

SOUTH AFRICA / JUDGMENT

# Dikgalopeng Community (Di Thomo Tsa Bokone) and Others v Chief Land Claims Commissioner and Others [2022] ZALCC 45 (25 October 2022) [2022] ZALCC 45

COURT

Land Claims Court

BEFORE

Y S Meer

CASE / FILE NUMBER

LCC 108/2022

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## Source record

IN THE LAND CLAIMS  
COURT OF SOUTH AFRICA  
HELD AT RANDBURG  
Case No: LCC 108/2022

Before: The Honourable Acting Judge President Meer  
Heard  
on: 25 October 2022  
Delivered  
on: 25 October 2022  
In the matter

between: DIKGALOPENG  
COMMUNITY  
(DI THOMO TSA  
BOKONE)  
1st  
Applicant  
ANDREW MAMADILE  
MOHLALA  
2nd  
Applicant  
MARIBE MAILULA  
HENDRICK  
3rd  
Applicant  
And  
CHIEF

LAND CLAIMS COMMISSIONER  
1st  
Respondent  
REGIONAL  
LAND CLAIMS COMMISSIONER  
2nd  
Respondent  
CHIEF  
DIRECTOR: RESTITUTION SUPPORT – LIMPOPO  
3rd  
Respondent  
THE  
MINISTER OF AGRICULTURE, LAND REFORM AND RURAL DEVELOPMENT  
4th  
Respondent  
BAKWENA  
BA MATSEPE TRADITIONAL COUNCIL  
5th  
Respondent  
FONTIS  
DEVELOPMENTS (PTY) LTD  
6th  
Respondent  
VICICON  
PROPERTY DEVELOPMENT (PTY) LTD  
7th  
Respondent  
TAFELKOP  
MALL (PTY) LTD  
8th  
Respondent  
KOPA  
PROPERTIES  
9th  
Respondent  
ALL  
CONSTRUCTION WORKERS AT  
TAFEKOP  
OPPOSITE NONYANE FILING STATION AND FAITH APOSTOLIC CHURCH  
10th  
Respondent  
REGISTRAR  
OF DEEDS, POLOKWANE  
11th  
Respondent  
SURVEYOR-GENERAL,  
POLOKWANE  
12th  
Respondent  
MORARE  
PATELA ABRAM

13th  
Respondent

## JUDGMENT

### MEER AJP

[1] This matter was brought before me on an urgent basis on 21 July 2022. Directions were issued on 22 July 2022, paragraph 11 whereof

specifically stated that none of the directions will prevent any of the parties from disputing the urgency of the case.

[2] The application has its genesis in a claim for restitution of rights in land lodged by members of the first applicant on the farm

Eensgevonden 119 JS in the Limpopo Province (“the farm”). Part A of the application which is before me seeks urgent

interdictory relief to stop building construction on the farm, transfer and the subdivision thereof pending the determination of

Part B which seeks, inter alia, to review the decision to permit the development of a shopping complex on the farm. The notice of motion sets out the interim interdictory relief in Part A which this judgment is concerned with, as follows:

*“1. That the application be heard as an Urgent Application in terms of Rule 34 of the Rules of the Land Claims Court, and that the provisions regarding the service requirements and time periods in the Land Claims Court be dispensed with.*

2. Interdicting the 6th, 7th, 8th and 10th respondents from continuing with the building construction and development of a shopping complex as well as from tempering with portion 6 of the farm Eensgevonden 119 JS pending the determination of Part B.
3. Interdicting the 11th Respondents from effecting any transfer of land in respect of the farms Eensgevonden 119 JS| and hartebeesfontein 20 JS without the written consent of the 2nd and 4th respondents.
4. Interdicting the 12th respondents from approving any subdivision of land in respect of the farm Eensgevonden 119 JS and hartebeesfontein 20 JS without the written consent of the 2nd respondents.
5. Ordering any of the respondents who oppose this application to pay the costs of this application on attorney and own client scale jointly and severally liable one paying eth others to be absolved.
6. Further and or alternative relief.”

- [3] The applicant submits that the matter is of extreme urgency as it relates to an on-going construction development on the farm Eensgevonden 119 JS in (“the farm”). If the application is brought in the normal course they contend by the time the

application will be heard construction of the development shall have been completed and as such this will defeat the purpose of the application. It is anticipated that the development will be fully completed some time in November 2022.

- [4] An additional ground of urgency cited in the founding affidavit is that the seventh respondent has exhumed two graves belonging to the Boshielo family on portion 6 of the farm and the applicants require immediate and urgent relief to deal with this issue as well as to organise the reburial of the remains.
- [5] The founding affidavit moreover states that on or about 1 March 2022 the seventh respondent on instruction of the sixth, eighth, ninth and thirteenth respondents started “evading” the farm for the purposes of building a shopping complex. This was the catalyst for the application. The respondents contend that the matter is not urgent. The answering affidavit of the sixth, eighth, ninth and thirteenth respondents (“the developers”) states that the applicants were aware of developments on the land well over 12 years ago and they applied to the North Gauteng High Court for an interdict pertaining thereto for the first time in 2010. The first to fourth, eleventh and twelfth respondents (“the State Respondents”) aver that the applicants have not satisfied the requirements for urgency and merely make the bald statement that the development will defeat the purpose of the application. They contend, moreover, that for the applicant’s land claim to succeed the development does not have to be stopped urgently. The development could be classified as another form of restitution, and that restitution of their claim

if successful could also take the form of equitable redress excluding physical restoration.

- [6] The pleadings make clear that the applicants were aware of potential development on the farm in 2010 when they applied for an interdict to the North Gauteng High Court. It was, however, only when there was evidence of building construction commencing on the land in March 2022 that they applied to interdict the construction. Their route to this Court has been a circuitous one as appears below.

1. The founding affidavit states that on 1 March 2022 the seventh respondent “started evading” the farm;
2. It was only three weeks later on 22 March 2022 that the applicants approached the Groblersdal Magistrate’s Court for an order

interdicting the construction. The order was granted ex parte in the Magistrate’s Court on 22 March 2022;

3. The order of the Magistrate was reviewed and set aside by this Court on 10 June 2022 on application by the sixth and eighth respondent. A month and a half later the present application was brought on an urgent basis on 21 July 2022 to this Court. There is no adequate explanation for the delay in the applicants' persistence that this matter be heard urgently. Instructions to launch this very urgent application was only given a week after this court's judgment on 10 June 2022, thereafter the applicants took until 5 July 2022 to conduct investigations and thereafter until 20 July 2022 to settle the papers.
- [7] It ill behoves an applicant who wishes to engage the time of a court urgently to drag their heels in this manner, more so when it concerns brining in essence the same application in this Court that was brought in the Magistrate's Court for which the same investigations would have been applicable.
- [8] On 22 July 2022 this issued directions and the matter was set down for hearing on 24 August 2022. On 29 July 2022 at the request of the applicants the directions were amended and the hearing was set down for 2 September 2022, this by a party asserting extreme urgency.
- [9] At the request of the sixth and eighth respondents, thereafter, the directions were further amended to extend periods for filing of answering affidavits from 8 to 10 August. A consequent extension to the applicant to file its reply from 15 to 16 August was also granted.
- [10] On 22 August 2022 the attorneys representing the eighth and ninth respondents wrote to the Registrar that the applicants had not filed their reply due on 16 August and had failed to index and paginate the court file timeously. They enquired if the matter will proceed on 2 September 2022.
- [11] On 31 August 2022 the Registrar wrote to all parties indicating that the matter will not be allocated to a Judge for hearing on 2 September 2022 and the matter would be removed from the roll. This was due to the fact that the applicants' attorney had failed to index and paginate the court file by 19 August as directed nor by the extended date of 22 August. Applicants' attorney had moreover failed to file a practice note. Applicants' heads of argument were to be filed on 19 August but were only filed on 23 August.
- [12] On 1 September the applicants' attorney wrote to the Registrar that they intended to file their practice note on 5 September 2022 as well as to index the court file on "Monday", no date provided.
- [13] On 1 September 2022 the Court directed the applicants' attorney to liaise with all other parties and obtain a date of hearing. Thereafter the Registrar wrote to the parties on 5 September 2022 stating that if the file is indexed and paginated and all directions complied with the hearing can occur on 13 September 2022. Counsel for the State was not available on that date.

- [14] On 9 September 2022 the Registrar wrote to the parties lamenting the fact that the file had still not been indexed and paginated by applicants' attorney and a practice note had still not been filed. The parties were told that no date would be allocated until the file is properly prepared.
- [15] On 20 September 2022 the Registrar then wrote to the parties that the court file had been indexed and paginated and the practice note had been filed and allocated the date of 25 October 2022 for the hearing.
- [16] On 2 October 2022 the eighth and ninth respondent's attorneys wrote to the Registrar saying that they had not received the index as requested from the applicants' attorney on more than one occasion. It was indicated that once applicants' attorneys email the index they could finalise their clients bundles and counsel can finalise heads of argument. It is not clear if this was ever done.
- [17] The conduct of the applicants and their attorneys is the antithesis of what would have been expected of a litigant and a practitioner who urges a court to hear a matter on a very urgent basis. I note that in motivating for an urgent hearing as opposed to one in due course the applicants averred that the purpose of the application would be defeated as the building construction would be completed by November 2022. Ironically due to delays by the applicants the hearing of their alleged urgent application could only be heard just over a week before November 2022.
- [18] The applicants have in my view not satisfied the grounds of urgency and the application stands to be dismissed for this reason alone.
- [19] I note that the applicants have not established a prima facie right to the relief sought at paragraphs 2, 3 and 4 of its Notice of Motion. Section 6(3) of the Restitution Act provides for an interdict of the type sought by the applicant where there reason to believe that a development of land subject to a claim will defeat the achievement of the objects of the Restitution of Land Rights Act, 22 of 1994. The applicants have not averred that the development will defeat the objects of the Act. The high water mark of the applicants' case is that the development amounts to great disturbance of their land claim and further reduces chances of acquiring the farm back and will undermine the legitimacy of the land claims process. It is trite that restitution may take wards other than the physical restoration, namely equitable redress. There is also no evidence that the development per se would prevent restoration. These are matters which would have to be considered in the adjudication of the claim. There is I note also no guarantee that the applicants' claim will succeed. There only certainty at this stage is that a claim has been lodged. See *Singh and others v the North Central and the South Central Local Council and others* [1999] 1 All SA 350 LCC. I note also that the relief sought in prayer 1 of Part B may well not supported by the relief sought in Part A. The Second Respondent, being the Regional Land Claims Commissioner is not the official that grants permission to develop shopping centres, as suggested in prayer 1 of Part B. The relief sought at prayers 2 to 5 of Part B may well suffer

the same fate. It is however not necessary for me to consider this here.

- [20] I note moreover that section 6(3) requires notice of an interdict such as the present to be given to all interested parties. The relevant municipality, the Elias Motsoaledi Local Municipality, an interested party in respect of developments within its jurisdiction, was not given notice.
- [21] With regard to the relief sought at prayers 3 and 4 there is no statutory or common law requirement for the written consent of the second and fourth respondents for transfer of land by the Registrar of Deeds, Polokwane the eleventh respondent or for the approval of any subdivision by the Surveyor General, Polokwane the twelfth respondent. The Restitution of Land Rights Act, 22 of 1994 certainly does not require this. Also, given that the transfers and subdivisions have already occurred, the relief sought to interdict

them, at prayers 3 and 4 are not competent.

- [22] With regard to the lapse or expiry of the ninth respondent's environmental authorisation licence being a grounds for the granting of the interdictory relief sought at Part A, firstly, I note that there is no prayer for relief pertaining thereto and secondly, this is not a matter that falls within the preview of section 6(3) of the Restitution Act for consideration in an interdictory application such as the present. It may well be a matter which is beyond the jurisdiction of this Court. Mr Ogunronbi for the developers submitted that reference to a licence was made to show that when development started there was environmental authorisation, and that the relevant decision maker in respect of such license was not joined.
- [23] I note further that the answering affidavit of Mr Matlala for the State respondents explains in detail the procedures that were followed when portion 6 was registered in the name of the ninth respondent, when the ninth respondent submitted the application

to alienate for the development of a shopping complex at portion 6 of the farm to the eighth respondent and the approval thereof. The State respondents have explained with evidence the procedures which were followed when portion 6 of the farm was subdivided, purchased and sought to be developed. The applicants only utter bald statements pertaining to the unlawful sale thereof. They have not alleged any non compliance or reviewable error in terms of the State Land Disposal Act 48 of 1961. Insofar as issue is taken with absence of approval by the Minister for the sale of the farm, the letter from the Management State Land Unit Limpopo dated 29 October 2009, suffices as proof of the Minister's approval. It must also be noted that there is no prohibition of the sale or subdivision of land that is claimed in terms of the Restitution of Land Rights Act.

- [25] In view of all of the above the application cannot succeed.

Costs

[26] The practice of this Court is not to award costs except in exceptional circumstances. My finding on urgency as well as the tardy manner in which the applicants litigated constitute such circumstances which warrant a cost order against the Applicants. In this regard my comments at paragraphs 49 and 50 in Ebenhaeser LCC

[2019] ZALCC 2 are apposite, albeit the tardiness of the attorney in that matter resulted in the case not being heard. Applicants' attorney in the instant matter can consider themselves fortunate that my registrar took over supervising the preparation of the court file

to enable the matter to proceed. This in my view averts an award of costs de bonis propriis as sought by the developers. In my discretion I do not deem it necessary for an award of costs on an attorney and own client scale

notwithstanding the tardiness aforementioned.

[27] I order as follows:

1. The application is dismissed;
2. The Applicants shall bear the costs on a party and party scale.

Y S MEER

Acting Judge President

Land Claims Court

For the Applicants: Adv. C. Khoza Instructed by: KJ Mogofe Attorneys For the First to Fourth, Eleventh and Twelfth Respondents : Adv. Z.S Mothupi Instructed by: State Attorney, Polokwane  
For the Sixth, Eighth, Ninth and Thirteenth Respondents: Adv S. Ogunronbi Instructed by: Strydom Britz Mohulatsi Inc.

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