



IN THE LAND COURT OF SOUTH AFRICA
HELD AT RANDBURG

CASE NO: LCC37/2003

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

SIGNATURE

16 August 2024
DATE:

Plaintiff

MACASSAR LAND CLAIMS COMMITTEE

and

MACCSAND CC

First Defendant

THE GOVERNMENT OF THE REPUBLIC OF

SOUTH AFRICA

Second Defendant

MINISTER OF LAND AFFAIRS

Third Defendant

CITY OF CAPE TOWN

Fourth Defendant

MINISTER OF LOCAL GOVERNMENT AND HOUSING

Fifth Defendant

THE REGIONAL LAND CLAIMS COMMISSIONER

Sixth Defendant

THE MUSLIM JUDICIAL COUNCIL	Seventh Defendant
CLIVE AUBRYT FIGAJI	Eighth Defendant
GEOFFREY LANE FIGAJI	
MARIANNA LORETA FIGAJI	
THE REGISTRAR OF DEEDS	Ninth Defendant
THE SURVEYOR-GENERAL	Tenth Defendant
THE CAMMES DARRIES HERITAGE LANE TRUST	Eleventh Defendant

JUDGMENT

COWEN J

Introduction

- [1] The plaintiff, the Macassar Land Claims Committee, has requested this Court to separate two issues in the above action for preliminary hearing in terms of Rule 57 of the Rules of this Court. The action is a claim for restitution in terms of the Restitution of Land Rights Act 22 of 1994 (the Restitution Act).
- [2] The plaintiff claims restitution of various parcels of land situated in Macassar, Cape Town, in the Western Cape, more specifically Erf 1991, Erf 1195, Erf 1196, Erf 1197 and Erf 1198 (the commonage). In its statement of claim, the plaintiff describes this land as a commonage, in respect of which members of the community of Sandvlei, Macassar, exercised a right in land held in common. The plaintiff pleads that the commonage used to be known as Zandvliet. The plaintiff also claims the remainder of Cape Farm 544.

[3] Rule 57 is titled 'Prior Adjudication Upon Issues of Law or Fact' and provides:

(1) Should the Court, upon application by any party or of its own accord, be of the opinion that there is an issue of law or fact in a case which may conveniently be decided –

(a) before further documents are delivered in the case;

(b) before evidence is led in an action; or

(c) separately from some other issue,

the Court may order a separate hearing of that issue, and grant any extensions of time periods prescribed in the rules which may be desirable because of the separate hearing.'

[4] There are two issues the plaintiff seeks to have determined separately in the action, one of which is a question of fact and law and the other a question of law. The only parties to the litigation who oppose the proposed separation are the seventh and the eleventh defendants, the Muslim Judicial Council (MJC) and the Trustees of the Cammies Darries Heritage Land Trust (the CDH Trust). It is common cause that the MJC is also a land claimant, but the extent of its claim is in dispute. There is a dispute whether the CDH Trust is a land claimant, but even if it is, there is a further dispute of the extent of its claim. The fourth defendant, the City of Cape Town is of the view that the separation proposed would expedite the finalisation of the action and for that reason supports it. However, the fourth defendant abides by the Court's decision and it did not participate in the hearing. The Minister of Land Affairs and Rural Development and the Commission on the Restitution of Land Rights (the Commission), being the third and sixth defendants respectively, support the proposed separation and participated in the hearing to

assist the Court. In this regard, the Commission suggested that the land claimed by CDH Trust does not overlap with the plaintiff's claim.

[5] The two issues proposed to be separated may be formulated, broadly speaking, as follows:

5.1 What land was claimed by the MJC, and what overlapping land, if any, was claimed by the CDH Trust prior to 31 December 1998 (the 1998 cut-off date);

5.2 Whether the MJC and the CDH Trust duly lodged claims when they delivered counter-claims with this Court on or about 16 January 2015 in terms of section 38B of the Restitution Act, as amended in 2014.

[6] The question for decision is whether one or both of the above issues, as broadly formulated, may conveniently be decided separately from other issues in the case.

The first issue

[7] As indicated, it is common cause that the MJC lodged a land claim prior to the 1998 cut-off date but the extent of the land claimed is the subject of dispute. According to the plaintiff, the MJC claimed only Erf 1195 prior to the 1998 cut-off date. The MJC's initial claim form describes the claimed property as Erf 1195 (Portion 88-Farm 664 Zandvliet). In a counter-claim the MJC delivered on or about 16 January 2015, however, the MJC claimed multiple properties including all of the properties that the plaintiff claims. Moreover, when the MJC amended its counter-claim in July 2022, it then pleaded that in fact, its initial claim lodged before the 1998 cut off date includes the land the plaintiff claimed and not only

Erf 1195. The relevant paragraph is paragraph 10.1 of the amended counter-claim,¹ and, pertinently, paragraph 10.1.2 which reads:

‘The claim contemplated by the MJC claim form, properly interpreted taking into account all relevant considerations pertaining to the use of the property by the community on behalf of which Mr Braaf acted, extends to Farms 544 and 664 Macassar, thereby incorporating the property set out in paragraph 4 above.’

[8] The property set out in paragraph 4 includes all of the property the plaintiff claims and not only Erf 1195. Accordingly, pursuant to the counter-claim, as amended in 2018, the MJC claims the property in paragraph 4 on two alternative bases, being the initial claim form, alternatively the counter-claim itself.

¹ Paragraph 10 read with 10.1 reads:

10. This counterclaim serves as an application for restitution of the Seventh Defendant’s land rights in respect of the property set out in paragraph 4 above. It is advanced on the following two alternative bases:

10.1 First, on the basis that the eleventh defendant submitted claims in respect of the property set out in paragraph 4 above on or before 31 December 1998 in accordance with the provisions of the Act. In this regard:

10.1.1 Mr MN Braaf (**Mr Braaf**) submitted a claim form to the Sixth Defendant in the prescribed manner on or about 31 December 1998 (**the MJC claim form**) which stipulated that the land described as ‘Erf 1195 (Ptn 88 – Farm 664 Zandvliet) was claimed by the ‘Cape Malay Community – Muslim Judicial Council / Faure / Kramat / Sandvlei Muslim Community’, a copy of which is attached marked ‘M-CC4

10.1.2 the claim contemplated by the MJC claim form, properly interpreted taking into account all relevant considerations pertaining to the use of the property by the community on behalf of which Mr Braaf acted, extends to Farms 544 and 664 Macassar, thereby incorporating the property set out in paragraph 4 above;

10.1.3 The sixth defendant subsequently designated reference number N479 to the claim contemplated by the Darries claim form;

10.1.4 By way of Notice 643 of 2018 in Government Gazette No 41982 of 19 October 2018, the Sixth Defendant gave notice in terms of section 11A(4) of the Act that claim B479 had been submitted and would be investigated;

10.1.5 The aforesaid notice described the property claimed in respect of B479 as the ‘remaining extent of erf 1195, Macassar’ and the claimant as Mohamed Nazeem Braaf;

10.1.6 The seventh defendant objected to the aforesaid notice on or about 13 December 2018 on the basis that the property is was (sic) not properly described (inasmuch as it did not extend to Farm 664 Macassar) and the claimant is the Muslim Judicial Council, on behalf of the Muslim community of South Africa (and not only Mojamed Nazeem Braaf);

10.1.7 The seventh defendant represents the Muslim community of South Africa, the community on whose behalf the MJC claim form was lodged and who claims restitution of land rights in respect of the property set out in paragraph 4 above in terms of the Act.’

[9] There is no dispute between the parties that, inasmuch as the counterclaims comprise claims to land additional to the land claimed prior to 31 December 1998, the claims would be interdicted claims as contemplated by the Constitutional Court's decisions in *Lamosa 1*² and *Lamosa 2*.³ That status would not necessarily preclude the MJC and the CDH Trust from participating in the proceedings but the participation would be limited. The limits are set out in the order in *Lamosa 2* in the following terms:

‘Until the date referred to in para (a), no interdicted claim may be adjudicated upon or considered in any manner whatsoever by the [Land Court] in any proceedings for the restitution of rights in land in respect of old claims, provided that interdicted claimants may be admitted as interested parties before the Land Claims Court solely to the extent that their participation may contribute to the establishment or rejection of the old claims or in respect of any other issue that the presiding judge may allow to be addressed in the interests of justice.’

[10] Similar considerations apply to the CDH Trust. In paragraph 3 of its counter-claim, as amended in 2018, the CDH Trust claims the same land that the MJC claims, and, additional land. Thus, the CDH Trust also claims the land the plaintiff claims in its amended counter-claim. Like the MJC, the CDH Trust pleads in its amended counter-claim that it claims the land on two alternative bases, the first being a claim it pleads it lodged before the 1998 cut-off date and the second being the counter-claim itself which was lodged on or about 16 January 2015. Again, as with the MJC, any claim in respect of land claimed only by virtue of the counter-claim itself would, at best, constitute an interdicted claim

² *Land Access Movement of South Africa v Chairperson, National Council of Provinces* 2016(5) SA 635 (CC).

³ *Speaker of the National Assembly and another v Land Access Movement of South Africa and others* 2019(6) SA 568 (CC) .

and the participation of the CDH Trust in the proceedings would be restricted by the Constitutional Court's order in *Lamosa 2*.⁴

[11] The CDH Trust pleads the two alternative bases for the claim in paragraph 11 of its amended counter-claim. Paragraph 11.1 deals with the contention that all of the property claimed in paragraph 3 was in fact claimed prior to the 1998 cut-off date.⁵ I emphasise paragraphs 11.1.1 to 11.1.3 which embrace a contention that where the claim form referred to a portion of Farm 664, additional documentation

⁴ See above paragraph 10.

⁵ Paragraph 11 read with 11.1 reads:

11. This counterclaim serves as an application for restitution of the Eleventh Defendant's land rights in respect of the property set out in paragraph 3 above. It is advanced on the following two alternative bases:

11.1 First, on the basis that the Eleventh Defendant submitted claims in respect of 'Farms 544 and 664 Macassar' comprising the property set out in paragraph 3 above, on or before 31 December 1998 in accordance with the provisions of the Act. In this regard:

11.1.1 Mr Mogamat Ganief Darries ('**Mr Darries**') submitted a claim form to the Sixth Defendant in the prescribed manner on or about 31 December 1998 ('**the Darries claim form**') which stipulated that the land described as 'Portion of 664 Macassar, Somerset Weste, Cape Province' was claimed by the 'Kamies Darries Estate', a copy of which is attached marked 'D-CC6';

11.1.2 On or about the time of the submission of the aforesaid claim form, Mr Darries submitted to the Sixth Defendant additional documentation supporting the claim, including a letter entitled 'The Kamies Darries Land Claim', a copy of which is attached marked 'D-CC7' which explains that the claim extends to 'farms 544 and 664 Macassar';

11.1.3 The claim contemplated by the Darries claim form, properly interpreted taking into account the additional documentation so submitted, extends to Farms 544 and 664 Macassar, thereby incorporating the property set out in paragraph 3 above;

11.1.4 The sixth defendant subsequently designated reference number D697 to the claim contemplated by the Darries claim form;

11.1.5 By way of Notice 644 of 2018 in Government Gazette No 41982 of 19 October 2018, the Sixth Defendant gave notice in terms of section 11A(4) of the Act that claim D697 had been submitted and would be investigated;

11.1.6 The aforesaid notice described the property claimed in respect of claim D697 as Erf 7461, Macassar and the claimant as Mogamat Ganief Darries;

11.1.7 The Eleventh Defendant objected to the aforesaid notice on or about 12 December 2018 on the basis that the property is was (sic) not properly described (inasmuch as it did not extend to Farms 544 and 664 Macassar) and the claimants are the descendants of the late Kamies Darries (and not only Mogamat Ganief Darries).

11.1.8 The Eleventh Defendant is the representative of the direct descendants of Kamies Darries, the community on whose behalf the Darries claim form was lodged and who claims restitution of land rights in respect of the property set out in paragraphs 3 above in terms of the Act; ...'

submitted confirmed that the claim was in respect of Farms 544 and 664, Macassar and that the claim form should be so understood, properly interpreted.

[12] In its plea to the amended counter-claim, the plaintiff denies that the CDH Trust claimed any land before the 1998 cut off date. In the event that it is found that a claim form was timeously lodged, the plaintiff pleads to the effect that for the most part, the properties referred to in paragraph 3 of the counter-claim were not claimed. The plaintiff contends that the only property in respect of which a claim form may have been lodged before the cut off date is Portion 110 (a portion of Portion 3) of the farm Zandvliet.

[13] The first issue thus arises as a dispute between both the plaintiff and the MJC and the plaintiff and the CDH Trust. Simply understood, the plaintiff is contending that both the MJC and the CDH Trust are impermissibly seeking to expand their claims beyond what was claimed in 1998.

[14] My attention was drawn to case law of relevance to the enquiry to determine the first issue. The two cases the plaintiff referred to are *Minaar*⁶ and *Makhuva-Mathebula Community*,⁷ the latter decided ultimately by the Supreme Court of Appeal. The seventh and eleventh defendants, on the other hand, relied on the more recent decision of this Court in *Nyavana Traditional Authority*,⁸ in which

⁶ *Minaar NO v Regional Land Claims Commissioner for Mpumalanga and others* [2006] ZALCC 12 (*Minaar*) at para 23: '...There is no manifestation that the person who signed the claim form intended, at the time when he lodged the claim that the claimed land should also include other land. Even if he has had such an intention, that subjective intention alone cannot expand a claim which *ex facie* the claim form is limited to portion D, to also include other subdivisions of Daisy Kopje.' See too para 27.

⁷ *Makhuva-Mathebula Community v Regional Land Claims Commissioner, Limpopo & another* [2019] ZASCA 157 (*Makhuva-Mathebula*)

⁸ *Nyavana Traditional Authority v MEC for Limpopo Department of Agriculture and others* [2020] ZALCC 12; [2021] 1 All SA 237 (LCC) (*Nyavana Traditional Authority*).

Spilg J considered the import of *Minaar* and *Makhuva-Mathebula*. Ultimately, and with reference to these authorities, the parties have starkly divergent views on the scope of the enquiry a Court can embark upon when a claimant has described the claimed property in a claim form with reference to its cadastral boundaries and then seeks to assert that in fact they intended to claim more land.

[15] While mindful of the parties' divergent submissions in respect of these authorities, I am of the view that it is neither necessary nor desirable to consider their full implications in order to determine whether it is convenient to separate the issues as the plaintiffs seek. Suffice to emphasise that on either party's approach, the nature of the enquiry is one of both fact and law. And that on the plaintiffs' understanding of the authorities referred to, the evidence that would be relevant to the enquiry would be considerably more limited than on the approach of the MJC and the CDH Trust. In my view, what must be asked at this stage to assess the convenience of the proposed separation is whether there is any material overlap between the evidence that could be relevant on either approach, with the evidence that would be relevant to the remainder of the trial should the Court determine the first issue in favour of the MJC and the CDH Trust.

[16] The only basis for contending that there would be a material overlap is the reliance, pertinently of the MJC, in paragraph 10.1.2 of its counter-claim as amended on "all relevant considerations pertaining to the use of the property ..." in interpreting the claim form. The pleadings do not say what those relevant considerations are, but Mr Duminy SC, on behalf of the MJC and CDH Trust, submitted that the issues are inextricably intertwined with those that would arise in the trial itself. What is clear, however, is that even on the authority of *Nyavana*

Traditional Authority, the fact that a claimant used property in the past, cannot, without more, determine that that property is the subject of a claim form, properly interpreted. Notably, there is no similar allegation in the counter-claim of the CDH Trust. In these circumstances, and having regard to the pleadings in both counter-claims, as amended, and *Nyavana Traditional Authority*, upon which Mr Duminy relies, I am unpersuaded that there is any cognisable risk of a material overlap of evidence.

[17] Mr Duminy also submitted that the separation will likely trigger piece-meal appeals in circumstances where the matter has long been delayed and has already reached the Constitutional Court on a prior issue. Mr Joseph SC (with him Ms Williams) accepts that the separation might give rise to a further appeal, but contends that if this transpires, that would not be contrary to interests of justice and is a risk his clients are willing to assume. Indeed, he submitted that the interests of justice might be served thereby should the issues dealt with provide certainty in respect of other restitution cases.

[18] In my view, the broader considerations about the impact of the separation on the trial favour a separation of issues, more pertinently, those that flow from obtaining certainty, in advance of the trial, about the extent of the land in respect of which the MJC and the CDH can assert their interests. This will self-evidently affect matters such as how one prepares for trial, what evidence can be led, the prospects of pre-trial settlement and the ability to adduce or test evidence without impediment or controversy. It will also reduce confusion in the trial process. This may mean that the finalisation of the matter will take time, but that appears to be inevitable in this case and a failure to obtain certainty on these matters in

advance has the real potential to generate an unnecessarily complex and prolonged trial.

[19] During the course of argument, Mr Joseph and Mr Majozi submitted that in any event, unless a review of the relevant decisions to gazette the properties is brought, the MJC and the CDH Trust are confined to the property as gazetted. In respect of the MJC, the gazetted property is pleaded as the remaining extent of Erf 1195. In respect of the CDH Trust, the gazetted property is pleaded as Erf 7461. This too, the plaintiff submitted, favours a separation. The Court was not addressed on whether a review is necessary in view of section 11A of the Restitution Act which provides a procedure to withdraw or amend notices of claim. Nonetheless, in my view the status of the gazettes is a relevant consideration and, on the information to hand, favours separation.

[20] In the result, I have come to the conclusion that the first issue should be separated in terms of Rule 57 for prior determination in the trial.

[21] I requested further submissions from the parties regarding how to frame the separation with reference to specific paragraphs in the pleadings. Only the plaintiffs responded to the request and in doing so, identified multiple paragraphs. Unfortunately, the MJC and CDH Trust declined to respond saying that they could not afford legal representation to prepare the submissions. In these circumstances, the precise formulation of the separation must be finalised prior to the commencement of the hearing of these issues.

The second issue

[22] The second issue is a question only of law and arises should the Court find that the MJC and the CDH Trust lodged only limited (or no) overlapping claims before the 1998 cut-off date. In that event, to participate in the proceedings, the MJC and the CDH Trust would need to rely on the status of an interested person whose claim is an interdicted claim under *Lamosa 2*. However, neither the MJC nor the CDH Trust lodged their claims in 2015 directly with the Commission. They lodged their claims by instituting direct access proceedings under section 38B of the Restitution Act. Relying on *Witz*,⁹ Mr Duminy submitted that it is plain that this constitutes lodgement and that *Witz*, a two judge decision of this Court, binds this Court. Mr Joseph submitted that the plaintiffs contend that *Witz* is wrongly decided and contended that the issue warrants the further attention of the Court, in light *inter alia* of the wording of the Restitution Act. Reference was also made to *Mahlangu NO*.¹⁰ He requested that the bench in the matter be accordingly composed of more than one Judge so that the correctness of *Witz* can be duly determined. Mr Duminy submitted that that is an issue that can be dealt with by a higher Court should the matter progress on appeal.

[23] In my view, the plaintiff is correct that the second issue can conveniently be separated and dealt with together with the first issue, and even more so if the matter is heard by a Court comprised of more than one Judge. The two issues will, together, materially inform both the extent to which and the basis upon which the MJC and / or the CDH Trust can participate in the proceedings. Mr Joseph is correct that the issues raised can have an impact on other matters that come

⁹ *Department of Land Affairs v Witz* LCC152/98 delivered on 12 October 2000 (*Witz*) at para 7.

¹⁰ *Mahlangu NO v Minister of Land Affairs and others* 2005(1) SA 451 (SCA).

before this Court, not least in light of the wave of interdicted claims that were lodged between 2014 and 2015 before the *Lamosa 1* decision. As regards *Witz*, if the plaintiff is correct and *Witz* was wrongly decided, then it would be highly prejudicial for the plaintiff to have to run a trial on the basis that the MJC and the CDH Trust are interested parties as contemplated by *Lamosa 2*. And if *Witz* was correctly decided, the MJC and the CDH Trust should be permitted duly to assert their rights. However, the power to constitute a Court comprising of more than one Judge resides with the Judge President of the Court.

Legal representation of the MJC and the CDH Trust

[24] As indicated above, the MJC and the CDH Trust declined to make substantive submissions in respect of the paragraphs of the pleadings that would sensibly be separated should the Court order a separation. The Court was informed that this is because they could not afford to pay counsel. Their attorney made brief submissions mainly on the impact of the new Land Court Act 6 of 2023, and particularly section 16(4), which deals with legal representation and which provides:

(a) Where a party involved in a matter before the Court is not represented by a legal representative because such party cannot afford to pay for legal representation, and the Court is of the opinion that it would be in the best interests of the party to have legal representation, the Court must refer the matter to Legal Aid South Africa as contemplated in section 2 of the Legal Aid South Africa Act 2014 (Act No 39 of 2014). .

(b) Legal Aid South Africa must deal with a matter referred to in paragraph (a) in accordance with section 43(1)(f) of the Legal Aid South Africa Act, 2014, to provide legal representation at State Expense, where substantial injustice would otherwise result.

(c) Expenditure in connection with the implementation and application of paragraph (a) must be defrayed from money appropriated by Parliament for this purpose and monies appropriated by Parliament for this purpose constitute earmarked funds on the vote of Legal Aid South Africa, and may not be used for any other purpose.'

[25] In short, the Court was requested *mero moto* to 'regularise' the position regarding the funding of the MJC and the CDH Trust by Legal Aid. In my view, it would not be appropriate for this Court to entertain this request in these proceedings. The issue was raised only after the hearing of the matter, the Court has not heard argument on how issues of this sort should duly be raised, there is no adequate information before the Court and the Court is not apprised of the status of recent engagements between Legal Aid South Africa and these parties. There are also unsatisfactory features of how the MJC and the CDH Trust is approaching its representation, which it is able to afford from time to time and for purposes it selects. Specifically it is difficult to understand how a party can justify instructing senior counsel to oppose the request for separation but then fail to comply with the Court's request to assist in identifying how to frame a separation having regard to the pleadings. That stance, indeed, can give rise to wasted costs for others.

Order

[26] I make the following order:

26.1 The following two issues, broadly formulated, are to be decided separately.

26.1.1 What land was claimed by the MJC, and what overlapping land, if any, was claimed by the CDH Trust prior to 31 December 1998;

26.1.2 Whether the MJC and the CDH Trust duly lodged claims when they delivered counter-claims with this Court on or about 16 January 2015 in terms of section 38B of the Restitution Act, as amended in 2014.

26.2 The decision whether to constitute the Court of more than one Judge is referred to the Judge President for determination.

26.3 Subject to 26.4 costs are costs in the cause.

26.4 Any costs wasted by the failure of the of MJC and CDH Trust to facilitate the final formulation of the separated issues are reserved.

26.5 Any party may at any time request a conference to determine the further conduct of the matter.



SJ Cowen

Judge, Land Court

Date of decision: 16 August 2024.

Appearances:

Plaintiff: Adv B Joseph SC and J Williams instructed by Ighsaan Sadien Attorneys

Seventh and eleventh defendants: Adv W Duminy SC instructed by Raymond McCreath Inc.

Third and sixth defendants: Adv M Majozi instructed by the State Attorney, Johannesburg.