

SOUTH AFRICA / JUDGMENT

Kwaliddolo Communal Property Association v Mahlangu and Others (LCC287/17) [2020] ZALCC 32 (15 February 2020) [2020] ZALCC 32

COURT
Land Claims Court

BEFORE
M P Canca

CASE / FILE NUMBER
LCC287/17

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

IN
THE LAND CLAIMS COURT OF SOUTH AFRICA
HELD
AT RANDBURG

Case Number:	LCC287/17 In
the matter between:	KWALIDDOLO COMMUNAL PROPERTY ASSOCIATION Applicant And KOROMBO MAHLANGU First Respondent JACOB GIYANE Second Respondent OBED MTSWENI Third Respondent WILLEM SUHLA Fourth Respondent SOGULU JOB MNGUNI Fifth Respondent ALPHEUS MAHLANGU Sixth Respondent

SIMON
MASINDI
Seventh
Respondent
CARL
MAGNUS VAN ROOYEN
Eighth Respondent
MOHLAKENG
COMMUNITY TRUST
Ninth Respondent
THE
MINISTER: RURAL DEVELOPMENT & LAND REFORM
Tenth Respondent
DEPARTMENT
OF RURAL DEVELOPMENT & LAND
REFORM
Eleventh
Respondent
THE
COMMISSION FOR RESTITUTION OF LAND RIGHTS
Twelfth
Respondent
REGIONAL
LAND CLAIMS COMMISSION NELSPRUIT
Thirteenth
Respondent
THE
MINISTER: AGRICULTURE, FORESTRIES &
FISHERIES
Fourteenth
Respondent
Judgment
delivered on: 15 February 2020

JUDGMENT

INTRODUCTION

- [1] This is an opposed application for the rescission of a rule nisi granted on 6 December 2017 and made a final interim order on 15 January 2018. In the alternative to the rescission or setting aside of the order, the applicant prays for the amendment or variation thereof. The impugned order, which prohibits the applicant (and its members) from conducting certain actions, set out more fully below, was sought by the first to eighth respondents herein in terms of Part A of their notice of motion for review proceedings, pending the finalization of the review, particulars of which are contained in Part B of the said notice of motion.

- [2] The applicant in this rescission application, the Kwaliddolo Communal Property Association (“the CPA”), is the first respondent in the aforementioned review application which was launched on an ex parte basis, on 4 December 2017, by the first to eighth respondents in this rescission application, namely, Korombo Mahlangu (“Mahlangu”);

Jacob Giyane; Obed Mtsweni; William Suhla; Sogulu Job Mnguni; Alpheus Mahlangu; Simon Masindi and Carl Magus Van Rooyen. These respondents, who are hereinafter referred to as “the review applicants”, seek, inter alia, the review of the decision by the Minister of Rural Development and Land Reform (“the Minister”) and the Department of Rural Development and Land Reform (“the Department”) respectively, to award certain farms to the CPA and the ninth respondent in this application, the Mohlakeng Community Trust (“the Trust”), in terms of the Restitution of Land Rights Act, 22 of 1994 (“the Restitution Act”).

- [3] The notice of motion launched by the review applicants, in relevant part, reads as follows:

“PART A:

1. That Part A of this notice of motion is declared to be urgent as envisioned in rule 34 of the rules of the above Court and that the ordinary prescripts with regard to service and filing be dispensed with, and Part A be ordered to commence on an ex parte basis, and;
2. That the Court issue a rule nisi in terms of prayers 3-4 below and set the return date for an appropriate date for the first and second respondents to give reasons to the Court why the order should not be made a final interim order;
3. That the order granted below in prayers 4 and 5 to be immediately operative pending the finalization of the relief sought in Part B of the notice of motion;
4. That the members of the 1st and 2nd Respondents are interdicted from entering the farms Leeuwkop NO 228 and Rietfontein NO 214 until finalization of Part B of the application, and are also interdicted from:
 - 4.1 Harassing any person currently inhabiting any of the two farms;
 - 4.2 Damaging the property of the applicants that is present on the farms, including livestock;
 - 4.3 Harassing, intimidating or otherwise assaulting the applicants who are currently farming on the abovementioned properties;
 - 4.4 That the first respondents [sic] are ordered to remove the cattle delivered at the farm Leeuwkop belonging to them;
5. That the third respondent is ordered to pay the costs of the application.
6. That prayers 7-8 are postponed sine die.” [1]

Given that Part B of the application was postponed sine die, it is, for the purposes of this judgment, not necessary to set out in detail the relief sought therein at this stage of the judgment. More on this below.

- [4] The rescission application before me was filed of record on 30 April 2018 by the CPA and the relief sought is framed in the following terms in the notice of motion:

“1) Condoning the Applicants [sic] late lodging of this application for rescission of

judgment.

- 2) Rescinding and/or setting aside [the] whole of the judgment and orders of the above Honourable Court made on the 06th December 2017 and the 15th January 2018.
 - 3) Granting the Applicant leave to oppose Part A of the notice of motion issued by the 1st – 8th Respondents on the 04th December 2017.
 - 4) Alternatively[sic] to the afore-going, setting aside/amending/varying the order/directive of the December 2015 by deleting from paragraph 3 of the directive a reference to prayers 4 and 4.4 of Part A of the notice of motion.
 - 5) Cost of suit
 - 6) Further and/or alternative relief.”[2]
- [5] Apart from seeking condonation for the late filing of this application and the grant of the relief set out in sub-paragraphs 2) to 6) above, Ms. Omar, for the CPA, in heads of argument, attacked the order on, inter alia, the grounds that:

5.1 it was procedurally defective, and

5. 1.1 it misled the CPA by being described as a directive;

5.2 there was a presumption in favour of an owner seeking to exercise rights as owner;

5.2.1 the review applicants were mala fide by not setting down the hearing of Part B of the review application;

5.3 the interim order could not have been granted against the CPA without identifying each of its members.

- [6] The review applicants, opposed the relief sought by the CPA and it was contended strongly by Ms. Coetzee, for the review applicants, that there was no merit in the arguments advanced in support of the submissions set out in sub-paragraphs 5.1 to 5.3 above.

BACKGROUND

[7] During 2016, the Minister, on the advice of the Department, awarded, in terms of the Restitution Act, the farms Portion 1 of the Leeuwkop, 228 JR Registration Division JR, Province of Mpumalanga, held by title deed number T6332/2017 (“Leeuwkop”)

and Rietfontein No. 214, Province of Mpumalanga (“Rietfontein”), jointly hereinafter called “the farms”, to the CPA and the Trust respectively.

[8] The review applicants allege that they have been in possession of the farms for decades, either as tenants or by way of a tacit or an express agreement entered into with the Department and on which they have, inter alia, conducted farming operations as well as other profit-making enterprises. They further allege that they were never consulted

when the decision to transfer ownership of the farms from the State to the new owners, namely, the CPA and the Trust. They also allege that they stand to lose financially should the decision to transfer the farms to its new owners not be reviewed and set aside, given the investments they have made to enhance the value of the farms.

[9] It is only the CPA which opposes the relief granted in terms of Part A of the review application. The Minister, the Department, the Commission of Restitution of Land Rights and the Regional Land Claims Commissioner-Nelspruit requested a stay of the application, specifically Part B thereof, to enable them to undertake a land rights enquiry in terms of the provisions of the Restitution Act. The stance of the Trust and that of the rest of the respondents herein is not evident from the papers filed in this matter.

The CPA’s case

[10] The deponent to the founding affidavit of the CPA, Mr. Victor Mashilo (“Mr. Mashilo”), is the chairperson of the CPA. He avers that as owner of Leeuwkop, the CPA is, through its members, entitled to the possession and control of the farm, to the exclusion of all others. The review applicants, who are in possession of Leeuwkop, in terms of a written lease with the Department, lost their right to occupy the said farm, some time back, when that lease expired through the effluxion of time, so the averment continues. Mr. Mashilo further avers that, in the light of the fact that the aforesaid lease had not been extended, the review applicants have not made out a case that they have a better right to occupy Leeuwkop than the CPA.

[11] Mr. Mashilo also states that some of the review applicants knew of the transfer of the farms for more than a year before instituting the review application, consequently, there were no grounds for the Court to entertain that application on an urgent and an ex parte basis.

[12] Moreover, so it is alleged, the review applicants have not substantiated their allegation that they are engaged in negotiations

with the Department, the aim of which is the extension of their lease agreement with the Department. In Mr. Mashilo's view, even if it was true that such negotiations were in fact taking place, there was no guarantee that those negotiations would succeed, given that "Negotiations fail all the time."

[13] Finally, Mr. Mashilo denies that he and the rest of the members of the CPA are guilty of any of the acts attributed to them in sub-paragraphs 4.1 to 4.3 of the notice of motion in the review application and avers that they are entitled to have their cattle on Leeuwkop, rendering the relief sought by the review applicants, in sub-paragraph 4.4 of the notice of motion, inoperable against the CPA.

The review applicants' opposition to the rescission application

[14] The review applicants' answering affidavit was deposed to by Mr. Korombo Mahlangu ("Mr. Mahlangu") who describes himself as an adult male farmer whose main place of residence is Stand 217 Section B, Kwa-Mahlangu.

[15] In brief summary, opposition to the rescission application appears to rest on the following defenses, namely that

(a) condonation for the late filing thereof ought to be refused on the basis that the default was wilful and intended; (b) whilst conceding that the lease agreement had expired through the effluxion of time, the review applicants allege that they are in occupation of the farms and were in the process of negotiating the extension of the lease agreement and, as a result, had the tacit agreement of the

State to occupy same; (c) given that the order was interim in nature and dependent on the outcome of the review application, the CPA would not be prejudiced by the maintenance of the status quo, particularly, in view of the fact that the CPA and its members had "lived with this order for more than 5 months [and that] they can keep living with it until the process is finalized and part B can be heard."

Condonation

[16] In seeking condonation for the late filing of this application, the CPA concedes that the filing was out of time in terms of the Rules of this Court but, citing the common law, contends that the launch of the application was made within a reasonable time of the order coming to its notice.

[17] In terms of Rule 64(2)(a), a rescission application should be brought within ten (10) days of the applicant becoming aware of the offending order and, in terms of Rule 64(2) (b), good cause must be shown by the applicant for the rescission or its variation.

[18] It is convenient to remind ourselves that this Court's authority to rescind or vary an order granted in the absence of a person against whom it was made is contained in section 35(11) (a) of the Restitution Act. Rule 64(2) only contains the procedural requirements that must be followed for obtaining a rescission or variation of such an order.

[19] The law pertaining to the adjudication of applications for the rescission or variation of an order is now trite and does not require extensive exposition in this judgment. See *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills* (Cape) 2003

(6) SA 1 (SCA)

(2003) 2 All SA 113 at para 11, where the requirements for such an application are set out as follows:

“The applicant must show cause why the remedy should be granted. That entails (a) giving a reasonable explanation of the default;

(b) showing that the application is made bona fide; and (c) showing that there is a bona fide defence to the plaintiff's claim which prima facie has some prospects of success.”

Also see *Hassim Hardware v Fab Tanks* [2017] ZASCA 145, at paragraph 12, where the principles set out in *Colyn* above were re-affirmed.

[20] Given that it is not disputed that the CPA brought the application outside the period prescribed by the Rule 64(2)(a), alluded to above, a determination must now be made as to whether or not good cause has been shown by the CPA for the order to be rescinded or varied. Also, whether there is merit in the contention that the application was brought within a reasonable time.

[21] Mr. Mashilo states that both he and his fellow members of the CPA did not understand the contents of the notice of motion, founding affidavit and the annexures in the review application which were e-mailed to him during December 2017. He states that they are all rural inhabitants of Leeuwkop and do not have “any advanced education or particular knowledge of the [sic] legal proceedings.” Consequently, according to him, following a discussion among themselves, they resolved to refer the documentation in the aforesaid application to a Mr. Mnisi, an official in the employ of the Department, to “do what is necessary to attend to the application.”

[22] Mr. Mashilo further avers that, despite receipt of the said legal papers, he did not receive the directive issued by this Court on 6 December 2017 and was, therefore, not alerted of the need to attend at Court or to the need to file documents. The interim

order issued on 15 January 2018, which was e-mailed to him during that month, however, contained the aforementioned directive and it was only then, according to him, that he had sight, for the first time, of the directive. He then e-mailed both the directive, as well as the order, to Mr. Mnisi, referred to above, and a Ms. Queen Zulu, who is also in the employ of the Department, so the averment continues. Both officials, allegedly, during telephone calls with them, assured him

that “there was nothing for the Applicants to do and that the matter must be dealt with by the Department.”

[23] Further averments by Mr. Mashilo are that:

23.1 following numerous telephonic calls, to the officials alluded to in the previous paragraph, enquiring as to the progress of the matter, they heard “nothing from them”. They then resolved to acquire the services of an attorney, Ms. Omar, and consulted with her on 22 March 2018;

23.2 it was during that consultation that the contents of the review application and the order were explained to them, and

23.3 it was only then that it became apparent to them that the Department had failed to oppose the application or to protect their interests in respect of Leeuwkop.

[24] In the light of the above, Mr. Mashilo avers that the CPA was not in wilful default and that the afore-going was evidence that they had a good cause for the default.

[25] Ms. Omar filed an affidavit in support of the CPA’s contention that its members are “all lay people, who have no knowledge of how legal proceedings work. They are largely labourers who have minimum funds at their disposal.” Ms. Omar further avers that the review applicants would not suffer any prejudice from the late lodgement of the rescission application.

[26] Although not stated in so many words, read as a whole, Ms. Omar’s averments support Mr. Mashilo’s allegations that he and his fellow members of the CPA only became aware of the contents of the order, and its effects, during the consultation held on 22 March 2018.

[27] It is instructive to note that Ms. Omar, in the last sentence of paragraph 9 of her supporting affidavit, states that “There [They] are largely labourers who have minimum funds at their disposal.” Earlier, in paragraph 6 of the said affidavit, Ms. Omar states that “The applicants were unable to secure a contribution to the disbursement[s] required to run this matter from the members of the Applicant in haste.” This, according to Ms. Omar, caused “a slight delay in the dispatch of the application to each of the Respondents.” In her view, the rescission application should have been lodged on or about 9 April 2018, making lodgement only approximately nine

(9) days out of time. Ms. Omar contends that the above is evidence that the application was lodged within a reasonable time.

[28] Ms. Omar also referred me, inter alia, to *Weare v ABSA Bank Limited* 1997 (2) SA 212D, at 216G, where the Court, in dealing with a rescission or varying of a default judgment held that:

“...This sub rule entitles the Court to rescind or vary a default judgment if it is satisfied that there is good reason to do so, even if good cause is not shown. Good reason will, for the most part, be found in the Applicant’s reasons for his absence or default and his ground of defense ...”

[29] The application for condonation is opposed by the review applicants.

[30] The review applicants, whilst conceding that Mr. Mashilo is not trained in the law, dispute that he is illiterate and aver that Mr. Mashilo

“know[s] the necessary responsibility that one bears after receiving legal documents [and] therefore he [sic] knew what was required of him but opted not to act upon his knowledge.”

particularly as he is employed by the City of Tshwane Metropolitan Municipality (“the City of Tshwane”).

[31] As support for his averment that Mr. Mashilo received and understood the contents of the directives and order well before consulting with their attorney, Mr. Mahlangu states that the harassment and ill-treatment they suffered at the hands of the members of the CPA ceased upon the rant and service of the ex parte order.

DISCUSSION

[32] Are the CPA’s reasons for the default reasonable?

[33] The essence of the CPA’s submissions that the Court should condone the default is that its members are ignorant of the law, mostly illiterate and that they were let down by the officials of the Department from whom they had initially sought assistance in dealing with this application.

[34] The review applicants, on the other hand, submitted that, given the fact that the order is drafted in layman’s terms and, in view of Mr. Mashilo’s station in life, namely, him being a manager in the employ of the City of Tshwane, it can be taken for granted that he must have had the knowledge of a reasonable person. And, therefore, ought to have understood the review application’s contents, the directives issued by this Court, as well as the interim order, so the submission continued. It was also contended that ignorance of the law was no excuse and that the explanations given by Mr. Mashilo, including those of Ms. Omar, are not reasonable. Consequently, the CPA has not shown good cause for the default, so the contention continued.

[35] The directives, at paragraph 3, state that:

“The Court is further satisfied that it is in the interests of justice that an ex parte interim order be granted, in terms of Prayer 4, 4.1, 4.2, 4.3 and 4.4 only of Part A [of] the Notice of Motion, pending the determination of [the] relief contained in the Notice of Motion on the return date. Prayers 7-8 of Part B of the Notice of Motion are postponed sine die.”

The wording of Prayer 4, 4.1, 4.2, 4.3 and 4.4 of Part A of the notice of motion are set out in full in paragraph 3 above. The Court wishes to point out that, although not raised by any of the parties, interdicting the “members” of the Trust as sought in prayer 4 of the notice of motion, was done erroneously. A trust does not have “members”, only trustees and beneficiaries.

- [36] It is not evident from the papers what Mr. Mashilo's level of education is but, having regard to the fact that he is employed as a manager by the City of Tshwane, it is reasonable to assume that he understands English and therefore, ought to have understood the contents of the papers served on him. I am strengthened in this view by the allegation by Mr. Mahlangu that the mischief, sought to be prohibited in sub-paragraphs 4.1 to 4.4 of the notice of motion, stopped after service of the papers. Mr. Mashilo only proffered a bald denial to Mr. Mahlangu's allegations of the mischief alluded to earlier in this paragraph.
- [37] Notwithstanding the contents of previous paragraph, I am of the view that the CPA's reliance on the assurances by Mr. Mnisi and Ms. Zulu that the Department would take care of the matter was not unreasonable and outweigh the submission that he understood the contents of the papers served on him. And, taking into account the averments contained in Ms. Omar's supporting affidavit, which were not challenged, I find that the explanation for the delay is reasonable and that the application was made bona fide. It follows, therefore, that condonation for the late filing of the application should be granted.

The Merits of the rescission application

- [38] I have, in large measure, already dealt with two of the three threshold requirements for the grant of a rescission or variation of an order. What now remains to be determined is whether the CPA has a bona fide defence to the relief sought in Part B of the review application.
- [39] As previously stated, the review applicants seek the review and setting aside of the award of the farms by the State to the CPA and the Trust in Part B of their notice of motion. In addition, they also, inter alia, seek:
- (1) the setting aside of the settlement entered into by the State with the CPA and the Trust in respect of the farms;
 - (2) that the Registrar of Deeds be ordered to transfer the farms back into the name of the State;
 - (3) that the land restitution claims of the CPA and the Trust be referred back to the Regional Land Claims Commissioner: Nelspruit ("the Regional Commissioner"), for proper investigation and consultation in terms of the Restitution Act; and
 - (4) that the Department, the Commission on Restitution of Land Rights and the Regional Commissioner be ordered to engage meaningfully with the review applicants, who must be party to any settlement and/or Court proceedings which may follow.
- [40] The review application, set out above, is not before me and the prayers relating thereto, and alluded to in the previous paragraph, are merely set out to give context to the ruling which follows below.

[41] It is not disputed that the CPA and the Trust were awarded ownership of the two farms by the State. Consequently, they have, by virtue of their rights of ownership, access to their respective farms, Leeuwkop and Rietfontein. Moreover, as alluded to in paragraph

[9] above, a report was compiled by officials in the employ of the Department, following a land rights enquiry in respect of the aforesaid farms. A copy of the said report is annexed to the CPA's replying affidavit.

[42] The land rights enquiry report, in relevant part, states that:

"4. Lessees

The last category of rights holders is that of people who never lived in [sic] the farm and their link with the farm is based solely on the lease agreements. It is worth noting that their lease agreements have lapsed and they do not have any legal claim against the Department. Neither do they have a legal claim against the current owners (Kwalidobo [sic] CPA and Mohlakeng Community Trust) of the farms.

The following are the names of the lessees.

- . Mr. Sogulu Job Mnguni
- . Obed Mtsweni
- . Mr. Korombo Mahlangu
- . Ketlekwana Mahlangu
- . Karl Van Rooyee[n] (He entered into a partnership with Mr. Mahlangu)
- . Mr. Jan Masemola
- . Frans Masemola
- . Mr. Philip Nkwana
- . Ms. Betty Mashego
- . Lucas Mashego"

It is apparent from the above list that only the names of four of the review applicants fall under the category of "Lessees", namely, Korombo Mahlangu, Obed Mtsweni, Sogulo, Job Mnguni and Carl Magus Van Rooyen. It is not clear whether Ketlekwana Mahlangu and Alpheus Mahlangu is one and the same person.

[43] The aforesaid land rights enquiry concludes with the following paragraph and recommendation:

"Lessees

There are nine

(9) people who do not live in [sic] the farm but have signed lease agreements with the Department. These people may only pursue legal recourse based on the lease agreements if there is a breach on the part of the Department. However, the lessees do not have any legal claim after the lease agreements have lapsed. In this case, all the lease agreements that were signed with the Department in respect of Rietfontein and Leeuwkop farms have lapsed. Consequently, the Department does not have any legal obligation to renew their lease agreements. It is, however, recommended that an [sic] alternative land be acquired and allocated to them considering that they have been leasing the current farms for more than 20 years. It is further recommended that they be allowed to harvest the current planation before the land owners take occupation of the farms.”

[44] Based on all of the above, I find that, prima facie, the CPA has a bona fide defence to the review set out in Part B of the notice of motion in the review application. And, in my view, that defence has some prospects of success.

[45] In the result, I order as follows:

The rule nisi granted on 6 December 2017 and confirmed on 15 January 2018 is hereby rescinded and replaced by the following order:

(a) The members of the first respondent (the Kwaliddolo Communal Property Association) are hereby interdicted, pending the finalisation of the relief sought in Part B of the Notice of Motion, from:

(i) harassing any person currently inhabiting any of the properties (farms) known as Portion 1 of Leeuwkop No 228 JR (“Leeuwkop”)

and Rietfontein No. 214, Province of Mpumalanga (“Rietfontein”);

(ii) damaging the property of the first to the eighth applicants that is present on the abovementioned two properties, including livestock;

(iii) harassing, intimidating or otherwise assaulting the first to the eight applicants who are currently farming on the abovementioned two properties;

(b) The costs of the hearing of Part A of the application (including the costs of the rescission application brought by the Kwaliddolo

Communal Property Association in terms of its Notice of Motion dated 30 April 2018) are reserved;

(c) The hearing of prayers 7 and 6 contained in Part B of the Notice of Motion is postponed sine die.

M P CANCA

Acting Judge

Land Claims Court

Appearances:

For the Applicant

Ms Y Omar

Zehir Omar Attorneys, Springs

For the Respondent

Advocates A C Diamond and M Coetzee

(The original Heads of Argument were drafted by Adv Diamond. Adv. Coetzee drafted Supplementary Heads of Argument and argued the matter.)

Instructed by

Lawyers for Human Rights, Pretoria

[1] The rule nisi was granted in the absence of the CPA.

[2] It is not clear why it took the parties to so long have the rescission application argued given that the main heads of argument were filed of record during August 2019 and supplementary heads of argument approximately a year thereafter.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZALCC/2020/32.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/kwaliddolo-communal-property-association-v-mahlangu-and-others-unknown-topic-alcc-2020>

Prepared on 12 October 2026 · Esheria