




IN THE LAND COURT OF SOUTH AFRICA  
(HELD AT RANDBURG)

CASE NO: LCC160/2021

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.
	7 May 2024
SIGNATURE	DATE:

In the matter between:

**THE REGIONAL LAND CLAIMS COMMISSIONER**

**First Applicant**

**THE CHIEF LAND CLAIMS COMMISSIONER,  
GAUTENG PROVINCE**

**Second Applicant**

and

**AMANDEBELE AKWA-MANALA COMMUNITY**

**Respondent**

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IN RE:

**AMANDEBELE AKWA-MANALA COMMUNITY**

**Applicant**

And

**THE CHIEF LAND CLAIMS COMMISSIONER,  
GAUTENG PROVINCE**

**First Respondent**

**THE REGIONAL LAND CLAIMS COMMISSIONER**

**Second Respondent**

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## JUDGMENT

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### COWEN J

1. The applicants, the Chief Land Claims Commissioner and the Regional Land Claims Commission, Gauteng Province, (collectively, the Commission), have applied to rescind an order of this Court granted on 28 February 2022. The order compelled the Commission to transfer twenty portions of Downbern Farm 594JR, Gauteng (Downbern) to the respondent. The respondent is the Amandebele Akwa-Manala Community (the Amandebele Community).
2. The Amandebele Community lodged a claim under the Restitution of Land Rights Act 22 of 1994 (the Restitution Act) in respect of numerous properties, one of which is Downbern. According to the Commission, out of all the claims lodged, only certain portions of the farm Downbern were the subject of an agreement in terms of section 42D of the Restitution Act, specifically Portions 0 (R/E), 1, 3, 5 (R/E), 6,7,8,9,10,18,19, 20, 21, 22, 23, 24, 27, 28, 29, 30, 32, 34, 35 and 40. The claims in respect of a further seventeen portions of Downberg (specifically, portions 4, 11, 12, 13, 14, 15, 16, 17, 25, 26, 36, 37, 38, 39, 41, 42 and 43) were not settled, as negotiations with landowners were still ongoing. The contention that the claim was only partly settled under the section 42D agreement is supported by the documents before Court.
3. The Commission dismissed the remainder of the claims lodged as non-compliant with the requirements of section 2 of the Restitution Act. More specifically, the

claims were dismissed on the basis that the dispossession of land was of individual families and not the Amandebele Community.

4. Although the section 42D agreement only dealt with certain of the Downbern portions, the Amandebele Community thereafter instituted proceedings to compel the transfer of 'the remaining 20 [portions of Downbern], which have been agreed to in terms of the section 42D settlement agreement entered into between the respondents and the applicant.' Those proceedings were instituted late in October 2021.
5. The Commission received notification of the proceedings on 12 November 2021 and instructed the State Attorney to oppose the application and appoint counsel. The State Attorney delivered a notice of intention to oppose dated 17 November 2021. The matter was allocated to an attorney, a Ms M Nduli, who confirmed her appointment and advised that she was in the process of briefing counsel. On 1 December 2021, the Commission followed up on the matter with the State Attorney. Counsel was briefed only on 14 December 2021. A consultation with counsel took place on 15 December 2021 who requested further information in January 2022. The last time that the Commission received communications from Ms Nduli was on 26 January 2022.
6. On 18 March 2022, the Commission learnt through the State Attorney that the application was determined by the Court in the absence of the Commission. What had ensued is that the matter came before Judge Ncube on the unopposed roll on 28 February 2022 and an order was granted compelling the transfer of twenty properties. The notice of set down was served on the State Attorney.

7. The Commission seeks to rescind the order saying that the Commission was not in willful default and that the Commission was not aware that the matter was in Court on the day that it was heard. When the Commission learnt that the order had been granted and upon enquiry, the Commission ascertained that Ms Nduli – who had only commenced working at the State Attorney in October 2021 – had tendered her resignation in December 2021 with effect end January 2022. Her position had been vacant since then. A new attorney was appointed in the matter on the day that the Commission made the enquiries.
8. Under section 35(11) of the Restitution Act, this Court may ‘upon application by any person affected thereby’ and subject to its rules, rescind or vary any order or judgment granted by it in various circumstances including where the order was granted ‘in the absence of the person against whom that order or judgment was granted.’<sup>1</sup> Under Rule 64(2), a party seeking the rescission or variation of an order must do so on application delivered within ten (10) days of becoming aware of the order and upon good cause shown. Rule 58(6) and (7), however, govern rescission of orders granted in the absence of a party, and make provision for a twenty-day period for filing of the application. The Commission delivered the application outside of the twenty-day period. However, the applicant answered the application and, although again late, the Commission replied thereto. After hearing the parties, counsel confirmed that the application should proceed on its merits although it was late. Furthermore, there was ultimately no objection to the Court receiving the replying affidavit.

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<sup>1</sup> Section 35(11)(a).

9. The Commission argued the matter on the basis that the requirements for rescission when in default are met, which entail that a reasonable and acceptable explanation is given for the default, the application is made *bona fide*, and that on the merits, there is a *bona fide* defence, which carries some prospect of success.<sup>2</sup> The Court, however, retains a discretion which must be exercised after proper consideration of all relevant circumstances. The Commission contended further that the test for rescission imposed by Rule 42 of the Uniform Rules of Court, inasmuch as they apply, were met, specifically that the order was not only granted in the Commission's absence, but was 'erroneously' sought and granted. No argument was addressed to me on the differences in wording between section 35(11) of the Restitution Act and Rule 42 and more particularly the absence of any express reference in section 35(11) to a requirement that an order be erroneously sought or granted.
10. In my view, the Commission has established a case for rescission of the order in terms of section 35(11) read with Rules 58(6) and (7). I am satisfied on the evidence before me that there is a reasonable and acceptable explanation for the default and that the application is made *bona fide*.
11. On the merits, there is a *bona fide* defence which carries prospects of success. In this regard, the Commission made three submissions. First, the Commission pointed out that the properties affected by the order are owned by persons who had no notice of the proceedings and were not joined thereto.<sup>3</sup> That fact, it was submitted, was known to the Amandebele Community as it appears from the

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<sup>2</sup> *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) at para 11.

<sup>3</sup> *Morudi v NC Housing Services and Development Co Limited* 2019 (2) BCLR 261 (CC), albeit factually distinguishable as regards the role played by the Judge.

section 42D agreement that was placed before the Court to sustain the relief sought. Secondly, the Commission pointed out that the section 42D agreement did not contain any settlement regarding the portions that were the subject of the order and that, on a proper consideration thereof, it is clear that the procedures that the Commission had to follow in respect of those portions had not yet been followed. Thirdly, the Commission pointed out that there are only seventeen and not twenty portions of Downbern that remained in issue. The Amandebele Community ultimately conceded the latter point. In my view, the first two submissions constitute sufficient grounds to ground a rescission of the order. The owners had a direct and substantial interest in the relief sought and were not parties to the proceedings. Moreover, while the parties may wish to dispute the import of the section 42D agreement in respect of the remaining seventeen portions, the Commission's stance is indicative of a defence that has prospects of success.

12. During the course of argument, it was contended further that the order was erroneously sought in that the Amandebele Community misled the Court about the import of the section 42D agreement. In view of my conclusion above, it is unnecessary to reach this issue. It would also be imprudent because it is apparent at least from the submissions of counsel that different views are taken on the import of the section 42D agreement. It is nonetheless disconcerting that no mention was made in the founding affidavit itself to the fact that the properties sought to be transferred were owned by persons not party to the proceedings. I accept, as submitted on behalf of the Amandebele Community, that the identities of the owners may not be known to them whereas they would be known to the Commission. But the document relied upon to reflect the section 42D agreement,

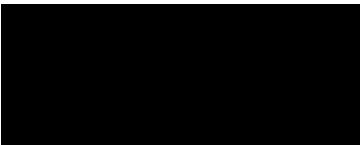
attached to the founding papers, refers to the fact that the properties are owned by persons with whom negotiations must still ensue before they can be purchased. In my view, that fact ought to have been drawn to the attention of the Court in the founding affidavit, and in the absence thereof, by the legal representative. Had mention been made of it, the Court's attention would have been duly drawn to the difficulty. In this regard, whether joinder is ultimately necessary should the proceedings continue may depend on whether the respondent can persuade the Court to dismiss the application on its submissions regarding the import of the section 42D agreement.

13. In the result, I conclude that there is just cause to rescind the order granted in the absence of the Commission. Moreover, there is no other reason that dissuades me from granting the rescission sought.

14. This Court does not ordinarily grant costs, save in special circumstances of which there are none.

15. The following order is made:

- 15.1. The order of this Court of 28 February 2022 under case number LCC 160/2021 is rescinded.
- 15.2. There is no order as to costs.



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SJ Cowen  
Judge, Land Court

Date reserved: 7 February 2024

Date of judgment: 7 May 2024

Appearances:

Applicants: S Poswa-Lerotholi SC & F Magano instructed by the State  
Attorney.

Respondent: D Pillay instructed by Sameera Cassimjee Attorneys