

SOUTH AFRICA / JUDGMENT

Ga Mabohlatjana Community v Capricorn District Municipality and Others (LLC48/20138) [2021] ZALCC 31 (5 July 2021)

[2021] ZALCC 31

COURT

Land Claims Court

BEFORE

SJ Cowen

CASE / FILE NUMBER

LLC48/2013B

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IN

THE LAND CLAIMS COURT OF SOUTH AFRICA

HELD AT RANDBURG

CASE

NO: LLC48/2013B

NOT

REPORTABLE

NOT

OF INTEREST TO OTHER JUDGES

NOT

REVISED

Before:

The Honourable Acting Judge Cowen

Heard

on: 11 May 2021

Delivered

on: 5 July 2021

In

the matter between: GA-MABOHLATJANA
 COMMUNITY Applicant
 (claimed as Duitschland
 Ga-Mabohlatjana Land claim)
 and
 CAPRICORN
 DISTRICT MUNICIPALITY First
 Respondent
 MOLEMOLE
 LOCAL MUNICIPALITY Second
 Respondent
 REGIONAL
 LAND CLAIMS COMMISSIONER: Third
 Respondent
 LIMPOPO

JUDGMENT

COWEN AJ

Introduction

[1] The applicant is the Ga-Mabohlatjana Community. The applicant seeks relief that will require the Regional Land Claims Commissioner,

Limpopo (the Regional Commissioner) to award certain land in settlement of the applicant's restitution claims lodged in terms of the Restitution of Land Rights Act 22 of 1994 (the Restitution Act). The relief sought is wide-ranging but all flows from a finding that the Regional Commissioner has awarded the land to the claimants. The notice of motion is narrowly framed on the basis

that the award is contained in a letter dated 30 November 2004 (the November 2004 letter) and was 'granted' by the Regional Commissioner pursuant to delegated powers.

[2] The land in question is described as the remaining extent of the farm Duitschland 169 LS (the property). The claimant/applicant community lived there for many years until dispossessed by forced removal in 1977 after the area was proclaimed for ownership and occupation of white people in terms of the Group Areas Act 36 of 1966.

[3] The application was instituted on 18 March 2018. Mr PW Mokgehle deposed to the founding affidavit alleging that he is the Chairperson of the Ga Mabohlatjana Community Property Association. The application is opposed by the second respondent (the Molemole Municipality) and the third respondent, the Regional Commissioner.

- [4] The application came before me on the opposed roll on 11 May 2021. Mr Ramphele appeared for the applicant Mr Moolman appeared for the second respondent. Ms Magano appeared for the Regional Commissioner. There was no appearance for the first respondent, the Capricorn District Municipality.
- [5] The main issue in this case is whether the applicant has made out a case that the Regional Commissioner awarded the property to the applicant under delegated power. This issue turns centrally on the status and import of the November 2004 letter written by a Mr Mashile Mokono, who was then the Regional Commissioner, and specifically whether it reflects an 'award' of land in terms of section 42D of the Restitution Act. The applicant seeks declaratory relief in that regard. Only if I conclude that the Regional Commissioner awarded the property to the applicant, do further questions arise regarding any entitlement to further relief. The second and third respondents have, however, raised various preliminary issues, which also require consideration and I deal with them first. These concern the authority of the applicant and whether the relief sought is academic in light of settlement agreements recently concluded between the Regional Commissioner and affected claimants. In order to deal with these issues, it is necessary to consider the background facts in some detail, to which I turn shortly.

Section 42D of the Restitution Act

- [6] Section 42D of the Restitution Act is material to this case. It is entitled 'Powers of Minister in case of certain agreements' and provides, in relevant part:
- (1) If the Minister [of Rural Development and Land Reform] is satisfied that a claimant is entitled to restitution of a right in land in terms of section 2, and that the claim for such restitution was lodged not later than 30 June 2019, he or she may enter into an agreement with the parties who are interested in the claim providing for one or more of the following:
 - (a) the award to the claimant of land, or portion of land or any other right in land (subject to certain provisos);
 - (b) the payment of compensation to such claimant;
 - (c) both an award and payment of compensation to such claimant; (c) both an award and payment of compensation to such claimant;
 - (d) ...
 - (e) the manner in which the rights awarded are to be held or the compensation is to be paid or held; or
 - (f) such other terms and conditions as the Minister considers appropriate.

- (2) If the claimant contemplated in subsection (1) is a community, the agreement must provide for all the members of the dispossessed community to have access to the land or the compensation in question, on a basis which is fair and non-discriminatory towards any person, including a tenant, and which ensures the accountability of the person who holds the land or compensation on behalf of such community to the members of the community.
- (3) The Minister may delegate any power conferred upon him or her by sub-section (1) or sections 42C and 42E to the Director-General or Rural Development and Land Reform, or to the Chief Land Claims Commissioner or a regional land claims commissioner.

Background

facts

- [7] It is common cause that the relevant claims in respect of the property were lodged timeously in terms of the Restitution Act. Mr Mokgehle attaches to the founding affidavit the claim form he submitted, which is dated 18 July 1998. In response to section 3 of the claim form, titled 'Full particulars of person who lost the right in land', the form identifies Mr Mokgehle himself, rather than any community. In response to section 5 of the form, which asks if the claimant knows of any other family member that might have an interest or claim on the land, Mr Mokgehle answers: Yes, and he lists eight names of family members (including his mother, brothers, sister, wife, son and cousin).
- [8] It is apparent from the answering affidavit of the Regional Commissioner, deposed to by Mr Lebjane Maphuta, that, indeed, multiple claim forms were lodged in respect of the property. It is not necessary for present purposes to analyse each form but it is apparent that a number of the forms are lodged by individuals who, like Mr Mokgehle, answer section 3 of the form by identifying themselves, rather than any community, and who answer section 5 in the affirmative and then identify other family members or persons who might have an interest in the claim.
- [9] It is common cause that the relevant claims were notified by gazette in terms of section 11 of the Restitution Act on 16 November 2001.[1] The gazette, which I refer to as GN2229, carries the name of M Mokono as then Regional Commissioner of the Northern Province. The property referred to in GN2229 is the Remaining Extent and a Portion of Portion 2 of the farm Duitschland 169LS in the Magisterial District of Pietersburg in the Northern Province. GN2229 records the following: "The claim was lodged by Mr William Pitsi Mokgehle on behalf of the members of the Duitschland Ga-Mabohlatjana Community. A number of claims were lodged by individuals on behalf of the Duitschland Ga-Mabohlatjana Community and the claimants subsequently took a resolution to combine the claims into one community claim under the name: Duitschland Ga-Mabohlatjana Land Claim. They also elected a committee to represent the Duitschland

Ga-Mabohlatjana Community.” This information, while recorded in the GN2229, is neither referred to expressly nor dealt with in the founding affidavit.

[10] According to the founding affidavit, on or about 30 November 2004, the Regional Land Commissioner awarded a portion of ‘the claim’ (which I assume to mean the property) to the community for resettlement. To prove this, Mr Mokgehle attaches the November 2004 letter which is written by Mr Mokono and addressed to the Mr Hlako, the Municipal Manager of the second respondent. The letter is headed: ‘Request for estimated costs in respect of servicing the land to be restored

to the Ga-Mabohlatjana Community’ and records the following:

‘The Regional Land Claims Commission: Limpopo is in a process of finalizing a memorandum to be sent to the Minister of Land Affairs in terms of which the land claimed by the Ga-Mabohlatjana Community is to be restored. The Ga-Mabohlatjana Community indicated that it would like to resettle on part of the claimed land as per the report by the Department of Health: Limpopo, which indicated that the Community can occupy the area to the west of the flood retention dam and sewerage oxidation ponds provided they settle at least 500 metres away from the sewerage and dumping site.

We therefore request the Molemole Municipality to provide us with an estimate of costs for servicing the land in question. We intend

requesting the Minister to approve release of this funding so as to enable the Municipality to service the land in favour of the

Ga-Mabohlatjana Community. The area where the claimants intend to settle is approximately 80 hectares in extent. The estimated total number of residential erven is 760 at a size of 600 square metres each.

Your urgent assistance will be highly appreciated.’

[11] Mr Mokgehle contends that this letter reflects the award of a portion of the property to the claimants which can be enforced. He says that the award was made by Mr Mokono pursuant to duly delegated powers. In answer, the Regional Commissioner denies these allegations alleging that the letter, on a proper reading, does not reflect the award of land and does no more than record that a memorandum to the Minister was in process of being finalized. He points out that there is no allegation that the memorandum was finalized or sent to the Minister. In the second respondent’s answering affidavit, the Municipal Manager of the Molemole Municipality (currently Mr Mosena) similarly denies that the letter reflects any award of the property.

[12] Mr Mokgehle has however attached a letter dated 20 January 2004 from the then Municipal Manager, Mr Hlako. The letter records that at a meeting of 12 December 2013, the Council resolved to recommend that a portion of the farm Duitsland be released to the land claimants, that an agreement between the Council and the Ga- Ga-Mabohlatjana community

be signed (ie occupation of arable land) and that the Council and the 'land commissioner' meet and decide on the compensation issue. Mr Mosena accepts that this resolution was taken but disputes that it was given effect to and says that it has now been overtaken by subsequent events, referred to below.

[13] In 2013, a dispute between the Ga-Mabohlatjana Community (represented, as in this case, by Mr Mokgehle), the respondents and another respondent came before this Court. Sardiwalla J granted the following order, in which the reference to the fourth respondent should be understood as a reference to the Regional Commissioner:

1. The fourth respondent shall forthwith commence consultation with all parties in an attempt to conclude an agreement in terms of section 42D on or before 21 January 2014.
2. Should the fourth respondent be unsuccessful in settling the claim by way of a 42D agreement, the fourth respondent shall refer the claim to this court on or before 28 February 2014.
3. Should there be non-compliance with this order a punitive costs order may be awarded against the employee of the fourth respondent responsible for compliance with this order.

[14] Mr Mosena explains that, to his knowledge, a process of engagement between the Regional Commissioner and the claimants did indeed ensue and while he has no personal knowledge of the process, he attaches a memorandum from the office of the Commission on Restitution of Land Rights, which records the extent of his knowledge. The content of the memorandum is not detailed in the answering affidavit. I mention this because of the important procedural injunction articulated in *Swissborough Diamond Mines v Government of the RSA*[2] that:

'it is not open to an applicant or a respondent to merely annexe to its affidavit documentation and to request the Court to have regard to it. What is required is the identification of the portions thereof on which reliance is placed and an indication of the case which is sought to be made out on the strength thereof. If there were not so the essence of our established practice would be destroyed. A party would not know what case must be met.'

[15] While remaining mindful of this injunction, to which I return below, I have noted that the memorandum reflects that the Chief Land Claims Commissioner, Ms Nomfundo Gobodo, took a decision in November 2017 approving an award amounting to six million six hundred and fifty six thousand, eight hundred twenty Rands (R 6 656 820.00) to be paid to thirty households in equal amounts of two hundred and twenty one thousand eight hundred and ninety four Rands (R221 894) per household as full and final settlement of the related claims and authorizing the Regional Commissioner to sign the related settlement agreements on behalf of the State. The second respondent alleges that this settlement process has overtaken the events of 2004.

[16] According to the Regional Commissioner, the Commission initially received a total number of 68 claims lodged by individual households, the claimants consisting of originally dispossessed individuals and in some instances, their direct descendants. Some 34 claims

are said to be in respect of seventeen (17) households with some claims duplicated. The Regional Commissioner says the total number of households is fifty-one (51) and there has been a verification process in respect of the claimants. The Regional Commissioner explains further that it is not feasible to restore the property to the claimants as it is currently used as a sewage area and a flood retention dam. He says that of the fifty-one (51) households, forty-one (41) have since opted for compensation and seven (7) have opted for land restoration. A resolution is referred to, allegedly taken on 12 December 2013, in which claimants allegedly opted for compensation, is attached. The views of three (3) households, he says, are not yet known. Attached to the answering affidavit are some twenty-four (24) claim forms, some twenty-seven (27) resolutions purporting to record various person's exercise of an option to receive compensation, some twenty (20) offers to pay compensation which purport to bear claimant's signatures and a settlement agreement purporting to reflect a section 42D agreement to settle the claimants' claims by payment of compensation in the amount of R 6 656 820 in lieu of the claimed land in full and final settlement of the claim. There is however only cursory reference to the content of these documents in the affidavit itself, which again brings to the fore the injunction in *Swissborough Diamond Mines*.

- [17] In reply, Mr Mokgehle denies the applicant sought compensation and while accepting that some 'beneficiaries' or 'members' accepted financial compensation, asserts that this is a small number of those who form part of the community. He reiterates that the claim is a community claim and says that the verification process, which must be in respect of the community, is not yet complete and that a resolution that was taken on 12 December 2013 was reversed on 19 February 2014.

The first preliminary issue: the authority of the applicant

- [18] Both the second and third respondents dispute "the authority" of the applicant and its deponent to act on behalf of the Ga-Mabohlatjana Community. The second respondent's complaint is that Mr Mokgehle has failed to demonstrate that the proceedings are authorized. The third respondent pleads that he is not authorized to act on behalf of the applicant and is not representing the applicant, various members of which have accepted compensation. As pleaded, the points taken are challenges that should be brought in terms of Rule 7 of the Rules of this Court but were not.[3] I decline to entertain them.
- [19] In doing so, I do not suggest that the issue of authority is unimportant, not least in a claim where there are multiple affected persons, who may or may not be part of a community claim, and decisions are apparently being taken on their behalf. But issues of authority of this sort must be duly raised to enable them to be properly ventilated or this Court must exercise its powers to enable their ventilation. Even a cursory consideration of the factual background reveals that this cannot be done on the pleadings as they stand both in view of the cursory manner in which the complaints are pleaded and in view of all parties' failure to comply with the injunction in *Swissborough Diamond Mines*. Moreover, in view of the narrow conclusion that I have reached on the main issue, which is dispositive of the case, I am of the view that it is both unnecessary and undesirable to ventilate the authority issue at

this stage.

- [20] During argument, Mr Moolman (supported by Ms Magano) raised a different objection to what was pleaded pointing to the fact that contrary to the case heading, the application is in fact instituted by the Ga-Mabohlatjana Community Property Association, the existence of which is not demonstrated. In the result he submitted, the applicant has not demonstrated its identity as a party. In response, Mr Ramphele informed the Court that there is no Community Property Association and that the reference in the affidavits to a Community Property Association is an error. Rather, read contextually, he submitted that the reference should be understood to be to the Ga-Mabohlatjana Community referred to in GN2229. In my view, the error Mr Ramphele refers to should have been explained on affidavit. However, again in view of the narrow conclusion that I have reached on the main issue, which is dispositive of the case, I am willing to assume, without deciding, that indeed the application was instituted by Mr Mokgehle on behalf of the Ga-Mabohlatjana Community and that the affidavits can and should be read to mean this in line with the GN2229.

The second preliminary issue: is the application academic?

- [21] The second preliminary point is raised by the Regional Commissioner and amounts to a contention that the application is academic and has no practical effect, because the claimants subsequently resolved to accept financial compensation in lieu of restoration of the claimed property. The submission is advanced in context of the factual background I have referred to above. For present purposes, I highlight the alleged resolution taken on 12 December 2013.
- [22] There are two difficulties with this point. First the resolution which is attached to the answering affidavit simply does not record any resolution to accept financial compensation. In this regard, Ms Magano informed the Court that the incorrect resolution was mistakenly attached and urged the Court to accept the correct resolution from the Bar. I declined to do so in circumstances where this was not uncontroversial and would have necessitated a further opportunity for reply. In any event, I am unable to make a finding on these papers regarding the import of any such resolution in light of what Mr Mokgehle says in reply, namely that the resolution of that day was subsequently reversed.[4]
- [23] Secondly, while it may or may not be that the claim has in fact and law been resolved as the Regional Commissioner contends, I am unable to make such findings in these proceedings and on the evidence before me. There are multiple difficulties. First, I am unable to make a finding on whether this is a community claim, as Mr Mokgehle contends and as suggested by GN2229, or individual claims, as the Regional Commissioner contends. This is a material dispute of fact which must be resolved with reference to relevant evidence, which may be extrinsic to the claim forms. As indicated above, the parties have pleaded their cases, respectively, without observing the injunction in *Swissborough Diamond Mines*. Moreover, there are glaring gaps in the respective accounts. Secondly, if the Regional Commissioner is correct and the claims are properly to be regarded as individual claims, then questions of

joinder surface and no individual claimant is cited as a party to these proceedings. Thirdly, I am in any event unable to conclude on the evidence before me, not least in light of Swissborough Diamond Mines, that all affected persons have settled their claims as the Regional Commissioner contends. In this regard, even accepting the Regional Commissioner's version regarding the number of claims received, he has not demonstrated that each claim has been resolved as alleged. Rather, the Regional Commissioner has merely attached verification documentation, multiple claim forms, resolutions recording offer and signature or mark and a settlement agreement without expressly detailing which claimants are allegedly verified and without identifying which claims should be regarded as settled having regard to the resolutions.

[24] I am accordingly unable to uphold the second preliminary point.

The main issue: an award of land?

[25] The main issue for decision is thus whether the Regional Commissioner took a decision under delegated power to award the applicant community land and which award is contained in the November 2004 letter. On this issue, the applicant's case stands or falls on the status and import of the November 2004 letter. Mr Ramphele submitted that the November 2004 letter records such a decision which is binding on the Regional Commissioner. He submits that the decision is administrative action which stands unless and until set aside and that the Regional Commissioner is *functus officio*. Mr Moolman and Ms Magano submitted that, on its own terms and properly interpreted, the November 2004 simply does not record any such decision to award land. I agree with their submission, which is dispositive of the case.

[26] First, the purpose of the letter was expressly to request an estimate of costs for servicing some 80 hectares of land. Secondly, the letter was not addressed to the claimants but is a communication from the Regional Commissioner to the Municipal Manager of the second respondent. Mr Ramphele was unable to point me to any other evidence upon which I can duly conclude in these proceedings that the alleged decision to award the land had been communicated to the claimants. Thirdly, the letter does not, without more, convey that the duly empowered delegee had finally made the decision to restore the property. What is clear from its terms is that the Commission on Restitution of Land Rights was finalizing a memorandum to the Minister dealing at least with a request to release funds to service the property. What is apparent from the letter is that the memorandum would deal with the restoration to the Ga-Mabohlatjana Community of a portion of the land claimed, and that, at least, the Regional Commissioner was of the view that 80 hectares of the property (as only broadly described) should be restored to the Ga-Mabohlatjana Community. However, the letter does not convey, unambiguously or even with reasonable clarity, that the decision to restore the property had already been taken by the duly authorised delegee nor indeed who was authorized to take it. Fourthly, the Regional Commissioner has pertinently and specifically denied on affidavit that Mr Mokono in fact exercised any such delegated powers. Thus, while it may or may not be that land was awarded to the claimant community, I am

unable to conclude – as the notice of motion narrowly contemplates – that the November 2004 letter reflects this.

- [27] For these reasons, the applicant cannot succeed in its application, which must accordingly be dismissed.

Costs

- [28] Costs are usually awarded in this court only in special circumstances. The third respondent submitted that the application was ill-conceived and the applicant should pay the costs. In my view, this is not a case which warrants a deviation from the usual approach in this Court. While the evidence the applicant adduced was inadequate, I have no reason to believe that the applicant was not genuinely pursuing enforcement of constitutional rights. Furthermore, it is not only the applicant's evidence which was unsatisfactory in this matter. I have dealt above with the evidential and other difficulties arising in connection with the preliminary points.

- [29] Finally, and importantly, it is a matter of great public importance that outstanding restitution claims be expeditiously resolved. It is highly problematic that the claims in this case continue to be the source of dispute. The Regional Commissioner was and remains under a duty under the order granted by Sardiwalla J to refer the claims to this Court. That was in

2013. This did not happen for reasons that are currently unknown. The fact that this did not happen then, has not yet happened, and there remain stark disputes of the sort that have surfaced (or resurfaced) in this case, are matters of serious concern. This is for at least two reasons. First, it is a constitutional imperative that land restitution claims be resolved without undue delay.[5] Second, non-compliance with court orders undermines the rule of law and the authority of the judiciary.[6] At this stage, I have issued a direction that the Regional Commissioner comply with the order of Sardiwalla J within 20 days of

the date of this order. The parties' attention is nevertheless drawn to the fact that this Court has the power to raise the issue of contempt of court at the instance of a party or mero motu (of its own accord).[7]

- [30] The following order is made:

19.1 The application is dismissed.

19.2 Each party is to pay its own costs.

19.3 The Regional Land Claims Commissioner is directed to comply with the order of Sardiwalla J within 20 days of the date of this order.

SJ Cowen

Acting Judge, Land Claims Court

Appearances:

Applicant: Mr

Ramphele, Ramphele Attorneys

Second respondent: Mr Moolman, Pratt Luyt & De Lange Attorneys

Third respondent: KD Magano instructed by the State Attorney

[1] This was by General Notice in the Government Gazette of 16 November 2001 (No 22819) as Notice 2229 of 2001 (GN 2229).

[2] 1999(2) SA 279 (T) at 324F-G

[3] Rule 7 is entitled Representation of Parties. Rule 7(2) to (4) read: '(2)Any party that disputes the authority of a person acting on behalf of any party may deliver a notice –

(a) within ten days after it has come to his or her notice that such person is so acting; or

(b) with the leave of the Court on good cause shown at any other time, calling on that person to prove is or her authority.

(3) That person must, within twenty days of receipt of that notice, deliver –

(a) a power of attorney signed by or on behalf of the party giving it and otherwise duly executed accordingly to law; and

(b) when a power of attorney is signed on behalf of a party giving it, documentary or other proof that the signatory is authorized to sign on behalf of that party, Failing which he or she may no longer act until the documents referred to in paragraphs (a) and (b) are delivered.

(4) The Court may, on application, declare that a person purporting to act on behalf of a party has not established his or her authority so to act, in which event that person may no longer act until he or she has established his or her authority to the satisfaction of the Court.

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(a) a power of attorney signed by or on behalf of the party giving it and otherwise duly executed accordingly to law; and

- (b) when a power of attorney is signed on behalf of a party giving it, documentary or other proof that the signatory is authorized to sign on behalf of that party,

Failing which he or she may no longer act until the documents referred to in paragraphs (a) and (b) are delivered.

- (4) The Court may, on application, declare that a person purporting to act on behalf of a party has not established his or her authority so to act, in which event that person may no longer act until he or she has established his or her authority to the satisfaction of the Court.

[4] See above, paragraph [17].

[5] Speaker v Land Access Movement 2019(6) SA 568 (CC).

[6] Pheko v Ekurhuleni City [2015] ZACC 10; 2015 (5) SA 600 (CC); 2015 (6) BCLR 711 (CC) (Pheko); Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma and Others [2021] ZACC 18 (Zuma).

[7] Pheko, para 2; Zuma para 110.

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