

SOUTH AFRICA / JUDGMENT

Majadibodu Community v Commission on Restitution of Land Rights and Others (LCC 147/2010) [2011] ZALCC 19 (5 October 2011) [2011] ZALCC 19

COURT

Land Claims Court

BEFORE

SP Kahanovitz, A Gildenhuys

CASE / FILE NUMBER

LCC 147/2010

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IN THE LAND CLAIMS

COURT OF SOUTH AFRICA

[HELD AT RANDBURG]

CASE

NO: LCC 147/2010

Heard on 7, 8 September 2011

Judgment delivered on 5 October
2011

In the matter between:

MAJADIBODU COMMUNITY

.....Applicant

and

COMMISSION ON RESTITUTION OF LAND

RIGHTSFirst

Respondent

REGIONAL LAND CLAIMS COMMISSIONER:	LIMPOPO PROVINCESecond Respondent MINISTER OF RURAL DEVELOPMENT & LAND REFORMThird Respondent NIEHAUS, CHRISTOPHER CHARLES DE MOWBRAYFourth Respondent MOSIMA COMMUNITYFifth Respondent MABULA-MOSIMA COMMUNITYSixth Respondent
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JUDGMENT

Kahanovitz AJ:

- [1] The applicant in this interlocutory application seeks to review the decision of the first respondent and/or second respondent to refuse it funding for legal representation in the main application. The main application is one where the fourth respondent seeks a declaratory order that there are no land claims in respect of the two named farms¹ that it owns in the district of Lephalale.
- [2] The applicant seeks a review of the first and/or second respondents' decision on numerous grounds including that the:
- 2.1. respondents failed to properly apply their minds ;
 - 2.2 respondents failed to follow the proper procedure;
 - 2.3 respondents failed to grant the applicants an opportunity to be heard before making a decision;
 - 2.4 respondents showed bias in their decision in that while they offered the sixth respondent (who had not requested it) assistance for legal representation, they denied the applicant similar assistance;
 - 2.5 decision taken by the first and /or second respondents was not rationally connected to the reasons given.
- [3] The first to third respondents are represented in answering papers by Mr Sunjay Singh who identified himself² as the second respondent. He deposed that the respondents refused the funding request because their investigations led them to conclude

that the applicant had no valid claim in respect of the land owned by the fourth respondent. The fourth respondent has decided to abide by the Court's decision in this interlocutory application, while the fifth and sixth respondents have not filed any papers.

[4] A brief chronology of the events leading to this application is necessary so as to understand what follows:

4.1 The applicant had submitted a claim for land in terms of the Restitution of Land Rights Act³ (hereinafter referred to as "the Act") during 1998 before the cut off date of 31 December 1998. That claim has been investigated and the first respondent determined that it complies with section 11(1) of the Act, even though the initial claim form⁴ didn't mention specific farms. After some investigation the second respondent caused a notice in terms of section 11(1) of the Act to be published in the government gazette⁵. It later added further farms to it in terms of section 11A⁶. The notice confirms that the second respondent was investigating the claims. This specific claim has not (yet) been referred to court in terms of Section 14 of the Act.

4.2 The fourth respondent issued its application for a declaratory order referred to in paragraph 1 above. The first, second and third respondents have opposed that application.

4.3 In the course of the section 30 pre-trial conferences arising in the main application Gildenhuys J raised the question of which parties may have an interest in the two farms owned by the fourth respondent and first and/or second respondent reported that the following communities had, according to its records, an interest in that land: the applicant, fifth and sixth respondents.

4.4 I interpose to note that if they had a legal interest and if the fourth respondent was to be successful in obtaining its declaratory order, their land claim, would be defeated for all time. Accordingly an order was issued in terms of which all these three interested parties named by the first and second respondents were joined as further respondents in the main application.

4.5 After being joined, the applicant herein requested that it be granted financial assistance to get legal representation as provided for in terms of section 29(4) of the Act so as to oppose the application by the fourth respondent.

4.6 The applicants didn't get a reply to their initial request and only after it has been requested by this Court in a further pre-trial did Counsel representing second and third respondents as well as the Chief Land Claims Commissioner report that :

(i) The applicant, who had applied, would not be funded;

(ii) The sixth respondent, if they applied, would be funded.

4.7 The sixth respondent, via the pre-trial procedure recorded that it would not apply for funding in respect of the application brought by the fourth respondent as it had no interest in the two farms mentioned; and added that it believed that the applicant did have such an interest.

5. In an answering affidavit filed by Sanjay Singh, who states that he is the second respondent and duly authorized by first and third respondents, tries to set out who took the decision, describes the enquiry that took place to inform the decision and the reasons for the decision. These three different aspects are not easy to separate but I have attempted to do so to ease the task of assessing each step. I turn first to understand who made the decision. Section 29(4) of the Act provides that the “Chief

Land Claims Commissioner may take steps to arrange legal representation” for parties who cannot afford it. In the Nkuzi Development Association⁷ matter Moloto J issued a declaratory order that:

“The persons who have a right to security of tenure in terms of the Extension of Security of Tenure Act 62 of 1997 and the Land Reform (Labour Tenants) Act 3 of 1996, and whose security of tenure is threatened or has been infringed, have a right to legal representation or legal aid at State expense if substantial injustice would otherwise result, and if they cannot reasonably afford the cost thereof from their own resources”

In a welcome step the second respondent issued guidelines⁸ which inter alia provide that the decision in applications for such assistance is to be made by the Chief Land Claims Commissioner, after receiving reports from others particularly the legal support staff, and if the application is refused the guidelines require a letter to be prepared with reasons. These guidelines include provisions as to the criteria to be considered listing “the prospects of success” as one of the criteria.

[6] The answering papers before me include:

6.1 the main affidavit in which Mr Singh states that he is the second respondent. The first, second and third respondents initially only filed this single affidavit and only after an objection by the applicant in terms of Rule 32 (5)⁹ alleging that it was an irregular process, did these respondents file further affidavits. The objection included one that Mr Singh did not have personal knowledge of the decision being reviewed. Nowhere in his affidavit had Mr Singh stated precisely who had made the decision relying rather on an imprecise “My office had already investigated the possibility of providing legal assistance and made the decision”.¹⁰ There is accordingly a lack of clarity in his affidavit as to who had made the decision.

6.2 After receipt of the Rule 32(5) notice further affidavits were filed. One by Mr Tele Alfred Maphoto is amongst those filed.¹¹ He initially in paragraph 1.1 stated that he is “employed in the office of the Regional Claims Commissioner , Limpopo Province and currently the Acting Chief Land Claims Commissioner”. In paragraph 1.2 he then states that he is “the second respondent in this application and took the decision that is the subject of this review application.” This suggests that he took the decision in his capacity as second respondent, a position also occupied by Mr Sanjay Singh. According to the guidelines the decision ought to be made by the Chief Land Claims Commissioner.

6.3 When these contradictions were drawn to the attention of counsel for the first, second and third respondents he tried to explain it by saying that the main affidavit by Mr Singh had initially been drafted for signature by Mr Maphoto - and when the latter couldn't be found at the time he was needed for signature it was redrafted for signature, by Mr Singh. At that stage the second respondent had also instructed new counsel. What is apparent is that there is no clear indication from these affidavits as to who made the decision and in what capacity. On this ground alone the decision is reviewable but I nonetheless wish to briefly consider some of the reasons submitted to court. I note further that the letter required in terms of the guidelines turning down the application for funding with reasons doesn't appear at all in the record filed. I do not know if the letter was written at all.

[7] I now turn now to the reasons submitted for refusing the funding application of the applicant and the process adopted by the first and second respondents.

7.1 In his answering affidavit Mr Singh stated that his office investigated the land claim in terms of section 6 of the Act and was assisted by the applicant inter alia attending consultations and by an inspection in loco .¹² Mr Singh continually states that these functions are carried out by "my office"—and as section 6 refers to the national and regional offices it is at times difficult to determine in what capacity his "office" was acting each time. He further correctly deposes that the claim form submitted by the applicant was vague and that it required further investigation to establish what land was subject of the claim. The investigations led them to draw up a list of farms which were gazetted¹³ and they later by a further notice in the government gazette¹⁴ added further farms to the list. He attests that the fourth respondent's two farms do not appear on those specific lists that were products of that enquiry.

7.2 He explains that the report made to the pre-trial conference in the main application advising that the applicant and two other respondents may have an interest in the farms can be understood as follows: after receipt of the fourth respondent's application and enquiry from the court, the court was informed that the applicant, fifth and sixth respondents may have an interest due to information found on the database. In deciding if the applicant should get funding further enquiry was made to the officials dealing with the database used by first respondent. He records their assistance as reflecting that "the farm Star was captured on the system on 8 July 2004 and that the farm Onskuld is not on the database " His summary doesn't capture all that appears on that report viz Annexure "F"¹⁵ . It confirms that the database records that one of fourth respondent's farms Star 567 LR is subject to a claim by the applicant . In regard to the second farm, Annexure "F" records that "Second Farm Onschul 568 LR is not on the database." The respondents in short submit that in view of their more detailed investigation of their documents we should ignore the appearance of Star 567 LR on their own database—and simultaneously accept that the non-appearance of the strangely spelt "Onschul 568 LR" as proof of the fact that there is no claim by the applicant for Onschuld 551 LR (being a consolidation of portion 3 of Eyzerbeen 553 LR and Onschuld 568 LR). Counsel for the applicant also drew attention to a letter addressed by the second respondent to the local authority dated July 2002 which lists both the farms owned by fourth respondent as farms on a list of farms being claimed by the

applicant.¹⁶Notwithstanding this Mr Singh and/or Mr Maphoto concluded that the applicant has no prospect of success in its claim for those named farms. I find it difficult to conclude that the applicants have not claimed these two farms on the basis of this unreliable database information. This however is not the only difficulty that faces the first and second respondents in their explanation.

7.3 Their counsel concedes in argument that the test that was applied in deciding the funding application was the guideline test of “prospects of success.” He concedes that once the officials were of the opinion that the applicants had no prospects of success the other criteria¹⁷ were not even considered. In applying this test it was applied to applicant’s prospects of success in its restitution claim overall, not in respect of resisting fourth respondent’s claim. They concluded that – in light of the problems facing applicant in proving claims in respect of the two farms, the applicant had no prospects of success and therefore denied funding. It appears to me that the first and second respondent asked the wrong question as the matter currently before the Court (for which applicant seeks funding) is not the success or otherwise of their land claim, but one of protecting a claim which might be successful in the future against fourth respondents’ current claim for a declaratory order.

7.4 This approach has to be contrasted with the first and/or second respondents’ acceptance that the sixth respondent does possibly have an interest¹⁸. They unlike applicant do not appear on the database as linked to the farm Star 567 LR. They themselves reported that they have no interest in the farms mentioned and believe that the applicant does have such interest. The probabilities accordingly are that the applicant has an interest to defend against the fourth respondent’s claim for a declaratory order. I am accordingly of the view that, for the reasons set out above, the decision to refuse financial assistance for legal representation should be set aside.

8. In its amended Notice of Motion the applicant asked for an order “reviewing, correcting and/or setting aside” a decision to refuse it funding. It did not request that it be remitted to the Chief Land Claims Commissioner. Counsel for 1st to 3rd respondents did not argue that the decision if set aside should be remitted. I believe that the parties have exhaustively canvassed the issues regarding this funding application in their unnecessarily lengthy record of more than 300 pages. It is in the interests of time to not only have the main application by the fourth respondent, but also the land claims of all three claimant communities resolved as quickly as possible. Taking into consideration the remedies provided for in the Promotion of Administrative Justice Act 19 I do not believe that on the facts of this matter I should remit it to the Chief Land Claims Commissioner for a decision. I am satisfied that due to the exceptional circumstances outlined above it is appropriate in this matter to substitute the decision which has been set aside. Counsel for the respondents further agreed that the funding for the legal representation should be back dated to coincide with the serving of the Notice of Motion in the main application on the present applicant. Accordingly I will order that funding should be granted in respect of the main matter.

[9] Costs: The applicant has asked for costs in this interlocutory on a punitive scale. It acknowledges that this Court rarely grants costs orders but suggests that the first and second respondents' conduct has been such that they should be ordered to pay costs in this matter on a punitive scale. I too am concerned about the conduct of the first and second respondent and its officials and their lack of compliance with their own guidelines. I am concerned that their counsel arrived at Court without his own set of paginated pleadings and without an instructing attorney, the state attorney on record being ill. This meant that on the first day of hearing the parties agreed to postpone the matter so as to enable them to be properly prepared to argue the following day. This was the second time the parties had not completed the matter on a date allocated by the court – an earlier date allocated for hearing had not been taken up. The applicant is not blameless – pagination in this application was late and the papers filed had missing annexures which led to that earlier postponement and a rather acrimonious exchange between the parties which required an additional rule 30 pre-trial conference. A statutory body now more than ten years in existence should be in a better position to respond to the issues raised in this matter – but I am not convinced that their conduct was such to enable a not entirely blameless applicant to be awarded costs on a punitive basis. The applicant is, however, entitled to a cost order against the first respondent in respect of this funding application, including the wasted costs of the postponed hearings on 11 August 2011 and 7 September 2011, and the costs of the hearing on 8 September 2011, taxed on a scale as between party and party.

I accordingly rule that :

- (i). The decision of the respondents to refuse to arrange legal representation for the applicant to enable the applicant to defend the main application brought by the fourth respondent for a declaratory order, is hereby set aside;
- (ii). The first respondent is directed to pay for legal representation for the applicant as and from the time when the main application was served on the applicant, in such amounts and on such conditions as the first respondent may consider appropriate;
- (iii). The first respondent is ordered to pay the costs of the applicant in this interlocutory review application, including the wasted costs of the postponed hearings on 11 August 2011 and 7 September 2011 and the costs of the hearing on 8 September 2011, taxed as between party and party.

SP KAHANOVITZ

ACTING JUDGE OF THE LAND CLAIMS COURT

I agree

A GILDENHUYS

JUDGE OF THE LAND CLAIMS COURT

Appearances:

For the applicant

Mr. G Shakoane

instructed by Magigaba Inc.

For the respondent

Mr. P Nonyane

instructed by State Attorney

1The farms are Star 567LR and Onschuld 551LR (the latter being a consolidation of portion 3 of Eyzerbeen 553LR and Onschuld 568LR)

2Record Page 158 paragraph 1.2.

3Act 22 of 1994.

4Record page 46 and 225

5Record page 257

6Record page 261

7 [2001] 4 All SA 460 LCC at 464

8Record page 49.

9Record page 268.

10Record page 167 paragraph 26.3.

11Record page 290.

12Record page 159ff.

13Record page 247/8

14Record page 261

15Record page 264

16Record page 125.

17Record page 50

18Record pages 102 and 179

19See Section 8 , Act 3 of 2000

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