

SOUTH AFRICA / JUDGMENT

Farao and Another v Regional Land Claims Commissioner and Others (LCC137/2019) [2020] ZALCC 16 (6 November 2020)

[2020] ZALCC 16**COURT**
Land Claims Court**BEFORE**
Spilg**CASE / FILE NUMBER**
LCC137/2019

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IN
THE LAND CLAIMS COURT OF SOUTH AFRICA
Case
number: LCC137/2019
In

the matter between:

FARAO,
CHRISTOFFEL First
Applicant
HANSE
FAMILY LAND CLAIMS COMMITTEE Second
Applicant
and
THE
REGIONAL LAND CLAIMS COMMISSIONER First
Respondent
THE
DIRECTOR-GENERAL OF RURAL DEVELOPMENT
AND
LAND
REFORM Second
Respondent
GIBSON,
WILLIAM
JAMES Third
Respondent
VAN
HEERDEN N.O., FREDERICK JOHANNES Fourth
Respondent

THE
MINISTER OF RURAL DEVELOPMENT
AND
LAND
REFORM Fifth
Respondent
THE
PREMIER OF THE WESTERN CAPE Sixth
Respondent
THE
CERES KAROO FARM TRUST Seventh
Respondent

JUDGMENT

SPILG, J

INTRODUCTION

1. The first applicant is Mr. Farao. Farao lodged a number of land claims in April 2016 pursuant to the dispensation granted under the Restitution of Land Rights Amendment Act 15 of 2014 (the Amendment Act). One of the land claims concerns the property which will be referred to as Meideberg which is in the district of Ceres.
2. Farao alleges that he lodged the claims on behalf of the Hanse Familie Grondeis Komitee, which is cited as the second applicant under the name Hanse Family Land Claims Committee. At this stage it suffices to point out that the claims were acknowledged by the Regional Land Claims Commissioner to have been made in the name of Farao and no reference was made in its acknowledgement to any of Farao's land claims being made on behalf of a family or community.
3. The constitutionality of the passing of the Amendment Act was subsequently challenged and in *Land Access Movement of South Africa and Others v Chairperson of the National Council of Provinces and Others* 2016 (5) SA 635 (CC); 2016 (10) BCLR 1277 at para 82 Madlanga J for the court held that the public participation process adopted by the National Council of Provinces was unreasonable, offended the requirements of s 72(1)(a) of the Constitution and that this in turn tainted the entire Parliamentary process rendering the passing of the legislation constitutionally invalid for want of adequate prior public participation. This judgment is generally referred to as LAMOSA.1.

The Constitutional Court afforded the legislature two years to remedy the situation. Despite declaring the Amendment Act invalid with immediate effect the court was careful not to adversely affect the rights of land claimants who had already lodged claims under it. It crafted the following order so as to protect them:

4. Pending the re-enactment by Parliament of an Act re-opening the period of lodgment of land claims envisaged in section 25(7) of the Constitution, the Commission on Restitution of Land Rights, represented in these proceedings by the Chief Land Claims Commissioner (Commission), is interdicted from processing in any manner whatsoever land claims lodged from 1 July 2014.
5. The interdict in paragraph 4 does not apply to the receipt and acknowledgement of receipt of land claims in terms of section 6(1)(a) of the Restitution of Land Rights Act 22 of 1994.
6. Should the processing, including referral to the Land Claims Court, of all land claims lodged by 31 December 1998 be finalised before the re-enactment of the Act referred to in paragraph 4 above, the Commission may process land claims lodged from 1 July 2014.
7. In the event that Parliament does not re-enact the Act envisaged in paragraph 4 within 24 months from the date of this order, the Chief Land Claims Commissioner must, and any other party to this application or person with a direct and substantial interest in this order may, apply to this Court within two months after that period has elapsed for an appropriate order on the processing of land claims lodged from 1 July 2014.

In effect claims lodged from 1 July 2014 onwards were not invalidated but were interdicted from being processed beyond their receipting and acknowledgment under s 6(1)(a) of the Restitution of Land Rights Act 22 of 1994 (“the Act”) until all land claims lodged by the original cut-off date of 31 December 1998 had been finalised.

4. Despite repeated concerns regarding the need to fast track land restitution and having regard to the critical nature of the Act in the process of restoring dignity and equality^[1] Parliament did not remedy the situation within the two year period. The Speaker of the National Assembly therefore approached the Constitutional Court to extend the period within which to do so. This was met with a counter-application for orders dealing with the interdicted claims as presaged by para 7 of the LAMOSA.1 order.
5. These matters were then considered in *Speaker of the National Assembly and Another v Land Access Movement of South Africa and Others* 2019 (6) SA 568 (CC); 2019 (5) BCLR 619 (LAMOSA.2). The Constitutional Court refused to grant Parliament an extension and formulated the following relief in respect of the interdicted claims:
 - .2 ... subject to the Parliament of the Republic of South Africa legislating otherwise:
 - (a) The Commission on Restitution of Land Rights (Commission) is prohibited from processing in any way any claims lodged in terms of section 10 of the Restitution of Land Rights Act 22 of 1994 (Restitution Act) between 1 July 2014 and 28 July 2016 (interdicted claims) until the earlier of the dates when—
 - (i) it has settled or referred to the Land Claims Court all claims lodged on or before 31 December 1998 (old claims) by way of a referral of the claim in terms of section 14; or

(ii) the Land Claims Court, upon application by any interested party, grants permission to the Commission to begin processing interdicted claims, whether in respect of the whole or part of the Republic of South Africa and whether in respect of part or all of the process for administering an interdicted claim.

(b) Until the date referred to in paragraph (a), no interdicted claim may be adjudicated upon or considered in any manner whatsoever by the Land Claims 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.

(c) Notwithstanding the provisions of section 11(5) and 11(5A) of the Restitution Act, no interdicted claimant shall be entitled to any relief having the effect of—

(i) altering or varying—

(a) the relief granted to any claimant in terms of section 35 of the Restitution Act in respect of a finalised old claim;

(b) the terms of an agreement concluded in terms of section 42D of the Restitution Act; or

(c) an award in terms of section 42E(1)(a) or (b) of the Restitution Act, unless the Land Claims Court in exceptional circumstances orders otherwise; and / or

(ii) awarding to such interdicted claimant land or a right in land that is subject to a pending claim for restoration by an old claimant.

(emphasis added)

6. Parliament has yet to reintroduce legislation which can validate the interdicted claims. On the last occasion a private members bill to this effect titled the Restitution of Land Rights Amendment Bill B 19B of 2017 was introduced but was not taken further within the required time period and therefore lapsed.

7. Although Farao's lodgment of the land claim does not impact on any other existing land claim, the legal effect of the Amendment Act being declared invalid is that it cannot be processed. Nonetheless it appears to me that since there is a contingent right which is more than a mere spes, if only because the Constitutional Court, despite declaring the Amendment Act invalid, has avoided rendering the interdicted claims

of no legal effect. The court under its powers has accorded the interdicted claims some legal recognition, however tenuous, pending

legislation which can breathe legislative life back into them.

8. Farao alleges that he lodged the land claims on behalf of the Hanse family. He contends that their rights in land had been eroded through discriminatory laws and practices to a point where such rights were no longer real rights in land but personal rights of occupation dependent on the provision of labour. If correct, one can appreciate why they had not lodged a claim prior to the original cut-off date at the end of 1997: It was only consequent upon the outcome in 2007 of the Goedgelegen case before the Constitutional Court that individuals and communities became aware that their status as labour tenants may have arisen precisely because of past discriminatory laws or practices which refused to recognise their historic rights in land.[2]
9. It was with these considerations in mind that I issued a direction in terms of s 34 of the Act affording limited relief after reading the urgent application brought by the two applicants. One of the orders sought was to set aside, or postpone until the final determination of the applicants' land claim, the terms of a deed of settlement which had been made an order of court on 17 February 2019. None of the other orders sought justified urgent relief.
10. The terms of the deed of settlement which required urgent consideration, if the applicants' allegations were accepted, related to Johanna Mankopan, as the plaintiff in those proceedings, having agreed under duress (according to the papers) to reduce the number of livestock, whether sheep or goats, on the farm known as Meideberg in the district of Ceres. to no more than seven by 30 November 2019.
11. The owner of the farm is the CeresKaroo Farm Trust although only Mr. Gibson and a Mr. van Heerden were cited, the latter in a representative capacity.
12. Meideberg is one of the farms to which the land claim relates and the applicants' contention is that the deed of settlement was completed in bad faith, through an unfair procedure and that Mankopan had signed it under duress.
13. The applicants had brought the application without legal assistance. This was reflected in the way the papers were drawn. Nonetheless the bare bones of the case were sufficiently discernable justifying at least the grant of an interim order. The reason is that it was evident that if Mankopan had any rights by or through the applicants in the farm then they might be undermined by the implementation of the deed of settlement. I therefore granted an order staying the implementation and execution of the terms of the deed of settlement with immediate effect and interdicted Gibson and van Heerden from requiring compliance with the terms of the deed of settlement, giving effect to it or otherwise causing its terms to be implemented or executed upon.
14. The matter was not heard on 13 December as the presiding judge was asked to postpone the matter so that the applicants could obtain legal representation. The rule was extended to 10 March 2020 and the matter was re-allocated to me.

PROCEDURAL

ISSUES

15. A number of procedural issues were raised by Mr. Wilken on behalf of Gibson and van Heerden.
16. The first was the non-joinder of the Trust itself as there was a third trustee who was not cited. This was resolved by directing the joinder of the Trust as the seventh respondent.
17. The second was that the application was brought by Farao and the Hanse Family Claims Committee purporting to protect the interests of Mankopan yet she was not made a party nor did she file a supporting affidavit. I had assumed that she was a member of the Hanse family claimants. I directed that if she supports the application then she had to file an affidavit.
18. The applicants were still not legally represented in court on 10 March 2020. They requested a postponement to engage attorneys who had already been consulted and who had been paid an amount of R20 000. After Farao confirmed that he had spoken to them and that they were available to argue the case on 20 March the court granted the postponement and made an order which catered for any additional affidavits that the applicants may wish to file while reserving the respondents' rights to contend that the court should not receive them. The question of costs was postponed to the hearing of 20 March.
19. One of the outstanding preliminary issues was whether the applicants had locus standi to bring the application since they were not a party to the deed of settlement and the Trust alleged that they were not directly affected by it.

LOCUS STANDI

20. It is common cause that land claims were lodged under R/9/125/391/142272 in respect of a number of properties including Meideberg. The Regional Land Claims Commissioner ("the RLCC") acknowledged receipt of the claim on 12 April 2016. The court has already mentioned that the claims were made in the name of Farao and that Farao alleges that he had lodged them on behalf of the Hanse family who had formed a committee to pursue these claims. He alleged that Mankopan was one of the family members making the claim. Mankopan was in court on 10 March.
21. Relevant in this regard is the stay proceedings brought by Mankopan in the Magistrates' Court for the District of Ceres under case no 934/2014. In that case she sought an interdict to prevent the CeresKaroo Trust as owners of Meideberg from executing on an order granted in that case on 10 June 2015. In terms of that order the Trust was entitled to seize all of Mankopan's cattle which were grazing on the farm. The order also interdicted her from bringing any other cattle onto the farm.
22. The interdict sought by Mankopan was to stay the implementation of the Ceres Magistrates' Court judgment pending the finalisation of either;

- a. Her land claim under R/9/125/391/142272; or
 - b. Her application to be declared a labour tenant in her own right under the Land Reform (Labour Tenants) Act 3 of 1996
23. It is evident therefore that Farao on behalf of the Hanse family sought to bring the present application in order to protect such rights as a Gazette Notice published under s 11(1) and the provisions of s11(7) would have secured but for the invalidity of the Amendment Act; namely that a claimant cannot be evicted from land in respect of which a claim has been lodged and gazetted.

THE MERITS

24. If the applicants can demonstrate locus standi on this basis then a necessary consequence is that a claimant under an interdicted claim must demonstrate that a s 11 Gazette Notice would have been published. This in turn requires the party to allege facts in its papers demonstrating that the requirements of s 11(1) would have been satisfied and that the RLCC would have gazetted the claims.
25. It is unnecessary to decide whether the intention of the legislature in enacting s 11(7) was to preserve the status quo in respect of not only improvements that may have been effected but also the utilisation of the land by a land claimant, by giving the term “eviction” a broader meaning.
26. The reason why it is unnecessary to do so is that the declaration of invalidity of the Amendment Act and the terms of the LOMAS.1 order precluded the RLCC from doing anything other than acknowledge receipt of the claim. Indeed a subsequent letter from the RLCC to Farao confirmed that everything would be held in abeyance, even the investigations. And that raises its own difficulties
27. Although it might be argued that Mankopan should be entitled to a status quo protection order against the removal of her livestock this presupposes, as mentioned earlier, that the claim would have been gazetted under s 11. On the assumption that there is such a right then by reason of the declaration of invalidity of the Amendment Act, this court would nonetheless have to be satisfied that the claim would have been gazetted so as to trigger a s 11(7) protection
(assuming further that it would cover the grazing of livestock).
28. Even assuming that; the difficulty remains that Mankopan has not identified the nature or extent of the rights she enjoyed at the time the land claims were lodged.
29. Nowhere in the papers do the applicants contend that at the time the land claim was brought Mankopan, on the assumption that she was indeed a member of the claimant, had exercised rights beyond having livestock for subsistence purposes.

30. The difficulty facing the applicants is that while legally represented Mankopan had pursued her claim for rights as a labour tenant before this court under case number 934/2014 and the deed of settlement was the product of that litigation.
31. Accordingly it is necessary for the applicants, if they do have locus standi, to show why Mankopan should not be held bound by the terms of the deed of settlement which was made an order of court.
32. The applicants contend that the settlement was concluded in bad faith pursuant to an unfair procedure being adopted in that Farao was not invited to participate in the process, nor was the RLCC or Director – General of Rural Development and Land Reform. Farao alleges that he and they should have participated as all were interested parties. Farao also contends that Mankopan's

attorney forced her to sign the deed of settlement.

33. The attorney deposed to an affidavit in these proceedings. He dispelled the allegation made by Farao that Mankopan had been advised to settle because she had exhausted her legal funds. The attorney stated that the fees including those of counsel were being borne by the Department. The attorney furthermore set out what occurred and why the applicant's contentions cannot hold water.
34. The deed of settlement as concluded basically recognised that Mankopan could stay on as a subsistence occupier. She could continue to have livestock and cut wood only for her own needs.
35. Earlier I mentioned that the applicants' case was not that the respondents were required to respect the status quo ante the lodging of the claim. It was only that the deed of settlement had been improperly procured.
36. I have already dealt with the refutation by the attorney of the allegations made regarding duress. It is also apparent that the attorney had obtained the services of counsel for Mankopan at the trial and they both would also have been involved in weighing up the merits of the case and in the settlement discussions.
37. The only other complaint regarding the signing of the deed of settlement was the exclusion of Farao and officials from the discussions. Farao claims to have been aware of the litigation and the proposals. There is no suggestion that he would have been excluded from attendance had he wished to participate. It is evident that the terms of the deed of settlement were not a capitulation but ensured that Mankopan was not ejected from the farm and that she had rights to utilise the area albeit that they were limited to those appropriate to subsistence occupation. In this regard it should also be borne in mind that one of the issues was the carrying capacity of the area allegedly utilised by Mankopan. It is evident that the authorities already had objections and that overgrazing had also occurred.

ORAL EVIDENCE

38. Mr. Njeza for the applicants submitted that the issue of duress should be referred to the hearing of oral evidence. A notice calling for it had been filed as far back as December 2019. In my view oral evidence and cross examination will not deal with the insuperable difficulties facing the applicants in relation to the case they were obliged to make let alone that on the issue of duress such oral evidence will displace the probabilities. The application remains fatally flawed even on the basis that the court is entitled to effectively apply a s 11(7) protection provided it is satisfied that, but for the declaration of invalidity of the Amendment Act, the claim would have been gazetted by the RLCC under s 11(1).

COSTS

39. The court relaxed the rules to the greatest extent in order to accommodate the applicants on the basis that they did not have legal representation. The court adopted a benevolent interpretation of the case which the applicants were presenting and remedied procedural failings on the basis that there was no prejudice. Nonetheless, and even accepting that the applicants are looking in the long term to protect the rights in the land that they are claiming, the application was ill-conceived and I am concerned that its objective may have been to gain time rather than to protect a position. Another aspect is that the applicants had sought a postponement before Carelse J to engage legal representatives but when the matter came before me some three months later there was no appearance by counsel and a postponement had to be sought and granted. The respondents were brought to court and were obliged to incur costs on that occasion. For these reasons costs will follow the result.

RELIEF

40. I have mentioned that Mankopan has gained considerable time. The applicants came at the last minute to delay the implementation of the deed of settlement. The hard lockdown due to Covid-19 was implemented while the case was ongoing and logistically also prevented the implementation of the court order. That has since changed and Mankopan must now comply with the order of this court which incorporated the deed of settlement.
41. The court must also express concern about the lack of clarity regarding the land claims relied upon. In terms of s 2 (1) of the Act a claimant must be identified by reference to an individual, a community, or part of one. The Rules Regarding the Procedure of the Commission as well as its Annexure A form requires the identification of the applicant, the person who lost the rights and identifying if such person is an individual or a community or family.
42. Mankopan claimed that she was a labour tenant but before the Magistrates' Court in Ceres also sought to rely on the land claim which on the papers before the court was acknowledged by the RLCC to be in the name only of Farao. If the claim is a community or family claim then the issue arises whether Mankopan is simply one of a number of community or family members whose claims, if successful, will result in a distribution among them of real rights, but not necessarily, in the case of Mankopan to the farm in question where she is now. This also raise the question as to why Farao is making the claim

to the individual farm and why Mankopan

did not claim this farm in her own right. Having regard to the view I take it is unnecessary for the court to engage more deeply into these issues. They are however concerns which may arise in future.

43. Since Mankopan is not a party to these proceedings the appropriate order is to set aside the interdict and discharge the rule.

ORDER

44. The court orders that:

1. The interim ex parte order granted on 25 November 2019 in terms of which, pending the return date
 - a. the implementation and execution of the terms of the Deed of Settlement which was made an order of court on 17 February 2019 under case number LCC 19/2018 was stayed with immediate effect; and,
 - b. the third and fourth respondents were interdicted and restrained from requiring compliance therewith, giving effect thereto or otherwise causing its terms to be implemented or executed upon; is hereby set aside and the rule discharged
2. The applicants are jointly and severally liable, the one paying the other to be absolved, for the costs, including all reserved costs on the party and party scale

(signed)

DATE OF JUDGMENT: 6 November 2020

FOR THE APPLICANTS: Adv. A Njeza

Riaz Saloojee Attorneys

FOR RESPONDENTS: Adv. LF Wilkin

MacGregor Stanford Kruger Inc.

- [1] Madlanga J in LAMOSA.¹ said at para 63: As I state in the introduction, the subject to which the right relates touches nerves that continue to be raw after many decades of dispossession. The importance of the right to restitution, therefore, cannot be overstated. Restitution of land rights equals restoration of dignity. The sudden availability of land – a commodity which was pie in the sky for many – also facilitates the enjoyment of other constitutional rights. Families which – because of lack of land – lived in overcrowded shelters will be afforded an opportunity to enjoy privacy. This is also closely linked to the enjoyment of the right of access to housing. [58] Lack of land results in unacceptably high levels of population density. This in turn does not conduce to a healthy environment. Restored land affords the

recipients a wholesome environment See also Mhlantla J in Speaker of the National Assembly and Another v Land Access Movement of South Africa and Others 2019 (5) BCLR 619 (CC); 2019 (6) SA 568 (CC) where the judgment commences as follows: [1] “There can be no freedom, without land. There can also be no peace until the emotional issue of land is settled.”

Land restitution, albeit with its complications and setbacks, still forms part of an important process. It aims to right

historical wrongs, resolve unjust dispossession and heal the “trauma of deep, dislocating loss of land” that has taken root in our country. It entails the practical disruption of racialised privilege in respect of land ownership. But it also incorporates a symbolic function of recognising histories and legacies of injustice that influence the lives of individuals,

families and communities.

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families and communities.

[2] Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd

[2007] ZACC 12; 2007

(6) SA 199 (CC); 2007 (10) BCLR 1027;

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