

SOUTH AFRICA / JUDGMENT

BJ Smit Trust and 274 Others v Mutsei and Others (LCC 171/2008C; LCC 171/2008D) [2021] ZALCC 34 (12 May 2021)

[2021] ZALCC 34

COURT

Land Claims Court

BEFORE

B Spilg

CASE / FILE NUMBER

LCC 171/2008C; LCC 171/2008D

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IN THE LAND CLAIMS

COURT OF SOUTH AFRICA

HELD AT RANDBURG

Case

numbers:LCC 171/2008C

LCC 171/2008D

REPORTABLE:

NO
OF
INTEREST TO OTHER JUDGES: YES
REVISED.
12
May 2021

In the matter between:

BJ
SMIT TRUST AND 274 OTHERS
2nd – 275th Applicants
And
MUTSEI,
PHATUWANI COLLINS
1st Respondent
THE
MINISTER OF RURAL DEVELOPMENT
AND
LAND
REFORM
2st Respondent
REGIONAL
LAND CLAIMS COMMISSIONER

GAUTENG
AND NORTH WEST PROVINCE
3RD Respondent
In

the matter between: MEKGARENG
COMMUNITY
1st Claimant/Plaintiff
FRANS
BOTINYANA MAKUWE
2nd Claimant/Plaintiff

Concerning: THE
FARM BOEDERSTROOM 481 JQ & OTHERS
AND
LAND
REFORM
1st Defendant
BJ
SMIT TRUST AND 274 OTHERS
2nd – 275th Defendants
OTHER
INTERESTED PARTIES
276th and further Defendants

JUDGMENT

HEARING OF 21 April 2021 RE COSTS

SPILG, AJP

INTRODUCTION

1. This is an application for costs against the Minister of Agriculture,

Land Reform and Rural Development (the second and third respondents respectively) as well as the Regional Land Claims Commissioner;

Gauteng and North West Province (“the RLCC”) arising out of the failure of the State to comply with a court directive issued on 13 October 2017 (case no LCC 171/2008C) and

subsequently failing to provide dates for a hearing under Practice Direction 8 (4) (case no LCC 171/2008D). The applicants comprise a group of 275 land owners who are represented by Peet Grobbelaar Attorneys. They are not the only landowners whose properties are subject to the land claim; however they are the only ones who brought the present set of applications.

Initially costs were sought in the first instance against the State Attorney de bonis propriis. This is no longer being pursued. However, the applicants seek opposed costs on the attorney and client scale.

In order to appreciate the issues, it is necessary to briefly sketch the relevant circumstances which precipitated the current applications.

2. Despite the referral of the land claim of the Mekgareng Community to this court in 2008, by 12 October 2017 the claim still remained bogged down at the stage of finalising the gazetting of properties

which were subject to the claim and finalising which of the claimed properties were not feasible for restoration

3. AJP Meer held a pre-trial conference on 12 October 2017 with the objective of attending to these matters as well as the filing of expert reports and discussing trial dates. Pursuant to the pre-trial the court issued a directive that expert reports were to be filed by 31 January 2018 and that prior to 15 December 2018 the legal representatives of the parties were to arrange a meeting for the purpose of discussing inter alia the finalisation of the properties still to be gazetted and attempting to reach agreement on which properties were not feasible to restore.
4. Immediately after the pre-trial the applicants' attorneys

addressed a letter to the State Attorney dated 16 October requesting it to provide a date for the meeting directed by the court. There was no response to the letter, nor did the State Attorney respond to the letter sent approximately a month later advising of the availability of the applicants' counsel to attend the meeting within the time directed by the court. Once again there was no response to the letter.

5. It is common cause that the State Attorney failed to arrange a meeting within the time directed by the court. Almost a year later the State Attorney had still not arranged the meeting. This prompted the applicants to address a further letter to the State Attorney in September 2018 placing it on terms to schedule the meeting, failing which an application would be brought to compel the State Attorney and the RLCC to comply with AJP Meer's directive of 13 October
2017. The State Attorney was also advised that if such an application was necessary then punitive costs on the attorney and client scale would be sought, including costs de bonis propriis against the State Attorney.
6. The State Attorney did not respond to the demands and on 11 December 2018 the threatened application was brought against the State Attorney (against whom, as mentioned earlier, costs were initially sought de bonis propriis), the Minister and the RLCC. They served a notice to oppose but failed to file answering affidavits and were then barred. The matter therefore became unopposed and was accordingly set down on the unopposed motion court roll for hearing on Monday 25 March 2019.
7. On Friday 22 March the respondents sent an unattested answering

affidavit via email to the applicants' attorney. This was followed by an application for condonation.

8. At the hearing on 25 March the respondents were represented by senior counsel who advised the court that the matter had become opposed and requested a postponement. This is the ordinary consequence when a matter on the unopposed roll becomes opposed.

Accordingly, there would have been no need for the applicants to have prepared for an opposed hearing on 25 March despite receiving a set of answering affidavits (albeit unsigned). It is therefore evident that the applicants did not have to prepare for an opposed hearing on that day and this must be reflected in the order I make. The only question regarding the costs of the hearing of 25 March is whether or not they should be on the attorney and client scale or not.

9. It is equally clear that as from the date of that hearing the

applicants were obliged to prepare on the basis of an opposed application. It follows that the costs as from that date until such

time as the necessity for the application fell away (if at all) are to be on the opposed scale. This would include the costs of preparing the original application and considering all papers sent by the respondent in respect of opposing the application irrespective of whether they were deposed to or not. Accordingly the only question regarding the costs for this last period is once again whether or not they should be on the attorney and client scale.

10. It is common cause that the respondents complied with the directive when the requisite meeting was convened for 11 April 2019. It follows that any argument after that was unrelated to any failure to comply with the directive but rather, whether the application for costs itself was opposed and whether there are other factors warranting a punitive costs order.
11. Of significance in this regard is that the respondents were formally asked by letter whether they would consent to the order in the notice of motion, with an offer that the applicants would abandon the *de bonis propriis* order sought against the State Attorney. In other words, the applicants would persist in seeking costs of the application on the attorney and client scale against the Minister and the RLCC.

The respondents did not reply to this letter which was sent the day before the meeting of 11 April. Despite a further letter containing

the same tender there still was no response. A number of other letters were sent which repeated the same offer although on at least

one occasion other issues were canvassed. The applicants' last letter which repeated the offer was sent on 5 May 2020. It was not responded to and the applicants proceeded to set the application down. Throughout this period only one letter was responded to and even then the issue of costs was not canvassed.

12. Unfortunately the matter did not end there. Since the application was opposed, albeit only in relation to costs, the State Attorney was requested to agree on hearing dates. It failed to do so. Since Practice Direction 8(4) requires the parties to liaise with each other and inform the Registrar of suitable dates before an opposed matter can be set down, it was necessary for the applicants to bring another application compelling the respondents to comply with this practice direction. The application was brought on 23 October 2020 under case no LCC171/2008D. An order for costs on the attorney and client scale was once again sought against the State Attorney *de bonis propriis* alternatively that such costs be paid by the Minister and the RLCC.
13. This application was not opposed and was set down on the unopposed roll for hearing on 30 November 2020. The respondents' counsel appeared at the hearing and agreed to a date for the hearing of the

earlier application (under LCC171/2008C). This therefore also left outstanding the costs of this second application inclusive of the unopposed hearing of 30 November.

14. In summary therefore, the court is required to determine the scale of the costs to be awarded under the two interlocutory applications; the one (under case no LCC171/2008C) in terms of which the applicants sought to compel the respondents to comply with the court directive of 13 October 2017 and the other (under case no LCC171/2008D) requiring the respondents to provide dates for hearing argument on the outstanding issue of the costs incurred in the first application.

COST ORDERS IN LAND CLAIMS CASES

15. It is now trite that a private party who is substantially successful is entitled to costs against an organ of State without having to demonstrate special circumstances. Mr Havenga for the applicants referred the court to, among other cases, *Moloto Community v Minister of Rural Development and Land Reform and others* 2019 (3) SA 523 (LCC) at para 30 (applying *Biowatch Trust v Registrar, Genetic Resources and others* 2009 (6) SA 232 (CC)).
16. There are recognised grounds, such as vexatious litigation, for ordering punitive costs against a litigant.

This court has however been compelled to make special orders for costs where the conduct of the State body has resulted in a litigant being obliged to approach it, and thereby incur totally avoidable costs, to enforce orders, directives and the court's rules in the face of persistent non-compliance or where the State body persistently ignores correspondence which requires a response in order for the matter to move forward with the expedition required under the framework of the Restitution of Land Rights Act ("the Act"). [1]

The court has frowned on a party being unnecessarily mulcted in costs in this manner. See *Qwabe-Waterfall Community v minister of Rural Development and Land Affairs and others* 2018 [ZALCC] 15 where the court referred to indifference and negligence as justifying a special costs order in appropriate cases.

RESPONDENTS' EXPLANATION FOR CONDUCT OF CASE

17. Mr Shakoane for the respondents submitted that they were attempting to deal with the issues and simply failed to act with the degree of expedition insisted upon by the applicants.

18. There are a number of difficulties facing the respondents.

Firstly, there had been a court directive requiring compliance because of earlier delay. Accordingly the time frame for compliance was not that imposed by the applicants but rather one contained in a court order pursuant to agreement or objectively determined by a court.

Moreover the court's intervention was sought because of a failure to comply with its directive despite the lapse of a period of more than 15 months. While Mr Shakoane identified certain difficulties experienced, there are large gaps in the chronology which are just not explained- at the latter stages of up to five months.

19. The difficulties raised by the respondents were not communicated to the applicant's attorneys despite the number of requests and demands made by them.

A failure to communicate particularly when reasonable demand is made leaves both claimant communities and affected landowners with little choice but to approach the court. I say this because the inordinate delay, an issue I had occasion to raise in this very matter at a pre-trial hearing as far back as April 2013, prejudices both the claimants and the landowners. The former are prejudiced because the longer the delay, the more members of the claimant community pass on without having their dignity fully restored and without being able to vindicate the injustices that had been committed directly against them, their children and family.

Restitution is much more than about the land alone; it is about the restoration of individual dignity, about vindication and justice, about rebirth and regeneration, about the restoration of hope, and about securing the actual realisation that the claimants' children and those of future generations have the opportunity to enjoy a better life. The landowner also suffers as a consequence of delay because until the claim is finalised there are restrictions on the development of the land in question and on it being used as collateral; the land is effectively sterilised with potentially devastating financial consequences if the finalisation of the claim drags on.

20. Perhaps this case demonstrates the need for a party not to remain silent or supine if an unanticipated exigency arises. In my view the applicants had reached a point of desperation because of the silence

on the part of the respondents and had little choice but to approach the court to secure compliance with an existing directive, which itself was born out of frustration due to delay. This was exacerbated when the second application became necessary because of a failure to provide a number of suitable dates for the hearing of the first application. There was nothing which required investigation or could otherwise account for the failure to supply these dates.

21. The court therefore finds that all the costs incurred would have been absolutely unnecessary had the respondents engaged the applicants or had not failed for such a lengthy time to comply with the court directive of 12 October 2017 and Practice Directive 8 (4).

The respondents should be held liable for the attorney and client costs incurred by the applicants in circumstances where the latter did not rush to court but were frustrated by a continued failure on the part of the respondents to comply with directives despite requests and demands to do so. The applicants should not be out of pocket in securing compliance after such lengthy delays.

22. There is however a qualification in relation to the attorney and client costs in the second application (under case no LCC171/2008D). While I accept that counsel engaged in a matter may be entitled to be on brief, in the exercise of my discretion when it comes to costs, the straight forward nature of such an application and the minimal

number of allegations required does not warrant imposing the attorney and client fee of senior counsel on the respondents.

CAUSE OF RETARDING RESTITUTION PROCESS, REPORTING REQUIREMENTS, FUNDING AND SECTION 6(2) (e) OF THE ACT

23. The applicants had initially sought costs de bonis propriis against the State Attorney who represents both the Minister and the RLCC. This would have required a determination as to whether the failure to comply with the directives lay with the client in not providing instructions or with its legal representative. It also would have entailed incurring still further costs, which the applicants understandably were reluctant to do.
24. While a litigant will raise the issue before this court in order to secure compliance, it is not obliged to conduct an investigation into why claims are not being expeditiously finalised as required by the Act and in order to meet the Constitutional objectives for which it was enacted pursuant to section 25 (7) of the Bill of Rights.
25. However it does not mean that issues of accountability for the failure to comply with directives with its attendant punitive orders for cost should be ignored: If not addressed a continued failure to comply with directives to the extent evident in this case;
- a. will inevitably retard the ability of the Commission to perform its function particularly in respect of finalising the large backlog of claims once they are referred to this court under s 14 of the Act; and
 - b. will result in the Commission being obliged to pay unnecessary legal costs either by reason of its own internal oversight issues, by reason of a failure on the part of the State Attorney to ensure that it adequately represents the Commission (whether it be the Chief Land Claims Commissioner or a Regional Land Claims Commissioner) or any other Organ of State in cases where the Commission is also a party, or by reason of a breakdown in communication between the Commission

and the State Attorney or another State entity.

26. In regard to the first concern, the Commission is already obliged, by reason of the Constitutional Court case referred to as LAMOSA 2 (Speaker of the National Assembly and Another v Land Access Movement of South Africa and Others 2019 (6) SA 568 (CC)) to:

“... file a report with the Land Claims Court, to be dealt with as the Judge President of that Court may deem fit, at six-monthly intervals from the date of this order, setting out—

- (i) the number of outstanding old claims in each of the regions on the basis of which the Commission’s administration is structured;
- (ii) the anticipated date of completion in each region of the processing of the old claims, including short-term targets for the number of old claims to be processed;
- (iii) the nature of any constraints, whether budgetary or otherwise, faced by the Commission in meeting its anticipated completion date;
- (iv) the solutions that have been implemented or are under consideration for addressing the constraints; and
- (iv) such further matters as the Land Claims Court may direct; until all old claims have been processed.”[2]

27. The “old claims” are land claims that had been lodged by 31 December 1998. This was the cut- off date by when claims had to be lodged under s 2(1) (e) of the Act.

By contrast “interdicted claims” are those lodged between 1 July 2014 and 28 July 2016 pursuant to the dispensation provided by the Restitution of Land Rights Amendment Act (“the Amendment Act”). The Constitutional Court declared the Amendment Act invalid (under LAMOSA 1[3]) and subsequently under LAMOSA 2 prohibited the Commission from processing any of the interdicted claims until it had settled or referred to this court, under s 14 of the Act, all the old claims (subject to the court granting permission to deal with issues relating to such claims upon the application of an interested party).

28. Aside from requiring the Commission to provide a report to the Land Claims Court in the manner directed by the Judge President, the Constitutional Court in LAMOSA 2 also directed in para 2(e) of its order that:

“The Land Claims Court may make such order or orders as it deems fit to ensure the expeditious and prioritised processing of old claims”

29. This court therefore plays an important supportive role in the processing of old claims. To this end, and bearing in mind that the Mekgareng community number some 3500 people, which is likely to entitle the claim to priority (by reason of s 6(2)(d) of the Act), it is appropriate to bring to the attention of the Chief Land Claims Commissioner the failure to expeditiously finalise the claims in issue, particularly because only an unattested affidavit has been produced and therefore no proper explanation for the delay has been provided

under oath by any of the respondents to these applications.

The potentially damaging consequences of a persistent failure to bring land claims to finality are illustrated at a number of levels in the present case.

30. Earlier I mentioned the pre-trial conference held in April 2013. That was eight years ago and at that stage the conducting of the case by the State Attorney was already under scrutiny as appears from the directives I was required to make after hearing counsel for the Mekgareng Community, the landowners and for the RLCC, being respectively Advs. Mojapelo, Havenga and Shakoane. The directives speak for themselves:

“1. The State Attorney is to furnish to this court a final report on details of all land to this court by no later than 23 August 2013 owners in order for service to be effected;

The Judge emphasised that this 6 week period must be complied with and that there is an interest to the community and landowners in its finality.

2. The State Attorney is to furnish to this court a list of settled landowners no later than 19 July 2013
3. The State Attorney is to furnish a report to this court explaining why the previous directives were not complied with to date and the Court will consider what further steps it may or may not take. “
4. The State Attorney is to furnish a report to this court explaining why there has been a failure to comply with any of the directives made in this present teleconference.

All these years later one finds that yet another judge-issued directive as well as the most basic of practice directives have been ignored. One is therefore drawn to the conclusion that the problem is likely to be systemic.

31. The continued failure to address the problem which exists at some level between the RLCCs and the State Attorney’s Office or both has had repercussions.

Two or so weeks ago and sitting as the urgent court duty judge I dealt with an application brought by this very community to thwart a land invasion on one of the farms to which its land claim relates. The land invasion is directly attributable to the rights in the land in issue not being finalised despite the claim having been made over twenty years ago and the case being brought to court more than a decade ago. Moreover, if the land claim results in either restitution or restoration, then original members of the claimant community who have passed away have not been able to realise the promise contained in the legislation. It is unconscionable that individuals who have endured so much should be frustrated within sight of attaining their rights.[4]

32. A failure to finalise claims lodged by the cut-off date of 31 December 1998 also has a knock on effect. It impedes the prospect of those cases which are still to be referred to this court, out of the

7000 plus old claims which are still being processed by the Commission, from being finalised within a reasonable period. In turn

that precludes any of the interdicted claims being considered at all until all the old claims have been settled or referred to the court under s 14 of the Act.

In this regard, a number of the interdicted claims are already prejudicially affected. They concern land in respect of which a competing claimant community had already brought its claim prior to the 1998 cut-off. Interdicted claimants are also at a disadvantage in their ability to secure an interim status quo position in respect of their land claim because they cannot obtain Gazetting, with the protection it affords under s 11(7) of the Act, but must rely on common law or other Constitutional grounds to secure relief. These types of cases have already come before the Court.

33. Of the 81 cases which have been referred under s 14 of the Act to this Court since the LAMOSA 1 judgment of July 2016, only about seven have seen any movement beyond the original referral or any step being taken by more than one of the parties.[5]
34. There is also the question of costs. Each time costs are awarded against the RLCC because of a continued failure to comply with orders or directives there is an unnecessary incurring of expenditure. This is exacerbated if the legal representatives of the community which is dragged into such applications are also paid by the Commission (under s 29(4) of the Act) with resultant additional costs being born by it.
35. Since no attested affidavit was filed on behalf of the RLCCC, the Minister or the State Attorney explaining the failure to comply with the directives, it is not possible for the court to determine whether the cause of the problem is internal or due to a breakdown in communication between the RLCCs and the State Attorney.

The court is however aware that while National Government is committed to prioritising land reform, of which restitution under s 25 (7) of the Constitution is an integral part, the Commission has operated with 55% of its initially approved posts not filled due to various moratoriums placed by the then Department of Rural Development and Land Reform. More recently, under the Department of Agriculture, Land Reform and Rural Development, the Commission's approved posts were reduced by half because the balance had now become vacant unfunded posts and were withdrawn from the system. This still leaves a 10% shortfall in staff compliment which nonetheless cannot be filled while the moratorium applies unless special Ministerial approval is obtained.

The court is also aware that in the present case the applicants sought to lay the blame for non-compliance directly at the door of the State Attorney.

36. The issues may come down to the relationship between the RLCC and the State Attorney when engaged in court proceedings and their co-ordination if other Organs of State are involved.

As mentioned earlier, while an affected party may compel compliance, it is not obliged to investigate whether the underlying failure is attributed to the RLCC or the State Attorney. Presumably, as with any client, the Commission is entitled to require an accounting from its legal representatives for the manner in which its litigation is being conducted while the State Attorney is entitled to explain if the fault is to be attributable to RLCC officials failing to furnish instructions.

In either case it appears that the Chief Land Claims Commissioner is entitled to take such steps to ensure that claims are expeditiously

finalised and, if the State Attorney is responsible for the costs orders being granted against the RLCC, to refuse to pay for its

failures. In this regard if the failure to comply with court orders and directives is attributable to the State Attorney in part or in whole the question of liability inter se for all the unnecessary legal costs incurred can be apportioned.[6]

37. The Chief Land Claims Commissioner may therefore wish to consider that, as the client, the Commission is entitled to establish the cause of the failures and have an audit of the number of orders obtained against it which resulted from a failure by the RLCC to comply with court orders and to establish their cause.

Even if the cause is a breakdown in communication between officials of the RLCC and the State Attorney, the Chief Land Claims Commissioner will then be in a position to address the issues and engage the Solicitor-General at a structural level in relation to the creation

and implementation of policies relevant to the litigation in which the Commission is involved, bearing in mind that the Commission is fully funded out of the National Revenue Fund and is obliged to account directly to Parliament by providing it with an annual report under s 21 of the Act.[7]

In this regard the Commissions functions and powers, performed by the Chief Land Claims Commissioner, also appear to fall within ss 6(2)(d) (in the case of claims which affect a considerable number of persons) and 6(2) (e). These sections provide:

- (2) The Commission may, at a meeting or through the Chief Land Claims Commissioner, a Regional Land Claims Commissioner or a person designated by any such Commissioner-

.....

- (d) ensure that priority is given to claims which affect a substantial number of persons, or persons who have suffered substantial losses as a result of dispossession or persons with particularly pressing needs;
- (e) generally, do anything necessarily connected with or reasonably incidental to the expeditious finalisation of claims.

38. Since the effective implementation of land reform and land restitution may require that any systemic delay is addressed with some degree of urgency the Registrar is requested to forward this judgment to the Chief Land Claims Commissioner for consideration.

ORDER

39. In the result the following order is made:

1. In respect of the application dated 11 December 2017 under case no LCC 171/2008C compelling the second and third respondents to comply with the court directive of 13 October 2017; the second and third respondents are jointly and severally liable to pay to the applicant
 - a. Opposed costs on the attorney and client scale up to 11 April 2019, save that: the attorney and client costs of the hearing of 13

October 2017 and 25 March 2019 shall be on the unopposed scale

- b. Opposed costs on the ordinary party and party scale as from 12 April 2019 inclusive of the costs of the hearings of 30 November 2020

and 20 April 2021;

2. In respect of the application signed on 23 October 2020 under case no LCC171/2008D compelling the first to third respondents to provide a set-down date for the first mentioned application; the second and third respondents are jointly and severally liable to pay to the applicant the unopposed costs on the attorney and client scale, save that;
 - a. there shall be no costs allocated to the hearings of 30 November 2020 and 20 April 2021 in respect of this application (i.e. under case number LCC171/2008D); and
 - b. the costs of counsel in settling any papers or for any other work are no more than the fees charged by junior counsel of not more

than five years' experience.

B SPILG

Acting Judge President

Land Claims Court

Delivered: This judgement was handed down electronically by circulation to the Parties or their legal representatives via email. It will also be released for publication on SAFLII. The date for hand-down is deemed to be 11 May 2021

DATES OF HEARING:

20 April 2021

DATE OF JUDGMENT:

12 May 2021

FORV APPLICANTS:

Adv. HS Havenga SC

Peet Grobbelaar Attorneys

FOR RESPONDENTS:

Adv. G Shakoane SC

State Attorney, Pretoria

[1] In this regard the framework is designed to achieve the objective of the Act in claims meeting the necessary requirements during the lifetime of those who initiated claims and also not to place an unduly lengthy restriction on the ability of the landowner to fully realise the value of the land through development or otherwise where a claim may not be successful or where the land is not restorable.

[2] Para 2 (d) of the court order

[3] Land Access Movement of South Africa v Chairperson, National Council of Provinces 2016 (5) SA 635 (CC)

[4] This was the lot which befell Mrs Irene Grootboom in the landmark socio-economic rights case of Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46. The Constitutional Court held that the State's obligation to fulfil the right of access to adequate housing under s 26(2) of the Constitution requires it to take "reasonable legislative and other measures, within its available resources". Despite the court victory, the decision was a hollow one for Mrs Grootboom who died in 2008 still living without adequate shelter.

[5] In addition one of the cases was withdrawn leaving a present total of 80 referred cases since July 2016.

[6] It will be recalled that paras 3 and 4 of my order of April 2013 already had required the State Attorney to provide an explanation

for delays up to that stage.

[7] See also s 19 of the Act which provides that all expenditure in connection with the performance of the Commission's functions

are defrayed from monies appropriated by Parliament for such purposes, even though under s 20 the annual estimates of expenditure

are submitted by the Chief Land Claims Commissioner to the Director-General who is the accounting officer.

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