SOUTH AFRICA / JUDGMENT

Kgoantha, Molekoa Families and Others v Minister of Agriculture, Land Reform and Rural Development and Others (LCC 2019/139) [2021] ZALCC 24 (30 September 2021)

[2021] ZALCC 24

COURT
Land Claims Court

BEFORE
Spilg

CASE / FILE NUMBER
LCC 2019/139

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IN
THE LAND CLAIMS COURT OF SOUTH AFRICA
HELD
AT RANDBURG
Case
number: LCC
2019/139

REPORTABLE:	NO OF INTEREST TO OTHER JUDGES: YES REVISED In
the matter between:	KGOANTHA, MOLEKOA FAMILIES AND OTHERS Applicant and MINISTER OF AGRICULTURE, LAND REFORM AND RURAL DEVELOPMENT 1st Respondent REGIONAL LAND CLAIMS

COMMISSIONER 2nd
Respondent
CHIEF
LAND CALIMS
COMMISSIONER 3rd
Respondent
LEGATA
COMMUNIAL PROERTY
ASSOCATION 4th
Respondent

JUDGMENT

SPILG, J

INTRODUCTION

1. The deponent to the applicant's affidavit avers that his late father had lodged a land claim on behalf of what will be referred to as the Kgopung Community pursuant to the applicant families being dispossessed of their rights in land as contemplated by s 2 of the Restitution of Land Rights Act 23 of 1994 ("the Restitution Act").

2. The applicants allege that a request by the Molefe family who had also lodges a claim involving the same land as claimed by the Kgopung Community was rejected and while their claim continued to be referred to as the Kgopung land claim the Molefe family land claim was in fact gazetted under s 11(1) of the Act.

3. Of. concern to the court ar the alleÂ·gations GOhtained in the papers that;

a. while the Kgopung Community were being told by the Regional Land Claims. Commissioner (Limpopo), whose office will be referred to as the RLCC that their claim was progressing, in fact the RLCC did not do so and proceeded only with the gazetting of the Molefe family claim; and that

b. subsequently an agreement under s 42D of the Restitution Act was enteredÂ· into in respect of the claimed land by the first respondent who is the Minister of Rural Development and Land Reform (now the Minister of Agriculture, Land Reform and Rural Development) to which the Kgopung Community was not a party and without being informed that a s 42D process was under way in respect of land which was the subject of their claim or that that their claim had not met the threshold requirements set bys 11(1) in the manner provided for in s 11(4) or had otherwise been dismissed.

4. Of equal concern as the allegation of being misled about the fate of their claim, is the.allegation made by the applicants that the verification list is not that of the Molefe family but of the Makgae Community. Needless to say it is also alleged that the Kgopung Community members do not appear on the verification list. Moreover none of the applicant communities' members are included as members of the Legata Communal Property Association ("the CPA") which is the fourth respondent.

The CPA was formed as the legal structure through which the land in question would be acquired, held and managed in terms of the Communal Property Association Act 28 of 1996.

5. Certain other features of the case made out by the applicants are also disconcerting. Among them are the allegations that;

a. they had received a letter from the office of the RLCC to attend a meeting on 20 September 2008 but on arrival were chased away by RLCC officials;

b. during 2012 and 2013 they were informed that their claim had been mislaid and could not be traced on the Commission's system.

c. despite engaging a firm of attorneys to assist in obtaining information regarding their claim, nothing materialised save for a meeting in March 2016 when RLCC officials agreed to scan the contents of their office file and forward them to the applicant's representatives. However this was not done and all further communications with the RLCC office proved unsuccessful.

RELIEF SOUGHT AND FAILURE to FIL.E AFFIDAVITS OR ATTEND COURT.

6. Service of the main application was effected on the fy1inister, the Regional Land Claims Commissioner (Limpopo) and the Chief Land Claims Commissioner yet none entered a notice to oppose or filed any affidavits.

Although a notice of intention to oppose was filed by the CPA they also failed to file any answering affidavit.

In the result not one of these most serious factual allegations against the RLCC and the CPA are challenged or explained and the evidence on oath before this court is therefore uncontested and must be accepted as true. If that is the case it appears that the contents of the court file should be referred to the prosecuting authority and possibly the Special Investigating Unit. This will be considered at the hearing which will take place on 6 December 2021.

7. The main relief sought by the applicants are orders to effectively set aside the s 42D agreement and that the land claim which was gazette be referred to this court in terms s 14.

8. When the matter originally came before this court concern was already expressed about the failure of any respondent to place under oath, or at all, a single fact which contested the averments contained in the application or take this court into its confidence and explain what occurred.

There could be no misunderstanding that the averments made against the RLCC and the CPA were of a serious nature. They involve misrepresentations and non-disclosures which resulted in the hijacking, by way of the appropriation of the land claim of at least the Kgopung Community, and possibly even the Molefe family, by persons involved in the formation of the CPA aided and abetted by unscrupulous officials of the RLCC. These constitute the nub of the allegations made and, if incorrect, required an answer. None has been forthcoming.

9. While the exact nature of the relief that a court can grant may require careful consideration, the RLCC did not bother to file a notice to oppose.

RLCC REQUIREMENTS OF CONSTITUTIONAL ACCOUNTABILITY AND TRANSPARANCY

10. In terms of s 239 of the Constitution the Land Claims Commission including the office of the RLCC is an organ of State which is subject to the Bill of Rights provisions contained in Chapter 2.[1]

That being so, it is obliged to conduct its affairs openly and transparently, in a manner which ensures that the actions taken are lawful, reasonable and procedurally fair under s 33 of the Constitution. The office of the RLCC as an organ of State is obliged to perform its functions and duties in a manner consistent with the principles enunciated in s 195 of the Constitution.[2]

11. The principles set out in s195 to which the officials of the RLCC are subject include a high standard of professional ethics, accountability and transparency.

In the present case accountability and transparency are sorely lacking if, as the uncontested evidence demonstrates, no one is prepared to explain to the applicants or to the court how their land claim appears to have been scuppered.

Consequences must follow where there has been the avoidance of accountability in the face of such serious allegations and the infringement of such a basic principle to which the office of the RLCC is constitutionally bound to follow. I will return to this

12. While the nature of the ultimate relief may require careful consideration, save in one instance which is not applicable her), there must be an umbilical link founded under s 2 of the Restitution Act between the person who lodged the claim and the person or group of persons entitled to restitution. In short; only a person (as understood by the application of s 2 of the Restitution Act) who has lodged a claim is entitled to restitution of a right inland under this Act unless s 42E (1)(b) applies.

This is the golden thread which runs through the Act

The unchallenged case made out in the papers is that persons not entitled to restitution of land have unlawfully been given land on the back of a claim made by a completely different r group.

13. A further consideration is that s 42D can only be implemented if certain criteria are satisfied. Among these prerequisites are that;

a. the party to the agreement with the Minister must be a claimant (s 42D (1)). A claimant is defined ins 1 to mean "any person who has lodged a claim" which takes one back to the golden thread of land restitution claims.

b. any other claimant to the same piece of land to which the s 42D agreement relates has been granted restitution, or has waived his or her right to restoration of the land in question, or the Minister is satisfied that " satisfactory arrangements have been made or will be made to grant such other claimant restitution of a right in land" (see s 42D(a)(i) and (ii))

14. Once again, the unchallenged evidence is that either these prerequisites were not met when the agreement was purportedly concluded or that, as a fact, the CPA which was formed to enable the community in question to acquire, hold and manage the land which was subject to restitution does not comprise members of the community who lodged the claim.

This latter possibility would result in either a failure of the preconditions of s 420 (because the land remained subject to a claim by Kgopung community) or the Minister would have had to apply the provisions of s 2(2) of the CPA Act because s 2(1) (c) or (d) would have had to be triggered.

15. On the undisputed facts before the court, the applicants' rights under the Restitution Act have been infringed and they are therefore entitled to a remedy which may include unravelling any transaction , action or decision, which may be found to be illegal.

16. At this stage the applicants have obtained a court order which required the responsible authority, whether it be the first, second or third respondent;

a. to reinvestigate, scan and compile the relevant file and also verify the applicants' claims;

b. to report back to the court on 12 March 2021 on what they have done in relation to the reinvestigation, scanning, compiling and verification of the applicants' claim

The first second and third respondent were also required in terms of the order to appear before the court on 12 March 2021 and show cause why the substantive prayers sought in the notice of motion should not be granted.

A costs order was made that the first, second and third respondents pay the costs of the application to date on the attorney and client scale.

17. The court order was completely ignored, despite the applicants providing proof of service of the order on the first respondent on 1 February 2021 and on the second and third respondents on 3 February 2021.

CONSEQUENCES OF FAILUIRE OF RLCC TO APPEAR

18. While the first and third respondents are necessary parties, it is evident that the office of the RLCC failed to comply with the court order and in so doing;

a. has persisted in its failure to be accountable as required under s 195 of the Constitution;

b. has persisted in its failure to act transparently as required under s 195 of the Constitution;

c. has frustrated the court in the performance of its duties; and

d. has contravened the provisions of ss 165

(4) and (5) of the Constitution.in that it has failed to assist the court to ensure its effectiveness and did not hold itself bound by the order of this court.

19. These infringements of the Constitution cannot be treated lightly, let alone be ignored. They affect the very functioning of our constitutional democracy and the rule of law enshrined in our Constitution.[3]

20. The seriousness of the failure of the RLCC to meet its constitutional obligations to respect the rule of law and of avoiding its own obligations of accountability and transparency under s 195 of the Constitution by burying its head in the sand and refusing to openly address such grave accusations against them requires the court to elevate the issue. At this stage the court can only do so in a meaningful way having regard to its responsibilities to litigants to resolve issues and provide effective remedies by;

a. ensuring that the Minister and the Chief Land Claims Commissioner are aware of the seriousness of the allegations made and not disputed, and the failure of their representatives to comply with court orders when required to do so;

b. securing the attendance by way of subpoena under s 28F of the Restitution Act under pain of a warrant of arrest under that section or s 28G of the person responsible for dealing with the claims in respect of the land in issue, the s 42D process in relation to the agreement concerning the restitution of such land and all documents pertaining thereto which are in the possession of the Commission.

c. Requiring the relevant respondents to file an affidavit dealing with their failure to attend court on 12 March 2021 and comply with the other terms of the order initialed by the court on 25 January 2021.

ORDER

21. To ensure that the relevant respondents comply with their constitutional obligations under;

a. S 195 of the Constitution

b. S 165(4) and (5) of the Constitution

and further to ensure that orders of this courts are respected, effective and complied with it is ordered that;

1. Subpoenas are to be issued *in terms of s 28F of the Restitution of Land Rights Act 22 of 1994 ('the Acf') on the following persons to appear in person and physically at the Land Claims Court, 18 Hill Street Ferndale, Randburg on 6 December 2021;

a. The Chief Director: Land Restitution Support, Mr. Tele Maphotho, whose offices are at corner Rissik and Schoeman Streets, Polokwane;

b. The person at the Commission on Restitution of Land Rights responsible for performing the functions required under ss 7, 14 of the Act in relation to processing the claim to which this application relates;

a. ensuring that the Minister and the Chief Land Claims Commissioner are aware of the seriousness of the allegations made and not disputed, and the failure of their representatives to comply with court orders when required to do so;

b. securing the attendance by way of subpoena under s 28F of the Restitution Act under pain of a warrant of arrest under that section or s 28G of the person responsible for dealing with the claims in respect of the land in issue, the s 42D process in relation to the agreement concerning the restitution of such land and all documents pertaining thereto which are in the possession of the Commission.

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c. The person at the Commission on Restitution of Land Rights in whose custody and control all files relevant to the land which is the subject matter of this application relates

2. In terms of the said subpoenas each person referred to in para 1 shall also produce at court, on the aforesaid date, under s 28F of the Act the following documents;

a. all the files relevant to the land which is the subject matter of this application and their contents

b. without derogating from the generality of the contents of sub (a);

i. All referral reports

ii. All investigation reports and documents

iii. All documents and reports which were required to be prepared or signed, as the case might be, by the relevant officials approving and enabling the approval of the s 42D agreement in issue

iv. All documents required to be originated and completed under the provisions of the Rules Regarding the Procedures of the Commission under Government Notice GN 763 of 12 May 1995

c. The Regional Land Claims Commissioner (Limpopo), failing whom, the Chief Land Claims Commissioner shall serve and file an affidavit by no later than Friday 12 November 2021 explaining why there was a failure to comply with the court order signed by this court on 25 January 2021;

d. The judgment delivered in this matter on 30 September 2021 shall be served together with this order on;

i. The Director- General of the Department of Agriculture, Land Reform and Rural Development for the attention of the Minister of Agriculture, Land Reform and Rural Development;

ii. The Chief Land Claims Commissioner

DATE OF JUDGMENT: 30 September 2021

FOR APPLICANTS: Adv. S Masemola

TP PHALAME Attorneys

[1] See s 8(1) of the Constitution.

[2] See s 195 (2) of the Constitution The officers appointed under s 8 of the Restitution Act are subject to the provisions of the Public Service Act 1994 and as such are directly obliged to perform their functions and duties in accordance with the principles identified in. s 195(1).

[3] See ss 38, 167 to 169 and 173 of the Constitution

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