

SOUTH AFRICA / JUDGMENT

Mda and Others v Regional Land Claims Commissioner, Eastern and Others (LCC250/2015B) [2017] ZALCC 29 (14 May 2017) [2017] ZALCC 29

COURT

Land Claims Court

BEFORE

S. Poswa-Lerotholi

CASE / FILE NUMBER

LCC250/2015B

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REPUBLIC

OF SOUTH AFRICA

IN

THE LAND CLAIMS COURT OF SOUTH AFRICA,

RANDBURG

CASE

NO: LCC250/2015B

REPORTABLE:

YES/NO

OF

INTEREST TO OTHER JUDGES: YES/NO

DATE: 14/05/2017

In

the matter between -

NTANDAZO

MDA

First Applicant

WONGA

TUSWA

Second Applicant

TEMBISILE

MKANZI

Third Applicant

ONELE

NGCINGANE

Fourth Applicant

JONGA

JOHN

MKEFELELE

Fifth Applicant
BONGANI
LUCAS
MADIKAZI
Sixth Applicant
SABELO
VIKILAHLE
Seventh Applicant
NYAMEKAMDA
Eighth Applicant
NOKUBONGA
MAXWELE
Ninth Applicant
XOLELWA
NGQINAMBI
Tenth Applicant
And
THE
REGIONAL LAND CLAIMS COMMISSIONER,
EASTERN
CAPE & 13
OTHERS First
Respondent
THE
CHIEF DIRECTOR: LAND RESTITUION
SUPPORT,
EASTERN
CAPE Second
Respondent
ZUKILE
MATU Third
Respondent
SIBULELE
OSCAR MNQOTHO
Fourth
Respondent
THEMBA
BAM Fifth
Respondent
NTSIKELELO
MAKI
Sixth
Respondent
NOMBEKO
MAXWELE
Seventh Respondent
PHAKAMISA
MANENGELA
Eighth
Respondent
DUMISA

MLANJENI
Ninth
Respondent
PHUTHUMA
TUSWA
Tenth
Respondent
MKHULU
MAXWELE
Eleventh Respondent
LIZWI
MBALANE
Twelfth
Respondent
SIPHUMLE
TYUMRE
Thirteenth Respondent
MHLANGABEZIGQABA Fourteenth
Respondent

JUDGMENT

POSWA-LEROTHOLI, AJ:

Introduction

- [1] This is an application for costs, arising out of an interlocutory application for contempt of court proceedings against the First and Second Respondents. The court order alleged to have been flouted is dated 4 November 2016 ("the Court Order"). The parties settled the issues relating to the contempt of court application, which culminated in a consent order. However, the parties could not reach agreement on costs. Therefore, the only issue left for determination by this Court is costs.
- [2] The First to Seventh Applicants are members of the Zimbane Land Claims Committee ("the Committee"). The First Respondent is the Regional Land Claims Commissioner, Eastern Cape. The Second Respondent is the Chief Director: Land Restitution Support, Eastern Cape. The Third to Fourteen Respondents are members of the contested Community Property Association.
- [3] The Applicants allege that the First and Second Respondents acted wilfully, mala fide and in disregard of the Court Order in several respects. Furthermore, the First and Second Respondents have failed to mount a credible defence in order to discharge the onus to rebut the presumption of mala fides.

- [4] The First and Second Respondents deny that they are in contempt of the Court Order but contend that they communicated with the Committee through an attorney who it turned out, actually represented the Zimbane Land Claimants as a whole, not the Committee.

Factual

background

- [5] This matter arises out of a protracted land claim lodged by the Zimbane Community, on 31 December 1998 in terms of the Restitution

Act. The claim was gazetted on 10 March 2007. The normal procedures and processes were followed in line with the legislative framework.

In the process of finalising the settlement agreement, various disputes arose between the parties not least of which was the legitimate entity to represent the community in the Zimbane land claim. This culminated in the disbandment of the Zimbane Land Claims Committee; First to Seventh Applicants ("the committee") followed by the establishment of the Zimbane Community Property Association, Third to Fourteenth Respondents ("the CPA"). The First to Seventh applicants then approached this court in order to enforce their rights.

- [6] The Court Order dated 4 November 2016 read as follows:

"1. The purported disbandment of the Zimbane Land Claims committee, of which the 1st to 7th Applicants are members, by the 1st and 2nd Respondents be and is hereby declared

improper, unlawful, irregular and set aside.

2. The Zimbane Land Claims Committee ("the Committee"), be and is hereby declared to be the only valid and proper entity entitled to deal with the Zimbane Land Claim ("the land claim") registered as claim number 6/2/2D/963/0/0/7, to the exclusion

of all else.

3. The 1st and 2nd Respondents be and are hereby ordered to deal exclusively with the Committee with regard to the land claim.
4. The purported Communal Property Association to which the 3rd to 14th Respondents are purported to have been elected as members, be and is hereby declared to be non-existent.
5. The 1st and 2nd Respondents be and are hereby ordered to pay the costs of the application jointly and severally, the one paying the other be absolved from liability.
6. The 1st and 2nd Respondents furnish the verification list of the proper land claimants to the Applicant Committee, Chieftainess Nosizwe Maxhwele and the Mthatha State Attorney (Mr Mlola) within a period of two weeks of the grant of this order.

- i. Any claimant who has any complaint with regard to the verification list shall submit such complaint, in writing, to the first and second respondents within a period of two weeks of their furnishing the list as set out in paragraph 6 above.
8. In the event of there being any complaint as envisaged in paragraph 7 above, such will be resolved by way of Mediation, failing which Arbitration. All such processes should be finalised within a period of one month
9. After the finalisation of the verification process the first and second respondents shall call a meeting of all the verified claimants for purposes of deciding whether or not the applicant committee shall continue as representing the claimant community."
- [7] Initially, the First and Second Respondents seemed to cooperate in that they furnished the verification report on 30 November 2016. Subsequent thereto, on 26 January 2017 the applicants submitted complaints on the verification list to the First and Second

Respondents. Thereafter, the applicants heard nothing further from the First and Second Respondents. However, the First and Second

Respondents chose to communicate with one Mr Barn, a claimant and not a member of the committee, even though paragraph 3 of the Court Order directed them to deal exclusively with the Committee.

- [8] In addition, the First and Second Respondents ignored written communication from the committee in that they;

[8.1] Failed to inform the committee about a meeting concerning the Zimbane land claim set down for the 28 February 2017. Despite the committee's protestations, the meeting proceeded as planned in the absence of the committee.

[8.2] Took resolutions at the meeting on 28 February 2017 that were in direct violation of the court order, for example the reinstatement of the CPA previously disbanded in terms of paragraph 2 of the court order.

[8.3] Submitted a revised draft settlement agreement to the King Sabata Dalindyebo Municipality in respect of the Zimbane land claim without informing the committee.

- [9] This conduct by the First and Second Respondents' constituted a flagrant disregard for the court order caused the applicants to seek urgent relief from this court.

[10] The First and Second Respondents for their part denied any wrongdoing arguing that:

[10.1] The meeting on 28 February 2017, which culminated in the removal of First to Seventh Applicants as members of the Zimbane Land Claims Committee was legal.

[10.2] The Applicants also acted in violation of the Court Order by failing to raise complaints about the verification list within two weeks as per the court order.

[10.3] The First and Second Respondents claimed that they had sent written communication to a firm of attorneys, Chris Bodlani Attorneys, which turned out, were never the applicant's attorneys of record.

[10.4] There was no deliberate flouting of the court order, and contended that subsequent to 4 November 2016, the date of the court order, the First and Second Respondents dealt with the Zimbane claim as per the court order.

[11] The main cause of complaint by the applicants is that the First and Second Respondents flouted paragraphs 2 and 3 of the order in particular, which required the First and Second Respondents to deal exclusively with the committee that had been affirmed by the court order as the legitimate Zimbane Land Claims Committee.

[12] Paragraphs 6, 7, 8 and 9 of the court order directed the First and Second Respondents to take the appropriate steps towards the finalisation of the verification list as directed. Save for furnishing the committee with the verification report, the First and Second Respondents took no further steps to resolve the complaints through arbitration or mediation as directed in paragraph 8 of the court order. They simply proceeded to convene a meeting at which the Zimbane Land Claims Committee was disbanded and replaced with the CPA Committee.

[13] All in all, the First and Second Respondents attempted to communicate with in flagrant disregard for the court order as they convened meetings without informing the committee, disbanded the committee before the verification list was resolved and made submissions for a draft settlement agreement to the King Sabata Dalindyebo Municipality without informing the committee and reinstated the CPA.

[14] The First and Second Respondents advanced no meaningful explanation for the breach of the order and were not able to convince me that they were not in wilful contempt of the court order.

Costs in the land claims court

[15] It is settled in our law of costs that costs follow the results. This is a general rule applicable in civil litigation. Section 35(2)(g) of the Restitution Act confers on this court the power to issue orders for costs as it deems just, including an order for costs against the State or the Commission. The approach of this court to costs orders was succinctly stated by Meir, J in *Afrifaze Leisure (Pty) Ltd and Others v The Commission for Restitution of Land Claims and Others*

(2010) 3 Alf SA 559 (LCC) at paragraph 13. ("Afrifaze Leisure case")

"In essence the principle that costs follow the event has to yield to considerations of equity and fairness because inter alia of the public interest nature of litigation in the Land Claims Court..."

[16] Litigation under the Restitution Act is in the genre of 'social litigation' or 'public interest litigation'; as a result, the general practice no costs orders are made.[1]The rationale behind this rule is that the threat of an adverse costs order may deter litigants from

enforcing their rights before the courts.[2] This accords with the principle laid down by the Constitutional Court In constitutional litigation; that in the absence of special circumstances an unsuccessful litigant ought not to have to pay his opponent's costs.[3]

[17] Whilst the Courts wish to encourage litigation it seems that there is less sympathy for the state as a losing litigant. Sachs J in *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (6) SA 232(CC) at 246C quoted with approval the principle established in the *Affordable Medicines* case that ordinarily, if the government loses, costs should follow the event. On the other hand, if government wins, each party should pay its own costs.

[18] Without derogating from the above, the basic principle regarding the award of costs is that the Court has a wide discretion to be exercised judicially upon a consideration of the facts of each case and in essence it is a matter of fairness to both sides.[4] The approach a court should take when considering costs as stated in *Biowatch supra*.

"The need for flexibility and a careful case-by-case approach was in fact emphasized in one of the first cases heard by this court, *Ferreira v Levin*. In a judgment on costs given separately from the judgment on the merits, Ackermann J pointed out that the courts have over three years developed a flexible approach to costs which proceeds from two basic principles, the first being that the award of costs, unless otherwise enacted, is in the discretion of the presiding judicial officer, and the second that the successful party should, as a general principle, have his or her costs.

The court went on to explain[5]:

"A number of signposts have emerged. Without departing from the general principle that a court's discretion should not be straitjacketed by inflexible rules, it is now possible and desirable, at least, to develop some general points of departure with regard to costs in constitutional litigation"

[19] Costs have been awarded against the Land Claims Commission by this court

[19.1] In *Port Elizabeth Land and Community Restoration Association v The Regional Land Claims Commissioner*, Eastern Cape Case No LCC 136/2014 (unreported) the Regional Land Claims Commissioner failed to respond to correspondence from the applicants, The Court found that but for the respondent's inaction, the applicant's would not have come to court The Court reasoned that the Respondent was in possession of the requisite information to process the claim, but failed to do so, The application was brought after the Respondent failed to provide a programme and time line for the finalisation of the outstanding claims as required in compliance with section 6(1) of the Restitution Act The Respondents failed to explain the omission, but instead sought to raise spurious points in limine, the attitude adopted by the respondent in these proceedings.

[19.2] In Afriblaze Leisure Case, the applicant, a landowner, was forced to lodge an application to force the Commissioner to finalise its claim. A costs order was awarded against the Commission as a result of The latter's failure to deal expeditiously and efficiently with the land claim under the Restitution Act The court expressed its concern that land owners who are adversely affected by claims against their land, are stuck in limbo as they are unable to develop or sell their land. The landowners are often forced to incur the costs of applications such as the present in order to get the relevant Regional Land Claims Commissioners to deal with their claims efficiently in terms of the Restitution Act

[19.3] In Ndlela & Others v Nel & Others LCC 18/2002 (unreported) [2014] ZALCC 4 the Minister and Regional Land Claims Commissioner was in contempt of a number of this Court's orders. The court found that the state had opposed the application on frivolous grounds. The court followed the principles set down in Affordable Medicines Case and granted an adverse costs order against the State parties.

[20] There are a number of factors, which may influence the Court in considering an adverse costs order. The explanation by the defaulter for the infraction and the attitude of the erring party in the proceedings. In casu, the application was brought as a result of

the Second Respondent's failure to comply with the Court Order. In the answering affidavit the First and Second Respondents failed

to mount a meaningful defence to the application. In keeping with Biowatch, costs should follow the event.

[21] Consequently, I grant the following order:

1. The First and Second Respondents are ordered to pay to the applicants the costs of this application, jointly and severally, the one paying the, other to be absolved.

S. Poswa-Lerotholi

Acting Judge of the Land Claims Court

Date of judgment: 14 May 2017

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[1] Singh and Others v North Central and South Central Council and Others 1999

(1) ALL SA 350 (LCC) at para [115]; In re Kranspoort Community 2000

(2) SA 124 (LCC) at para [121].

[2] Affordable Medicines Trust v Minister of Health [2005] ZACC 3; 2006 (3) SA 247(CC) at 297 H-C.

[3] Biowatch Trust v Registrar Genetic Resources and Others 2009

(6) SA 232(CC) at 246C

[4] Wanderers Club v Boyes-Moffat [2011] JOL 27764 (GSJ), 2012 (3) SA 641 (GSJ).

[5] Biowatch Trust Case at 239H-I

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