IN THE LAND CLAIMS COURT OF SOUTH AFRICA

HELD AT RANDBURG

CASE NUMBER: **LCC270/2016**

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED: YES / NO
..... DATE ..... SIGNATURE

In the matter between

MAHONISI ROYAL FAMILY AND COMMUNITY (2418)	APPLICANT
and	
HEADMAN MANGANYI G.G (SHITLHELANI)	FIRST RESPONDENT
HEADMAN HLUNGWANI H.P (MPHONGOLA)	SECOND RESPONDENT
HOSI PATRICK MANGANYI	THIRD RESPONDENT
MAVAMBE TRADITIONAL AUTHORITY	FOURTH RESPONDENT
LIM 345 LOCAL MUNICIPALITY	FIFTH RESPONDENT
REGIONAL LAND CLAIM COMMISSIONER LIMPOPO	SIXTH RESPONDENT

Heard on: 19 December 2016
Judgment: 03 January 2017

JUDGMENT

CANCA AJ

1. The applicant approached this court on an *ex parte* and urgent basis, seeking an order interdicting the first to the fourth respondents from, *inter alia*:

> "Obstructing, selling the land, river sand, bow sand, allocating, debushing, excavating, exchanging, donating, occupying, leasing, subdividing, rezoning and developing the land in the Farm SEELING 206 LT, JIMMY JONES 205 LT, VAN DUUREN 207 LT AND IRELAND 210 LT pending the finalisation of the applicant's land claim under court number LCC29/2005 ("the subject land"). "

2. Interim relief, only to the extent that the first to the fourth respondents were interdicted from "selling the river sand, bow sand, debushing, excavating and developing" the subject land was granted on 22 November 2016, pending the return date, 19 December 2016.

3. This application is opposed by the first to the fourth respondents on the merits and they have raised a number of points *in limine,* including lack of urgency. I return to this aspect of the matter hereunder.

THE PARTIES

4. The deponent to the applicant's founding affidavit is one Sonto George Resenga ("Sonto Resenga") who describes himself as an adult male traditional leader. Sonto Resenga avers that he is acting on behalf of the applicant and that he is duly authorised to represent the applicant in any legal process relating to the applicant's land claim involving the subject land. Sonto Resenga also avers that he is a recognised headman under Chief Mavambe and the Mavambe Traditional Authority.

5. The first and second respondents are headmen residing on Farm VAN DUURHEN 207 LT and JIMMY JONES 205 LT respectfully. The third respondent, Shirilele Patrick Manganyi ("Manganyi"), deposed to the answering affidavit on behalf of the first, second and fourth respondents, describes himself as a "Hosi", and Chief of the Mavambe Traditional Community. As the senior traditional leader of that community in Limpopo and the leader of the fourth respondent, he avers that, in terms of legislation and custom, there are certain

duties assigned to him. These include promoting the interests of his community and assisting in its administration.

6. The fourth respondent is an authority established in terms of the Traditional Leadership and Governance Framework Act No 43 of 2003, the Limpopo Traditional Leadership and Institutions Act No 6 of 2005 and Black Authorities Act No 68 of 1951.

7. It is now convenient to set out, in brief summary, the facts that led to the launch of this application.

8. Sonto Resenga avers that the applicant, which he states consists of some 400 members, lodged a land claim in November 1998, claiming several farms and portions thereof including the subject land. The claim was gazetted in April 2007. When the Land Claims Commission ("the commission") failed to settle the land claim, the applicant approached this court, under case number LCC29/2015, for an order compelling the commission to refer the matter for adjudication. The order prayed for was granted on 27 July 2016. Whilst acknowledging that restoration of the claimed land was not desirable in respect of some of the land, the applicant is of the strong view that the subject land is restorable, hence this application.

9. It was further averred on behalf of the applicant that should the *rule nisi* not be confirmed, the subject land will be permanently damaged and rendered unconducive for restoration. In addition, should the excavations continue, there was a danger that ancestral graves would be destroyed, so the contention continued.

10. In support of the contention that the matter was urgent, Sonto Resenga avers that:

> "The matter is urgent in that on the 12 November 2016 the first respondent's employees have been excavating land using trucks and heavy machinery (TLB) in the farm SEELIG 206 LT and other above adjacent mentioned farms. I sent Amos Risenga accompanied by others to go and check what was happening. The employees of the first respondent arrogantly refused to stop

excavating and debushing the land. The first respondent indicated that he would not stop excavating the land and selling the land because the land owner is the third and fourth respondents and not the applicant. This matter is urgent in that the applicant must attain redress in the normal course and the irreparable harm would have occurred [sic]."

11. Manganyi, in response to these averments, contends that the urgency was self-created by the applicant because it was or should have been aware that the first respondent had been excavating that land, selling river and bow sand as well as allocating residential sites with his and the fourth respondent's permission for the past ten years. The colour photos which form part of the papers certainly bear out the contention that, any excavation or debushing which was happening on the subject land, could not have started ten days before the application was launched. Also, when pressed, during argument regarding evidence of ancestral graves being about to be destroyed, Mr Resenga, for the applicant, was unable to provide evidence that there were, in fact, any graves in the vicinity of the excavation, arguing, unconvincingly, that the graves were not marked, the way the traditional grave sites normally are.

12. It is also worth mentioning that:

    1. the issue of damage to ancestors' graves is only mentioned in passing by Sonto Resenga, and only as a possibility, when addressing the "clear right" threshold requirement for an interdict.

    2. in terms of the averments to support the requirement for "irreparable harm", Sonto Resenga simply states that "the applicant's loved ones graves will be permanently destroyed without trace" and that "the excavation will endanger the livestock of the community….during the raining seasons."

    However, what he applicant has failed to prove is that, whatever damage it perceived was about to befall it, no evidence has been adduced that such danger was imminent, an essential requirement for the grant of an interdict. Sonto Resenga refers to a "possibility" that the graves will be damaged and that the community's livestock will be endangered during the rainy seasons, without

averring that they are in fact, in the rainy season or how the first to fourth respondents activities will endanger the livestock's during that season.

13 I agree with Mr Barnardt, for the first to the fourth respondents, that the applicant has not only failed to show that the matter was urgent but that it also failed to meet the threshold requirements for the grant of an interdict.

14 I do not consider it necessary, for the purposes of this judgment, to deal with the merits of this matter. In my view, the first to fourth respondent have succeeded, certainly on at least two of the points *in limine* raised, namely, lack of urgency and the failure to meet the requirements for interim or final relief. During argument, I requested Mr Barnardt to give an undertaking, on behalf of his clients, not to damage any graves they might encounter during excavation and to secure any dams or excavations which might affect the safety of the applicant's livestock. Although such an undertaking was offered, Mr Resenga, inexplicably, refused to accept same.

15 In the circumstances, I am of the view that the interim order should be discharged. Mr Barnardt argued strongly that costs be awarded against the applicant on a punitive basis. This contention was based on the following: The applicant's failure to give notice of the application; failure to give written demand to the respondents to refrain from the impugned actions; and failure to exhaust alternative remedies before approaching this Court. Although one might have sympathy for Mr Barnardt's stance on costs, this Court is loath to burden losing litigants with costs save in special circumstances. Nothing in the papers persuades me that special circumstance justifying a costs order against the applicant exist in this case.

16 In the results, I order as following:

1. The rule nisi granted on 22 November 2016 is discharged.

2. No order as to costs

M.P CANCA

Acting Judge of the Land Claims Court

Appearances

For the Applicant: Advocate Resenga, R.

Instructed by: Nukeri Attorneys C/O Mulakhulu Attorneys, Randburg

For the First to Fourth Respondents: Advocate Barnardt, H M.

Instructed by: G.A Maluleke Attorneys C/O Larens Attorneys, Randburg