IN THE LAND CLAIMS COURT OF SOUTH AFRICA
HELD AT RANDBURG

Case Number: LCC 17/2018

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED: YES / NO
8/11/2019
DATE SIGNATURE

Heard on: 22 August 2019

Delivered on: 8 November 2019

In the matter between:

EMANTANJENI COMMUNITY	Applicant
And	
COMMISSION ON RESTITUTION OF LAND RIGHTS	First Respondent
MINISTER OF RURAL DEVELOPMENT AND LAND REFORM	Second Respondent
REGIONAL LAND CLAIMS COMMISSIONER, KWAZULU-NATAL	Third Respondent
CHIEF LAND CLAIMS COMMISSIONER	Fourth Respondent

EDWARD ALEXANDER CLOUSTON Fifth Respondent

DAVID EDWARD CLOUSTON Sixth Respondent

JUDGMENT

Carelse J

Introduction

[1] This application has its genesis in a consent order concluded between the Applicants, the Emantanjeni Community, the claimants in a claim for restitution, and the defendants (including the State and landowners) in the initial restitution proceedings. The consent order was made an order of Court by Canca AJ on 12 June 2017 and *inter alia* provides:

> *"1. The Commission on Restitution of Land Rights ("the Commission") and the State represented by the Minister of Rural Development and Land Reform, acknowledge the validity of the Claimant Community claim as published in Notice 880 in Government Gazette 30074 of 20 July 2007.*
>
> *2. Without prejudice to, and with reservation of their rights to claim equitable redress in the form of financial compensation from the State in terms of the provisions of the Restitution of Land Rights Act No 22 of 1994 ("the Restitution Act") the Plaintiff Community hereby abandon their claim for restoration in specie in respect of the following properties owned by the following Defendants represented by Cox and Partners . . .*
>
> *3. It is recorded that the Plaintiff Community withdraws their claim for physical restoration of the abovementioned properties of the abovementioned properties of the Defendants represented by Cox and Partners.*

4. It is hereby ordered and declared that as a consequence of the formal withdrawal of the Plaintiff Community of their claims for the physical restoration of the properties of the Defendants mentioned in paragraph 2 above, that none of the said properties of the said Defendants claimed by the Plaintiff Community shall be restored to the Plaintiff Community.

5. It is ordered and declared that the properties of the said defendants listed above are no longer subject to any land claim published in the Government Gazette by the Regional Land Claims Commissioner KwaZulu-Natal ("RLCC"), or by any other land claim of the Plaintiff Community or individual members of the Plaintiff Community or any such land claimed by any other individuals, community/ communities or groups of individuals who, after lodging claims, have joined their claims and made common cause with the claims of the Plaintiff Community.

6. It is ordered and declared that the abovementioned properties of the abovementioned Defendants, that were included in any of the Gazette Notices published by the RLCC in respect of all claims lodged by the Plaintiff Community, will no longer be subject to any of the said Notices.

7. The Regional Lands Claims Commissioner KwaZulu-Natal is ordered to publish a Notice in the Government Gazette in terms of section 11A(4) of the Restitution Act within 60 days from date of this order, in which it will be declared that by virtue of this court order the abovementioned properties of the abovementioned land owners will as from date of this order no longer be subject to Notice 880 of 2007 published in Government Gazette 30074 of 20 July 2007.

8. The Defendants represented by Cox and Partners mentioned above, are released from the litigation in these proceedings and will play no further part therein. . . ."[1]

[1] The remainder of the order deals extensively with costs and has been omitted as it is irrelevant in the present matter.

[2] In this application, the Emantanjeni Community, the Applicant, sought a number of orders in its notice of motion, but during the hearing, only persisted with the following relief:

> *"1. In this application the Applicant seeks to enforce the order of this Honourable Court dated 12 June 2017 per Canca AJ. To this end an order in the following terms is sought:*
>
> > *1.1 the First, Second, Third and Fourth Respondents are hereby ordered to comply with the order of this Court dated 12 June 2017 granted by Canca AJ by the immediate payment to the Applicant of the R502 017 807."*

[3] The parties are in dispute over whether or not the First to Fourth Respondents (the "State Respondents") failed to comply with the order. The Applicant contends that the order, properly understood and having regard to the common cause facts, the background and surrounding circumstances, provides that the State Respondents would settle the entire claim and make payment to the Applicant in the sum of R502 017,807.00. The State Respondents on the other hand contend that on a proper construction of the order, its primary focus was the abandonment by the Applicant of its claim for physical restoration of the greater part of its land claim along with the release of the defendant landowners in the main proceedings.

[4] The crisp issue before me is the proper interpretation of Canca AJ's order dated 12 June 2017. A further ancillary issue is the application by the State Respondents to strike out certain paragraphs of the founding affidavit and the replying affidavit[2] on the grounds that they contain irrelevant and inadmissible evidence sought to be admitted in conflict with the parol evidence rule and that the replying affidavit raises new matters which should have been raised in the

[2] Para 30 of the Founding Affidavit.

founding affidavit instead[3]. The issues for determination will be best understood against the following background facts.

Background

[5] The Applicant lodged a claim for the restitution of rights in land in terms of the Restitution of Land Rights Act, No. 22 of 1994 ("The Act"). As required under section 11(1) of the Act, the Regional Land Claims Commissioner, KwaZulu-Natal, the Third Respondent, published a notice of the claim in the Government Gazette on 20 July 2007.

[6] On 17 August 2007, following the publication of the claim, a number of landowners objected to publication of the claim. In its certificate in terms of section 14(1)(b)[4], the Third Respondent stated it was not feasible to settle the claim between the claimants and current

[3] Paragraph 9 (including all subparagraphs except paragraph 9.1 and 9.4); paragraph 10 excluding the first two sentences; paragraph 11; paragraph 12; the words in paragraph 13 'the fact that the hearing of the trial already took place'; subparagraphs 22.1 to 22.3; paragraph 39.1; subparagraphs 40.1 and 40.2 (including all sub-paragraphs); the words 'which in turn is linked to the value of the cadastral units of land as acknowledged to be embraced in the applicant's claim by the first to fourth respondents' in subparagraph 44.5.1; sub-subparagraph 44.5.2; the words 'and the value thereof" in sub-subparagraph 46.1.4; subparagraph 47.2; the words from "and at the conclusion" to 'accepted by the State Respondents" in subparagraph 47.4; sub-subparagraphs 47.7.3, 47.7.4, 47.7.5; subparagraph 47.8; subparagraphs 47.9 and 47.10; sub-subparagraph 47.11.3; the words "of the sum of R502 017 807 being the value of their claim as admitted by the first to fourth respondents" in subparagraph 47.11.4; sub-subparagraphs 47.11.5 and 47.11.6; subparagraphs 47.12 to 47.18; the words 'based on the value of their claim as admitted and accepted by the first to fourth respondents in the sum of R502 017 807,00"; subparagraph 48.2; the words from "in fact" to "between the parties" in subparagraph 48.4; subparagraphs 48.6, 48.7 and 48.8; subparagraph 49.2; the words "as the issues in question have been settled between the parties and is part of an order of court' in paragraph 50; the second sentence in paragraph 52; subparagraphs 53.3; the words 'and it is in this basis that the trial commenced and was concluded" in subparagraph 53.6; subparagraph 54.2; subparagraph 56.1; the words from "and by the time" to 'and occupied by the applicant community' in subparagraph 58.1; subparagraph 60.1; subparagraphs 61.4 and 61.5; subparagraph 62.2; subparagraph 63.3; paragraph 64 (including all subparagraphs); subparagraphs 65.1, 65.2 and 65.5; and annexure B to the replying affidavit.

[4] Section 14(1)b of the Act provides: "the regional land claims commissioner certifies that it is not feasible to resolve any dispute arising from such claim by mediation and negotiation".

landowners by way of mediation and negotiation. The claim was referred to this Court in terms of section 14(1) read with 14(2) of the Act[5], by notice of referral dated 12 May 2009.[6]

[7] After the claim was investigated, a report was filed in terms of section 14(2) of the Act, wherein the Third Respondent made a number of recommendations. These were *inter alia* that the land under claim should be restored to the Community and that a professional valuer should be appointed to conduct a valuation of the gazetted properties and advise on the feasibility of restoration of certain portions of the land.

[8] The plaintiff in the referral claim, being the Applicant before me, sought restoration of land as opposed to financial compensation. The matter proceeded on this basis and this remained the stance of the Applicant at the hearing, initially set down for trial from 31 October 2016 to 11 November 2016, which did not proceed. Instead, the Court conducted an inspection *in loco* with the parties during this time.

[9] The matter was set down again from 29 May 2017 to 2 June 2017. It was only then, after the inspection *in loco*, and after an indication by the Fifth and Sixth Respondents (the landowners who do not oppose this application) of their willingness to make certain portions of the land under claim available for a possible settlement, that the Applicant changed its

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[5] Section 14(2) of the Act provides: "Any claim referred to the Court as a result of a situation contemplated in subsection 1(a), (b) or (d) shall be accompanied by a document –

(a) setting out the results of the Commission's investigation into the merits of the claim;
(b) reporting on the failure of any party to accede to mediation;
(c) containing a list of parties who have an interest in the claim;
(d) setting out the Commission's recommendation as to the most appropriate manner in which the claim can be resolved."

[6] See *Gamevest (Pty) Ltd v Regional Lands Claims Commissioner, Northern Province & Mpumalanga, & Others* 2003 (1) SA 373 (SCA) at para 7[d].

stance. It indicated that it would no longer pursue restoration, and instead would consider financial compensation. Simply put, the Applicant abandoned its claim for restoration.

Court order and the interpretation thereof

[10] As indicated earlier, the determination of this matter depends on a proper interpretation of Canca AJ's order. At the outset, it must be stated that a consent order is like any court order and must be treated as such.[7]

[11] There have been significant developments in our law relating to the interpretation of documents.[8] It has been stated over and over again in numerous cases that clauses in a document must be interpreted by having regard to the text/ language used in light of the ordinary rules of grammar and syntax; the context of the clauses being interpreted in the document as a whole; and by taking into account the apparent purpose of the clauses so as to give the document a commercially sensible meaning. In *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd and others*[9] the Court held:

> *"The starting point is to determine the manifest purpose of the order. In interpreting a judgment or order, the court's intention is to be ascertained primarily from the language of the judgment or order in accordance with the usual, well-known rules relating to the interpretation of documents. [my emphasis]. As in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention."*

[7] See *Eke v Parsons* 2016 (3) SA 37 (CC) at para 29, where the Court held: "[o]nce a settlement agreement has been made an order of court, it is an order like any other. It will be interpreted like all court orders."
[8] See also *Airports Company South Africa v Big Five Duty Free (Pty) Limited and Others* [2018] ZACC 33 at paras 14 – 19.
[9] 2013 (2) SA 204 (SCA) at para 13.

[12] The "usual, well- known rules" relating to the interpretation of documents referred to in *Finishing Touch supra* have been set out in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[10] where Wallis JA held:

> *"Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears, the apparent purpose to which it is directed and the material known to those responsible for its production . . . A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document." [my emphasis].*

[13] In *Bothma – Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk*[11] Wallis JA restated the law and further held:

> *"The process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is 'essentially one unitary exercise.'" [my emphasis]*

[10] 2012 (4) SA 593 (SCA) at para 18.
[11] 2014 (2) SA 494 (SCA) at para 12.

[14] In *Betterbridge (Pty) Ltd v Masilo and others NNO*[12] Unterhalter AJ (as he then was) stated:

> *"As the Supreme Court of Appeal has made clear, the interpretation of language, including statutory language, is a unitary endeavour requiring the consideration of text, context and purpose."*

[15] I will deal with the interpretation of Canca AJ's order under three broad headings – namely, its text/language, its context, and interpretation giving rise to sensible and businesslike results.

The text/language of the order

[16] Paragraph 1 of the order is an acknowledgment by the State Respondents of the validity of the Applicant's claim. It is the Applicant's case that the Third Respondent, after investigating the claim, published it in terms of section 11(1) of the Act[13] having found that the claim complied with the requirements of 11(1)(a), (b) and (c). The State Respondents correctly submit that paragraph 1 is not an order by a Court upholding the validity of the Applicant's land claim.[14]

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[12] 2015 (2) SA 396(GP) at para 8.

[13] Section 11(1) of the Act provides:

"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."

[14] *Farjas (Pty) Ltd v Regional Land Claims Commissioner, KwaZulu-Natal* 1998 (2) SA 900 (LCC) at para 41.

[17] It has been stated in a number of cases[15] that there is a distinction between the validity of a claim lodged in terms of section 2 of the Act and the relief granted pursuant to proving a valid claim which is based on the exercise of a judicial discretion after taking into account the factors listed in section 33 of the Act. There is no mention in the order or on the papers that Canca AJ applied his mind to the section 33 factors or the question of equitable redress and quantum of compensation. The State Respondents submit that part of the enquiry is disposed of by the first paragraph of Canca AJ's order to the extent that the State Respondents concede the validity of the claim – but no concessions were made in respect of the extent of the claim.

[18] Referral proceedings are *sui generis* proceedings under Chapter H of the Rules of this Court and after the delivery of specified documents, the case proceeds in the form of an action. The relief seeking compensation by way of application is ill-conceived. Even when a restitution matter proceeds in the form of an action and there is no opposition, the plaintiff will have to lead evidence to satisfy the court, even if on a default basis. Evidence that is tendered must also demonstrate the extent of the claim to ensure that there is not overcompensation.

[19] In paragraph 2 of the order, the Applicant abandons its claim for physical restoration of the claimed land and in so doing has released certain landowners. The Applicant also seeks to reserve its rights to claim equitable redress. If the claim was settled in its entirety, as the Applicant claims, it makes little sense why the Applicant, who was legally represented at the time of the hearing, would need to reserve its rights. The State Respondents correctly submit that the wording suggests that future proceedings are anticipated in the Applicant's pursuit of

[15] See, for example, *Khosis Community, Lohatla v Minister of Defence and Others* 2004 (5) SA 494 (SCA) at para 5 and *Concerned Land Claimants Organisation of Port Elizabeth v Port Elizabeth Land and Community Restoration Association and Others* 2007 (2) SA 531 (CC) at para 26.

a claim for financial compensation once they have amended their response to support the necessary evidence.

[20] Similarly, paragraphs 3 to 9 of the order, in particular paragraph 8, provides that "the defendants represented by Cox and Partners... are released from the litigation in these proceedings and will play no further part therein." The State Respondents correctly submit that the wording points to a continuation of further litigation between other parties. It would not have been necessary to release the landowners if the claim was settled in its entirety.

[21] The State Respondents further submit that the right to claim equitable redress demonstrates a fundamental shift in the Applicant's approach to the proceedings. This argument is borne out by the initial referral of the claim, where the Applicant sought physical restoration. I agree with the State Respondents. Resultantly, this will require an amendment to Applicant's response and the relevant evidence to support an amended claim.

[22] I now turn to the text of the order. It is significant that there is no mention in the order for the payment of R502 017 807.00. The State Respondents correctly submit that the text of the order provides no basis for the relief sought and, at the very least for such a significant amount, there must at least be a clear textual basis.

[23] The order is also silent on the valuation of the Applicant's claim. Most significantly, nowhere in the order is there a reference that the order is in 'full and final settlement of the claim'. There is also no evidence of the value of the land claimed. The Applicant labours under the misapprehension that the expert valuer appointed by the State Respondents was for that very purpose. The expert valuer was appointed to value the properties of the landowners, and

he recommended an amount of R502 017 807, which was the present day market value of the properties for the purpose of physical restoration.

[24] The calculation of equitable redress in the form of financial compensation has been laid down in decisions of this Court and the Constitutional Court. The starting point is section 25(3) of the Constitution and the factors set out thereunder, which are considerations in the enquiry of just and equitable compensation. The test, as set out in several judgments,[16] is to first establish the historic value of the rights dispossessed, not the current market value, and to adjust any under–compensation by changes over time in the value of money.[17] It is clear that these factors have not been considered in the instant case.

[25] The more significant hurdle facing the Applicant is the letter of demand it has put up in reply, which the State Respondents submit supports their case.[18] The State Respondents

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[16] See, for example, *Wollach N. O. and Another v Government of the Republic of South Africa* [2018] ZALCC at paras 17 and 77; *Florence v Government of the Republic of South Africa* 2014 (6) SA 456 (CC) at paras 124 and 132; and *Minister of Rural Development and Land Reform v Phillips* [2017] ZASCA 1 at paras 13 and 30.

[17] *Florence v Government of the Republic of South Africa* 2014 (6) SA 456 (CC) at para 131 where the Court held that "In my view the Land Claims Court was correct in calculating the financial loss at the time of the dispossession and for the purpose of placing the Florence family in the same position they would have been immediately after the dispossession."

[18] The letter of demand provides as follows –

"1. We enclose herewith a copy of the Order of court dated 12 June 2017.

2. Our client, the Emantanjeni Community is entitled to be compensated on the basis of their community claim.

3. In terms of the valuation of our client's community claim proffered by the Commission, the Commissioner and the Minister, our client's community claim is valued in the sum of R502 017 807.00 (five hundred million seventeen thousand eight hundred and seven rands). For the purposes hereof we accept the lower valuation by the State and do not rely on the substantially higher valuation tendered on behalf of the landowners in respect of the published land.

4. In the circumstances we recommend that you make good the compensation our client is entitled to as follows:

4.1 The Sate is to procure the immediate purchase and transfer of the Clouston farms being Portion 10, 11, 12, 13, 14 and 15 of the Farm Varkensfontein 1138 in extent approximately 950 Ha ("the Clouston farms") together with the dairy business conducted on the Clouston farms which constitute an integral part of Clouston farms.

4.2 The balance of the value of the farms is to be paid to the trust of the community to be formed.

5. We pause to mention that it is as well for the Commission to bear in mind that the Commission erroneously failed to include the following cadastral units of land for publication in terms of Section 11 of the Restitution Act and that our client is entitled to bring an application for the inclusion of the value of these cadastral units of land to be included and to augment the compensation they are entitled to. Be

correctly make several submissions on this issue. Firstly, they contend that the Applicant's demand that "the valuation of our clients community claim proffered by the Commission and the Minister. . . in the sum of R502 017,807" is a misrepresentation because it was the land and not the claim that was valued. Secondly, the letter merely 'recommends', not demands, the transfer of certain properties with the balance to be paid in cash. Thirdly, the letter anticipates a broadening of the Applicant's claim, which demonstrates that the order did not bring an end to the proceedings. Fourthly, the letter states "pending the negotiations envisaged therein", which is inconsistent with the Applicant's version that the order settled the entire claim.

[26] Fifthly, the letter of demand states "for the purposes of seeking an amicable extra – curial resolution of the remaining issues between our respective clients", which without doubt demonstrates that the order did not bring an end to the proceedings. Sixthly, the letter calls for a meeting between the parties to drive this process forward. This new phase is inconsistent with Applicant's case that the order put an end to all disputes.

The context

[27] The context of the order must be seen in light of the nature of referrals. Because settlement of the Applicant's claim was not considered to be feasible, it was referred to this Court in terms of section 14(1) read with section 14(2) of the Act and the proceedings had to take place in accordance with the procedure described in Chapter H of the Rules. The State Respondents correctly submit that it is not possible to convert application proceedings to action

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that as it may, pending the negotiations as envisaged herein and without prejudice to our clients' rights we advise that our clients' rights in this regards remains strictly reserved.

6. We advise that without prejudice to our clients' rights as spelt out in the Order of the court and for the purposes of seeking an amicable extra-curial resolution of the remaining issues between our clients, our client is of the view that it is imperative in the circumstances that a meeting be arranged between our respective clients and their legal representatives to drive this phase of the process forward so that our client, the Emantanjeni community may receive their long-awaited compensation with due expedition.
7. We await your response within 7 days of the date of this letter."

proceedings. The claim in the present application is for the enforcement of the award of R502 01 807 which the Applicants argue is contained in the order. Application proceedings could be appropriate for the relief sought, however, the untenable interpretation of the order is the fundamental reason why the application must fail.

[28] On the Applicant's version, all that took place during the initial hearing of the matter was an inspection *in loco*. It bears mentioning that there is no record of this and neither is there any record of any further evidence, if any.

[29] The Applicant introduces evidence in the founding and replying affidavit. This includes evidence of negotiations or oral agreements reached pursuant to negotiations with the State Respondents; a written agreement concluded with some of the landowners in January 2017; and a signed agreement concluded in May 2017 between the Applicant and the State Respondents to purchase the Fifth and Sixth Respondents' portions of the Clouston farms. On 8 June 2017, the Applicant concluded an agreement in terms of which it would receive financial compensation as well as restoration of the Clouston farms. Based on the aforegoing, the Applicant submits that the State Respondents have failed to comply with the order. It becomes apparent that the relief sought is not only based on the order, but these other alleged background material and/or surrounding circumstances to support the interpretation that the order already includes an award of R502 017 807.

[30] The Applicant relies on *City of Tshwane Metropolitan v Blair Atholl Homeowners Association*[19] to support the submission of this evidence. *City of Tshwane supra* dealt with the interpretation of an 'Engineering Services Agreement'. The Court pertinently held:

> *"First, the integration (or parol evidence) rule remains part of our law. However, it is frequently ignored by practitioners and seldom enforced by trial courts.* [20]
>
> *"Allowing evidence in relation to negotiations will see further extensive evidence being led and will have the effect of minimising the words the parties have chosen to employ. Endumeni rightly emphasises the significance of the words the parties have chosen to record their agreement, though not above context. Permitting evidence of negotiations will lead to further uncertainty. The words, as an objective measure, are elevated above the partisan positions of parties in negotiations and litigation."*[21]

[31] It is necessary to restate the law governing the parol evidence rule. In *KPMG Charted Accountants (SA) v Securefin Ltd & another*,[22] the Court held:

> *"First, the integration (or parol evidence) rule remains part of our law. However, it is frequently ignored by practitioners and seldom enforced by trial courts. If a document was intended to provide a complete of a jural act, extrinsic evidence may not contradict, add to or modify its meaning... Second, interpretation is a matter of law and not of fact and, accordingly, interpretation is a matter for the court and not for witnesses . . Third, the rules about admissibility of evidence in this regard do not depend on the nature of the document... Fourth, to the extent that evidence may be admissible to contextualise the document (since 'context is*

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[19] [2018] ZASCA 176.
[20] *City of Tshwane supra* at para 65.
[21] *City of Tshwane supra* at para 77.
[22] 2009 (4) SA 399 (SCA) at paras 39-40.

everything') to establish its factual matrix or purpose or for purposes of identification, 'one must use it as conservatively as possible.'"

[32] The State Respondents correctly submit that the judgment of *City of Tshwane supra* is strong authority against the admission of the evidence the Applicant seeks to admit. The judgment strongly endorses *KPMG supra* and the parol evidence rule and confirms that extrinsic evidence is to be admitted conservatively. A conservative approach in this case would be to admit uncontentious evidence on the background of the order, including the Rules and referral process, and not the highly subjective and contentious statements the Applicant seeks to rely on – none of which are admissible.

[33] Counsel for the Applicant submitted that the parol evidence rule should not apply when interpreting a document or court order. He provided no authority to support this submission. There is no basis in law to do so. In my view the parol evidence rule is equally applicable when interpreting documents in restitution matters. Paragraph 30 falls to be struck out because it amounts to inadmissible evidence which is contrary to the parol evidence rule.

[34] The evidence put up by the Applicant is not found in any written form or alluded to in the order. The relief sought in this application is not contemplated in the order properly interpreted.

Sensible and businesslike results

[35] The State Respondents correctly submit that the Applicant's interpretation of the order gives rise to insensible and unbusinesslike results. The Applicant contends that the order, properly interpreted, already contains an award of equitable relief in an amount of R502 017

807. The Applicant's interpretation would be to grant financial compensation by having regard to the current developed market value of the properties under claim and not the historical under-compensation of the informal land rights of which the Applicants were dispossessed. The land rights which the Applicant was dispossessed of were based on subsistence agriculture, not commercial farming. In my view the State Respondent's interpretation of the court order is sensible and business-like and consistent with the purpose of the order. The effect of upholding the State Respondents' interpretation would allow for further adjudication in terms of the Act. What still has to be determined is not whether the restitution claim is valid, but whether section 2(2) of the Restitution Act disentitles the Applicant to restitution (*in casu*, to equitable relief), and if the Applicant is not so disentitled, what the amount of equitable relief should be.

[36] Having regard to the aforegoing, in my view, on a proper construction of the order, no provision is made for the relief sought in the main application and it falls to be dismissed.

Application to strike out

[37] The State Respondents seek an order striking out paragraph 30 of the Applicant's founding affidavit in the main application on the basis that it is irrelevant and inadmissible evidence and is in conflict with the parol evidence rule.

[38] The State Respondents further seek to strike out certain paragraphs in the replying affidavit[23] on the same grounds and as it raises a new matter which should have been raised in the founding affidavit and is in conflict with the parol evidence rule.

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[23] See footnote 3 above.

[39] It is trite law that an applicant must make out its case in its founding affidavit, not in reply. The State Respondents correctly submit that the replying affidavit raises a new matter, which includes a handwritten agreement as an annexure to the replying affidavit. There is no mention of a purchase price nor is there a reference to the purchase of the land owned by the Fifth and Sixth Respondents. It bears mention that the agreement has not been signed by the State Respondents, but only by the Applicant and the Fifth and Sixth Respondents.

[40] In my view the evidence put up by the Applicant not only contradicts, it adds to and modifies the meaning of the order and is inadmissible based on the principles enunciated in *KPMG supra* as it is in direct conflict with the parol evidence and falls to be struck out.

[41] Even if the evidence is not in conflict with the parol evidence rule, the version of the State Respondents in its answering affidavit must be accepted in terms of the Plascon-Evans[24] rule. In any event, the Applicant's version is so far-fetched that it falls to be rejected.

Costs

[42] Initially, the State Respondents sought costs against the Applicant but did not persist with this at the hearing, instead they persist with the claim that the Applicant's legal representatives should not be allowed to recover their legal costs under legal representation provided in terms of section 29(4) of the Act.[25] There is no need to deal with the legal fees of Advocate Shakoane SC who informed this Court that he volunteered his services and the issue

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[24] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634-635.

[25] "Where a party cannot afford to pay for legal representation itself, the Chief Land Claims Commissioner may take steps to arrange legal representation for such party, either through the State legal aid system or, if necessary, at the expense of the Commission."

of fees in relation to him does not arise. In my view, the Applicant's legal representatives' costs, should be disallowed following receipt of the answering affidavit. The Applicant's legal representatives should never have advised the Applicant to launch the main application.

[43] Pertinently, the State Respondents submit that the letter dated 19 June 2017 from the Applicant's attorneys' (which was sent some 7 days after the order was granted by Canca AJ) demonstrates without contradiction that the Applicant's attorneys' were fully aware that the order did not put an end to trial proceedings and that it did not contain an award of R502 017 807.

[44] When public funds have been provided to litigants in terms of section 29(4) of the Act there is a fiduciary duty on the legal representatives to be responsible when instituting litigation and they must bring litigation that is fully motivated. When a legal representative fails to do so and brings unwarranted applications, there is no reason why this Court should not disallow their fees. As soon as the Applicant's counsel's became involved in the matter he must have realised that the application was ill-advised and there is no reason why the Commission should pay his fees.

[45] In the result I make the following order:

1. The application is dismissed.

2. The application to strike out is granted and the following paragraphs of the Applicants papers are struck –

2.1. Paragraph 30 of the Founding Affidavit; and

2.2. The following paragraphs of the replying affidavit –

1. Paragraph 9 (including all subparagraphs except paragraph 9.1 and 9.4);
2. paragraph 10 (excluding the first two sentences);
3. paragraph 11;
4. paragraph 12;
5. the words in paragraph 13 'the fact that the hearing of the trial already took place';
6. subparagraphs 22.1 to 22.3;
7. paragraph 39.1;
8. subparagraphs 40.1 and 40.2 (including all sub-paragraphs);
9. sub-paragraph 44.2.1;
10. the words 'which in turn is linked to the value of the cadastral units of land as acknowledged to be embraced in the applicant's claim by the first to fourth respondents' in subparagraph 44.5.1;
11. sub-subparagraph 44.5.2;
12. the words 'and the value thereof" in sub-subparagraph 46.1.4;
13. subparagraph 47.2;
14. the words from "and at the conclusion" to 'accepted by the State Respondents" in subparagraph 47.4;
15. sub-subparagraphs 47.7.3, 47.7.4, 47.7.5;
16. subparagraph 47.8;
17. subparagraphs 47.9 and 47.10;

18. sub-subparagraph 47.11.3;

19. the words "of the sum of R502 017 807 being the value of their claim as admitted by the first to fourth respondents" in subparagraph 47.11.4;

20. sub-subparagraphs 47.11.5 and 47.11.6;

21. subparagraphs 47.12 to 47.18;

22. the words "based on the value of their claim as admitted and accepted by the first to fourth respondents in the sum of R502 017 807,00";

23. subparagraph 48.2;

24. the words from "in fact" to "between the parties" in subparagraph 48.4;

25. subparagraphs 48.6, 48.7 and 48.8;

26. subparagraph 49.2;

27. the words "as the issues in question have been settled between the parties and is part of an order of court' in paragraph 50;

28. the second sentence in paragraph 52;

29. subparagraphs 53.3;

30. the words 'and it is in this basis that the trial commenced and was concluded" in subparagraph 53.6;

31. subparagraph 54.2;

32. subparagraph 56.1;

33. the words from "and by the time" to "and occupied by the applicant community" in subparagraph 58.1;

34. subparagraph 60.1;

35. subparagraphs 61.4 and 61.5;

36. subparagraph 62.2;

37. subparagraph 63.3;

38. paragraph 64 (including all subparagraphs);

39. subparagraphs 65.1, 65.2 and 65.5; and

40. Annexure B to the replying affidavit.

3. No order as to costs in line with the usual practice of this Court.

4. No fees or disbursements, including counsel's fees and disbursements, may be recovered by the Applicant, their attorneys or counsel, from the State under any legal aid regime provided for in section 29(4) of the Restitution of Land Rights Act, 22 of 1994, in respect of the proceedings before this Court under case number LCC17/2018 following the filing of the answering affidavit.

Z CARELSE
Judge
Land Claims Court