: YES / NO                     |                                  |
| 19/10/2016<br>DATE                        | <i>H. Budlender</i><br>SIGNATURE |

In the matter between:

**BAWKENA BA MARE A PHOGOLE**

**Applicant**

**And**

**REGIONAL LAND CLAIMS COMMISSIONER,  
GAUTENG AND NORTH WEST**

**1<sup>ST</sup> Respondent**

**COMMISSION ON RESTITUTION OF LAND RIGHTS**

**2<sup>nd</sup> Respondent**

---

## JUDGMENT

---

**RAJAB-BUDLENDER AJ**

### *Introduction*

- 1 This is an application in terms of Rule 32(5) of the Rules of this Court, for an order compelling the First and Second Respondents to comply with the order of this Court dated 27 January 2014, which provided:

*“1. The First Respondent accepts that (sic) validity of Applicant’s claim and that it complies with the requirements of the Restitution of Land Rights Act 22 of 1994.*

*2. The First Respondent will cause the Applicant’s claim to be published in the Government Gazette within 60 days of the Order of this Honourable Court.*

*3. The First and Second Respondent approve the Applicant’s application for funding in terms of section 29(4) of the Restitution of Land Rights Act 22 of 1994.*

*4. First and Second Respondents are ordered to pay the costs of this application on the scale as between attorney and client.”*

- 2 The Applicant is the Bakwena Ba Mare A Phogole community which lodged a claim for restitution of significant portions of the South of Johannesburg in terms of the Restitution of Land Rights Act 22 of 1994 (“the Act.”) The Applicant seeks relief against the Regional Land Claims Commissioner for Gauteng and North West and the Commission on Restitution of Land Rights.

- 3 The claim was lodged more than 20 years ago in 1995 and has a protracted history. The dispute in this matter relates to whether or not the Respondents are obliged to publish the Applicant's claim in the Government Gazette, as they agreed to do and which agreement was subsequently made an order of this Court on 27 January 2014 ("the court order").
- 4 In short, the Applicant approaches this Court to enforce the court order. The Respondents' contention is that they ought not to be ordered to do so because new information has come to light since the court order, which makes them reluctant to gazette the claim.

### ***The Order***

- 5 After the Applicant's claim was lodged in 1995, little was done by the Respondents to process and finalise the claim.
- 6 In response, the Applicant attempted engaging in negotiations with the Respondents, which resulted in a series of meetings, discussions and emails being exchanged between the parties. During much of this time, the Applicant was unrepresented. Moreover, their application for funding for legal representation in terms of section 29(4) of the Act was not approved.
- 7 Eventually in 2012, the Applicant approached this Court for assistance. On 21 June 2012, Loots J made an order in terms of which the parties were required to exchange information, an evidence evaluation and

inspection in loco were took place. Pursuant to this order, the Applicant provided details of all of the different families occupying the area concerned and mapped out the area subject to the claim. The parties then attended a pre-trial conference with Loots J on 27 September 2012 at which they reported to the learned judge that they had reached agreement on all issues relating to the claim. Notwithstanding this, the Respondents' legal representatives requested that the matter be referred to mediation. This was done and the mediator's report was delivered on 14 December 2012. The mediator supported the validity of the Applicant's claim. The Respondents, however, still did not publish the Applicant's claim in the Gazette.

- 8 Finally, in or about July 2013, the Applicant approached this Court seeking an order that the Respondents gazette the claim and approve funding for legal representation in terms of section 29(4) of the Act. The Application was not opposed by the Respondents and was set down for hearing on 27 January 2014.
- 9 On that date, the parties reached agreement on the terms of a draft order, which was subsequently made an order of court as set out above.
- 10 Notwithstanding the fact that the court order was one to which the Respondents consented, and one in which the Respondents acknowledged unconditionally the validity of the Applicant's claim, the Respondents failed to comply with the court order.

- 11 On 9 April 2014, the Applicant issued a notice in terms of Rule 32(5) of the Rules of this Court, calling upon the Respondents to comply with the court order within a period of 5 days, failing which the Applicant would seek to hold the Respondents in contempt of the Order.
- 12 The merits of the land claim itself are not before me in this application. I therefore do not make any findings in relation to the validity of the Applicant's claim, other than to note that the Respondents accepted the validity of the claim and that this is recorded in the Court Order. The issue before this Court is whether the Respondents have failed to comply with the Court Order and if so, what the appropriate remedy is.
- 13 Notably, at the time of the hearing of this application, it was common cause that the Respondents had partially complied with the court order in that the Respondents had approved the Applicant's application for funding in terms of section 29(4) of the Act. However, at the time that this application was filed, the Respondents had yet to approve funding notwithstanding a court order requiring them to do so. Moreover, they failed to file an answering affidavit in time, waiting until two days after the notice of set down was served on them, to do so. No condonation was sought for the late filing of the affidavit. The Applicant initially raised a point *in limine* that the answering affidavit ought to be disregarded by this Court as it was filed out of time and because it was not clear whether the deponent to the answering affidavit did so on behalf of both Respondents. At the hearing of the matter, Counsel for the Applicant indicated that these points were no longer pursued.

### ***The Respondents explanation for their non-compliance***

- 14 The Respondents do not dispute that they have not complied with the Court Order. Instead, they contend that they failed to do so because they wanted to conduct further investigations in order to narrow down and specify the areas of land which it would gazette. Moreover, they state that they had commissioned an additional expert investigation after the court order, to be done by Dr Fischer into the validity of the Applicant's claim.
- 15 The Respondents were also concerned that blanket publication of a notice in relation to such a vast area would lead to widespread concern and a sense of alarm amongst the public and also amongst the municipalities and state institutions situated in the area of the claim. However, the Respondents did not raise this concern at the time that they consented to the Court Order and the validity of the Claim.
- 16 It would appear that in consenting to the court order which required gazetting of the claim within 60 days, the Respondents were of the view that they would be able to *"finalise and condone all defects in the claim"* during the 60 day period. In the event, the Respondents did not attempt to do so until the 60 day period contemplated by the court order was almost at an end.
- 17 To this end, Ms Nongaba Mehlomakulu, the deponent to the Respondents' answering affidavit, set up a meeting on 3 March 2014

with the Applicant's attorney to attempt to "*narrow down and finalise*" the claim.

18 The meeting between the parties did not ultimately take place because the Applicant's attorneys cancelled the planned meeting. However, the Applicant's attorneys asked for details of property descriptions and aerial maps in relation to the land claimed. A report was duly compiled by the Respondents' deponent.

19 After this meeting was cancelled, no further attempts were made by the Respondents to convene another meeting, or to ensure compliance with the court order. Instead, the Respondents appointed Dr Fischer to investigate the claim. At the time of the answering affidavit, Dr Fischer had yet to complete his report and the Respondents asked for more time to allow him to do so.

20 This sequence of events is deeply concerning, not least because it shows a flagrant disregard of a court order by state entities but it also reflects a fundamental misconception of the workings of the Act.

### ***The Process Mandated by the Act***

21 The Act sets out a process for the lodgement of claims and the rights and obligations of the Respondents in relation to such claims. Section 6 of the Act provides that the Commission, through a regional land claims

commissioner shall “*generally do anything necessarily connected with or reasonably incidental to the expeditious finalisation of claims.*” This includes assisting claimants in the preparation and submission of claims, investigating the merits of claims and ensuring that priority is given to claims which affect a substantial number of persons.

- 22 It is common cause that the Applicant has complied with all the formalities required by the Act in respect of the lodgement of the claim. Section 11 of the Act sets out the procedure to be followed by the regional land claims commissioner after the lodgement of a claim. It provides as follows:

*“ (1) If the regional land claims commissioner having jurisdiction is satisfied that-*

- (a) the claim has been lodged in the prescribed manner;*
- (b) the claim is not precluded by the provisions of section 2; and*
- (c) the claim is not frivolous or vexatious,*

*he or she shall cause notice of the claim to be published in the Gazette and in the media circulating nationally and in the relevant province, and shall take steps to make it known in the district in which the land in question is situated.”*

- 23 It is not disputed that the Applicant has lodged its claim in the prescribed manner and that the claim is not excluded on the grounds contemplated in section 11(1)(b) or (c). Once this is so, the regional land commissioner is obliged to publish the claim in the Gazette. The purpose of the publication is clearly to give notice of the claim to all those who may be affected by the claim. No legal right to the land is



conferred by the Gazetting of the claim. However, once a notice has been published in respect of any land, the provisions of section 11(7) are triggered.

24 This subsection precludes the sale, exchange, donation, lease, subdivision, rezoning or development of the land without one month's written notice of the intention to do so to the regional land claims commissioner. Moreover, once a claim has been gazetted, no claimant who occupied the land may be evicted from the land without the written authority of the Chief Land Claims Commissioner.

25 The gazetting of a claim of this nature, which affects enormous tracts of land including municipal offices, prisons and private homes, has consequences for the State as well as private land owners. For this reason alone, one would have expected that before consenting to an order that obliged it to publish the claim in the Gazette, the Respondents would have given careful thought to whether such an order was appropriate. On the facts of this particular case, it would appear that they failed to do so. I pause to note that the Respondents were afforded ample time to consider the validity of the claim in this matter. The claim was lodged in 1995 and this matter came to court in 2014. There were numerous engagements between the parties in this period, during which the Respondents were afforded ample opportunity to engage with the Applicant in relation to the nature and extent of the claim. The appointment of Dr Fischer at this late stage, after the Respondents consented to the court order, appears to be nothing more

than an attempt to circumvent a court order which the Respondents consented to. I find no compelling reasons why Dr Fischer's investigation and Report precluded the Respondents from complying with the court order. Until set aside by a court, the court order was valid and binding on the Respondents.<sup>1</sup> This is clear from section 165(5) of the Constitution of the Republic of South Africa, 1996 ("the Constitution") which states that "*an order or decision issued by a court binds all persons to whom and organs of state to which it applies.*"

26 In any event, the structure of the Act itself recognises that after the publishing of a claim, the Commission is entitled to investigate the claim and take steps as a result of such investigations.

27 Rather than follow the clear process contemplated by the Act, the Respondents chose instead to ignore a court order. This is simply not acceptable conduct on the part of the State, particularly as there were other legal avenues for the Respondents to pursue should they have had second thoughts about the court order to which they consented.

28 It was open to the Respondents, for example, to seek the rescission of the court order if they had a basis to do so. It was also open to them to publish the notice of claim in the Government Gazette and then to later withdraw or amend the claim if there were good grounds to do so, as contemplated in the Act. They did neither of these things. Instead, they

---

<sup>1</sup> See *Lane and Another NNO v Dabelstein and Others* 1999 (3) SA 150 (C) at 169 I-J where the Court held that "*an order by consent which embodies the terms of an agreement between the parties, has the same effect as any other court order and it remains valid and binding until set aside.*" See also: *Eke v Parsons* 2016(3) SA 37 (CC) at para 29.

forced the Applicant to obtain representation and to approach this Court for the enforcement of the court order. Only after this application was lodged did the Respondents approve the Applicant's request for funding under section 29(4) of the Act. There is no explanation by the Respondents as to why they took almost five months to approve the funding of legal representation for the Applicant and why it required the launching of this application before funding was approved.

29 The conduct of the Respondents in this matter falls far short of that which is expected of the State. This is particularly so when the Respondents are tasked with giving effect to a constitutional right and the redressing of past discriminatory and oppressive practices. Section 7 of the Constitution imposes a duty on the State to respect, protect, promote and fulfil the rights in the Bill of Rights. Moreover, section 165(4) of the Constitution requires organs of state to assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.

30 In *Quinella Trading (Pty) Ltd and Others v Minister of Rural Development and Others* 2010 (4) SA 308 (LCC) at para 36, Meer AJP reiterated that the state is required to lead by example. The learned judge went on to quote from the seminal case of *Olmstead et al v United States*. In the celebrated words of Justice Brandeis:

*"In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. . . Government is the potent, omnipresent teacher. For good or for ill, it teaches the whole people by its example. . . If the*

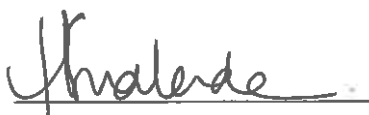
*government becomes a lawbreaker, it breeds contempt for the law, it invites every man to become a law unto himself; it invites anarchy."*

31 Our own Supreme Court of Appeal recently endorsed this when it held in *Free State Province v Terra Graphics (Pty) Ltd and Another* 2016 (3) SA 130 (SCA) at para 21, that "*Government should be a scrupulous role model.*" In this case, the conduct of the Respondents has not only shown a disdain for an order of court to which they in fact consented, but it also shows a fundamental misunderstanding of the provisions of a statute which they are tasked with giving effect to. Such conduct merits, in my view, a punitive costs order, as sought by the Applicant.

32 I therefore make the following order:

32.1 The First and Second Respondents are ordered to comply with the court order of this Court, dated 27 January 2014, within 7 days of this Order.

32.2 The First and Second Respondents are to pay the costs of this application on an attorney and client scale including the costs of two counsel.



RAJAB-BUDLENDER AJ

**APPEARANCES:**

For the Applicant:           RBG Choudree SC

D. Pillay

Instructed by:               Singhs Attorneys

For the Respondents:       T. Seneke

Instructed by:               The State Attorney, Pretoria