

SOUTH AFRICA / JUDGMENT

Mkutuka and Another v Minister of Land Affairs and Others (LCC 28/2020) [2024] ZALCC 12 (3 April 2024)

[2024] ZALCC 12

COURT
Land Claims Court

BEFORE
SJ Cowen

CASE / FILE NUMBER
LCC 28/2020

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Ammended 20 November
2024

IN THE LAND CLAIMS
COURT OF SOUTH AFRICA
(HELD AT RANDBURG)

CASE

NO: LCC 28/2020

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED.

3

April 2024

In

the matter between: NOTHEMBA
MKUTUKA
First
Applicant
NOMTSHA
MKUTUKA
Second
Applicant
And
THE
MINISTER OF LAND AFFAIRS
First
Respondent
ZITHEMBILE
MKUTKUA
AND
OTHER RESPONDENTS
Second
Respondent

JUDGMENT

COWEN J

1. The above application came before me on Tuesday 5 March 2024. That particular date was arranged by the Court with the agreement of the parties and the respondents delivered a notice of set down on 23 February 2024, through their attorneys, MT Mlola Attorneys Inc.
2. There had been prior attempts at the instance of the respondents to have the matter heard. Most recently, the respondents had set the matter down for hearing on 22 February 2024, but that date had not been confirmed with the applicant's attorney and the matter did not proceed on that date.
3. In this instance, there was a specific request that the matter be heard in open Court at the Land Claims Court in Randburg, Gauteng. While that is the default position, this Court will from time to time hear matters on an electronic platform if the interests of justice are thereby served. The respondents made the request on or about 26 February 2024. The Court then requested the views of all parties. The applicant, through its attorney Mr BF Mbebe, responded on Wednesday 28 February 2024, expressly accepting the request and confirming that the matter should be heard in Randburg in open Court on 5 March 2024. Thereafter, and on the same day, this Court confirmed those arrangements with the parties.

4. On Friday 1 March 2024, at 09h36, Ms Hlahla from Legal Aid South Africa wrote to the Court advising that the second respondent had approached its offices for legal assistance. However, as the application had to be processed, and in light of discussions between Legal Aid and the applicants, Ms Hlahla requested that the matter be postponed or removed from the roll to be reinstated once a decision had been taken on the provision of legal aid.
5. However, at 10h23, Ms Hlahla wrote a further e-mail saying: 'Kindly note that the 2nd respondent has approached our offices today and requested Legal Aid to no longer proceed with assisting him as he does have legal representatives of his own. As such the matter may proceed as scheduled on 05/03/2024.'
6. On Friday 1 March 2024, at 11h26, Mr Mbebe sent an e-mail to my secretary, Ms Mphokane, without copying the respondents' attorneys, requesting that the matter be removed from the roll on 5 March 2024. The e-mail then reads:

'The Second Respondent informed the applicants that he does not want to be represented by Legal Aid. The Second Respondent told the applicants he does not want to be represented either by Mlola attorneys. He said he is looking for another legal representative. We are waiting for the Second Respondent to give us the name and address of his legal representative. There is a confusion in this matter. Please remove the matter sine die.'

7. On Friday 1 March 2024, the Court received a letter from MT Mlola Attorneys who confirmed that the second respondent is duly represented by them. The letter conveyed the view that the applicant's efforts to postpone the matter amount to efforts to create confusion and mislead the Court. A request was made that the matter remains enrolled and that the hearing proceed on 5 March 2024. The respondents confirmed that they would be in Court on the day.
8. On Monday 4 March 2024, the applicant sent a document to the Court, again not copied to the respondents. The document is titled 'Request of removal of the case no 28/20 from the roll on 5 March 2024'. The document claimed that the second respondent does not want to be represented by Legal Aid South Africa and is looking for another attorney. After referring to certain events, the document requests that the matter be removed from the roll in circumstances where, Mr Mbebe says that Mlola attorneys cannot represent the second respondent.
9. At 09h45, my secretary responded, copying all parties, advising as follows:

'In respect of the request for removal, the matter remains on the roll. Should any part desire to have the matter postponed, same must be applied for timeously via application with an accompanying affidavit. Currently there is no consensus between the parties regarding any removal or postponement. As such the matter remains on the roll to be heard in open court at the Land Claims Court in Randburg on 5 March

2024. Judge Cowen will nevertheless hear the parties in respect of the recent correspondence. Should any of the parties prefer the matter to proceed on a virtual platform in light of the circumstances, please advise the Court accordingly.'

10. During the day, Mr Mbebe attempted to contact my Registrar telephonically regarding the proposed removal. In the course of the discussion, he informed my secretary that he would not be in Court the following day and that an explanation would be forthcoming. In these circumstances, my secretary sent the following e-mail to the parties at 16h22:

'The presiding Judge has instructed that all parties are to communicate any and all updates pertaining to the above-stated matter by written correspondence. Such correspondence must at all times include the other parties in the matter. As such, I will no longer receive any telephonic communication from parties involved herein. With reference to Mr Mbebe's advice that he would not be in Court tomorrow, parties are reminded that the matter is proceeding tomorrow at 10am in open Court and parties are expected to attend.'

11. On 4 March 2024, at 16h37 a further document from Mr Mbebe titled 'Request for removal of the matter from the roll on 5 March 2024' was sent to the Court by e-mail. Again it was not copied to the respondents' attorneys. The request is in affidavit form and states: 'I have tried my level best that this matter be finalized because it is long overdue. It is beyond my control that this matter should be removed from the roll. I am sick I cannot travel from Queenstown Eastern Cape to Johannesburg. I had to see the doctor and he booked me off and advised me not to travel because of my condition and booked me off sick from 4 March 2024 to 8 March 2024. I attach herein medical certificate from Dr P Jafta for your information and attention.' The certificate is attached and shows that the patient was seen on 4 March 2024 and it is recorded that the patient was seen for high blood pressure recorded as 164/90. There is nothing recorded in the section marked 'doctors' comments and recommendations.' However, under the section for recommended dates, it records 4/3/24 to 8/3/24.

12. On 5 March 2024, the respondents arrived in Court, having travelled from the Eastern Cape. Mr Mlola was present together with a representative from the Commission. They were accompanied by senior counsel Mr Msiwa SC. The second respondent was in Court and confirmed that Mr Mlola indeed was his attorney who represented him. They asked that the matter proceed. They confirmed that they did not have a copy of the request for removal and addressed the Court on the history of the matter.

13. In view of the history of the matter, the circumstances set out above, the fact that the applicant had delivered certain written submissions, and the absence of any postponement application duly made, I formed the view that the interests of justice demanded that the matter proceeds. However, before doing so, I adjourned the Court to request my secretary to contact Mr Mbebe to ascertain whether he wished to join the proceedings online. He declined the invitation citing ill-health.

14. I then proceeded to hear argument on the merits in accordance with the respondents' written submissions. During the hearing, I indicated to the respondents that should I be inclined to grant an order in their favour, I may do so on the basis of a form of rule nisi, providing the applicant a further opportunity to make submissions should he wish to, possibly in case management. I have decided to afford Mr Mbebe a further opportunity to make written submissions and to facilitate him doing so, have requested a transcription of the proceedings.
15. Mr Msiwa requested that I make an order referring the conduct of Mr Mbebe to the Legal Practice Council for investigation. In my view, such a step, if it is to be taken, would first require affording Mr Mbebe a hearing and would at this stage be premature.
16. I make the following order:
 - 16.1. The applicant is afforded an opportunity to deliver any further written submissions by no later than 30 May 2024 on why the following order should not be made:
 - 16.1.1. The application is dismissed with costs on a party and party scale.
 - 16.1.2. The matter is remitted to the Eastern Cape Regional Land Claims Commissioner to:
 - 16.1.2.1. Verify the beneficiaries of the late Jeremiah Mkutuka in respect of compensation for his dispossession; and
 - 16.1.2.2. To resolve any dispute regarding compensation that may ensue in terms of the Commission's internal dispute resolution processes within thirty days of the order of this Court.

SJ Cowen

Judge, Land Claims Court

Date of hearing: 5 March 2024

Date of decision: 3 April 2024

Appearances:

Respondents: Adv Msiwa SC instructed by MT Mlola Attorneys Inc

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Prepared on 10 October 2026 · Esheria