

SOUTH AFRICA / JUDGMENT

Regional Land Claims Commissioner, Limpopo and Another v Klipplaat Landgoed (Pty) Ltd and Another (LCC46/2010) [2023] ZALCC 38 (3 November 2023)

[2023] ZALCC 38

COURT

Land Claims Court

BEFORE

Ncube

CASE / FILE NUMBER

LCC46/2010

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REPUBLIC OF SOUTH AFRICA

IN THE LAND CLAIMS COURT OF SOUTH AFRICA

HELD AT RANDBURG

CASE NO: LCC46/2010

In the matter between:

REGIONAL LAND CLAIMS COMMISSIONER, LIMPOPO First Applicant MINSITER OF AGRICULTURE, RURAL DEVELOPMENT AND LAND REFORM Second Applicant And KLIPPLAAT LANDGOED (PTY) LTD First Respondent MAYDEO THIRTY-THREE CC Second Respondent In re: RAMORULA COMMUNITY First Plaintiff RAMORULA COMMUNITY PROPERTY ASSOCIATION Second Plaintiff And REGIONAL LAND CLAIMS COMMISSIONER, LIMPOPO Participating Party MINISTER OF AGRICULTURE, RURAL DEVELOPMENT AND LAND REFORM First Defendant KLIPPLAAT LANDGOED (PTY) LTD Second Defendant MAYDEO THIRTY-THREE CC Third Defendant JOCHEMUS RASMUS ERASMUS Fourth Defendant THE KOSS OPPERMAN TRUST Fifth Defendant MAGDALEMA ELIZABETH OPPERMAN Sixth Defendant CONCERNING: FARM KLIPPLAATDRIFT 43 JR, SITUATED IN THE WATERBERG DISTRICT LIMPOPO PROVINCE AND AS DESCRIBED IN NOTICE: 1739 OF 2005 DATED 16 SEPTEMBER 2005

This Judgment was handed down electronically by transmission to the parties' representatives by email. The date and time for hand down is deemed to be at 14h00 on the 3rd day of November 2023.

JUDGMENT:**APPLICATION FOR LEAVE TO APPEAL**

NCUBE J

Introduction

- [1] This is opposed application for leave to appeal. The Regional Land Claims Commissioner Limpopo (“RLCC”) and the Minister of Agriculture, Rural Development and Land Reform (“the Minister”), hereinafter referred to as applicants, in their amended Notice of Application for Leave to Appeal, seek leave to appeal to the Supreme Court of Appeal (“SCA”), against that part of my judgment and order dated 31 May 2023 which awarded costs to the second and third defendants, (first and second respondents in this case), against the applicants on attorney and client scale. In the original application, filed with the Registrar of this Court on 30 June 2023 and which has been subsequently amended, the applicants sought leave to appeal against the whole of my judgment and order handed down.
- [2] In terms of the Rules of this Court,[1] a Notice of Application for Leave to Appeal must be delivered within fifteen (15) days from the date of the order appealed against. The Notice of Application for Leave to Appeal in this application was delivered one week late. The amended Notice of Application for Leave to Appeal was filed on 6 September 2023. There is no application for condonation filed by the applicants. However, I have condoned non-compliance with the rules, since I think the interest of justice will be better served if I deal with this application once and for all. The amended Notice of Application for Leave to Appeal, replaced the original notice in its entirety. Whilst the original Notice indicated that leave was sought to appeal the whole of the judgment and the order, the amended Notice seeks leave to appeal only that part of the order which relates to an award of costs against the RLCC and the Minister.
- [3] On 31 May 2023, I granted a costs order against the applicants and in favour of the first and second respondents on a scale as between attorney and client. It is that order which the applicants seek leave to appeal against.

Legal Matrix Test

- [4] The starting point of exercise in such application is whether, in the opinion of the Judge or Judges concerned, the appeal would have a reasonable prospect of success on appeal. If there is no reasonable prospect of success, there must be some other compelling reason why the appeal should be heard.
- [5] Section 17(1) of the Superior Courts Act[2] states:

“17(1) Leave to appeal may only be given where the Judge or Judges concerned are of the opinion that-

- (a)(i) The appeal would have a reasonable prospect of success; or

(ii) there is some other compelling reasons why the appeal should be heard, including conflicting judgments on the matter under consideration.”

[6] This being an application for leave to appeal the costs order only, I think it is not even necessary to refer to those decisions which found that the Act has raised the threshold in application for leave to appeal.[3] In my view, looking at the circumstances of this case, even if the common law test was still applicable, the result was going to be the same. Before leave to appeal is granted, there must be reasonable prospects of success.

[7] In *Smith v S*[4], *Plasket AJA*, as he then was, expressed himself in the following terms:

“What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law that a court

of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be sound, rational basis for the conclusion that there are prospects of success on appeal.”

[8] In *MEC, Health, Eastern Cape v Mkhitha*[5] *Schippers AJA*, as he then was, with regard to Application for Leave to Appeal said:

“[16] Once again it is necessary to say that leave to appeal especially to this Court must not be granted unless there truly is a reasonable prospect of success. Section 17(1)(a) of the Superior Courts Act, 10 of 2013 makes it clear that leave to appeal may only be given where the Judge concerned is of the opinion that the appeal would have a reasonable prospect of success; or there is some other compelling reason why it should be heard.

[17] An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success or one that is not hopeless, is not enough. There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal.”

[9] In *Four Wheel Drive Accessory Distributors CC v Rattan NO*[6] the court held:

“There is a further principle that the court a quo seems to have overlooked- leave to appeal should be granted only when there is ‘a sound, rational basis for the conclusion that there are prospects of success on appeal.’ In the light of its findings that the plaintiff failed to prove locus standi or the conclusion of the agreement, I do not think that there was a reasonable prospect of an appeal to this court succeeding, or that there was a compelling reason to hear an appeal. In the result, the parties were put through the inconvenience and expense of an appeal without any merit.”

- [10] Leave to appeal is not just there for the taking. Leave to appeal will be granted only in instances where it is clear that there is a reasonable prospect of success. There must be substantial and rational reasons to believe that there is a reasonable prospect of success on appeal. There must be a likelihood, distinct from a mere possibility of succeeding on appeal.

Ground of Appeal

- [11] Despite the litany of submissions made in support of the application for leave to appeal, in essence, the grounds can be summarised into only two grounds; in the amended notice of application for leave to appeal. Firstly, the applicants contend that there are reasonable prospects of another court coming to a different conclusion in respect of the cost order which I granted against the applicants on 31 May 2023. They contend further that if there are no reasonable prospects of success at least, there are other compelling reasons why the appeal should be heard. The alleged compelling reasons are the following: -

The appeal court will have to decide if the Constitutional Court judgment in *Biowatch Trust v Registrar, Genetic Resources and Others*[7] discontinued the long-standing practice in the Land Claims Court of not granting costs against the losing party.

- [12] It must be noted, that litigation in the Land Claims Court is of a constitutional nature. At least three main pieces of legislation[8] applied in the Land Claims Court are umbilically linked to the Constitution. This court, has in a series of judgments held that a private party who successfully defends litigation against the State or organ of State, a litigation which is in the genre of a constitutional litigation, is entitled to a costs order against the State and that *Biowatch* principles are applicable.[9]

- [13] In *Biowatch*[10], Sachs J said:-

“Particularly powerful reasons must exist for a court not to award costs against the State in favour of a private litigant who achieves substantial success in proceedings brought against it.”

- [14] The position is clearly explained by Meer J in *Makhukhuza Community Claimants*[11] where she expressed herself in the following terms: -

“The characterisation of litigation concerning the constitutional right to restitution of rights in land in the genre of constitutional

litigation, was followed in the *Kusile* judgment *supra*. In keeping therewith and the subsequent decisions in *Quinella Trading (Pty) Ltd and Others v Minister of Rural Development and Others* 2010 (4) SA 308 (LCC) and *Greater Tembosch Land Claims Committee and Others v Regional Land Claims Commissioner and Others* LCC (74/06) [2010] ZALCC, 15 September 2010, it is of course no longer necessary for there to be exceptional circumstances before costs are awarded against the State or an organ

thereof.”[12]

- [15] In light of the Constitutional Court decision in Biowatch above, there is no likelihood of the SCA finding that the general practice in the Land Claims Court of not making costs orders in litigation involving the State still subsists. To that end, there can be no compelling reason why an appeal should be heard on that point. The position has been settled by the Constitutional Court and it cannot be resuscitated by this case.
- [16] The second alleged compelling reason is that the SCA should pronounce on whether I was correct in finding that the commission “can withdraw a claim lodged against it” and that if it does not do so, it should be punished with an order of punitive costs. There was no finding made that if the commission does not withdraw the claim, it should be slapped with punitive costs. Reference to the withdrawal of the claim by the commission appears in paragraph 43 of the judgment. This is a patent error in the judgment. If one compares paragraph 43 with paragraph 26 of the judgment, which refers to the refusal by the commission to “withdraw the Gazette” it immediately becomes clear that reference to withdrawal of a claim in paragraph 43 is an error, in fact what was meant was the withdrawal of a publication notice in the gazette. I could have rectified that error in terms of the rules[13], but I decided not to do so since the applicants have taken issue with it. In fact Mr Notshe, Counsel for the applicants, conceded in argument that reference to withdrawal of a claim by the commission was an error and he correctly submitted that in an appeal, you appeal against the substantive order made by the court and not the judgment or reasons for the judgment. [14]
- [17] It is important to refer to the judgment of Davis AJA, as he then was, in *R v Dhlumayo and Another*

[15] where he stated as follows:-

“Indeed, even in a written judgment, it is often impossible, without going into the facts at undue length, to refer to all the considerations

that arise. Moreover, even the most careful Judge may forget, not to consider, but to mention some of them. In other words, it does not necessarily follow that, because no mention is made of certain points in the judgment- more especially, of course, if that judgment be an oral and ex tempore one- they have not been taken into account by the trial Judge in arriving at his decision. No judgment can ever be perfect and all-embracing[16]. It would be most unsafe invariably to conclude that everything that is not mentioned had been overlooked.”

There is no likelihood of the SCA interfering with the exercise of judicial discretion as a result of one erroneous phrase in the judgment comprising of twenty-seven pages and forty-four paragraphs.

Approach to Appeals against Costs Orders

- [18] The starting point of exercise is that the costs order reflects the exercise of judicial discretion on costs. If the discretion is judicially exercised, there can be no interference by the Court of Appeal. The Court of Appeal will first have to consider if there are grounds to

interfere with my exercise of discretion. Usually, the Appeal Court will interfere with the trial court's exercise of discretion, where the discretion was not exercised judicially, where the decision was influenced by wrong principles, where the discretion was affected by a misdirection on the facts and where the decision could not reasonably have been reached by a court properly directing itself to the relevant facts and principles.

[19] In *Nonxuba v Ketj and Others*, [17] Jafta AJP stated:

"To be judicially exercised means that there must be grounds influencing the court's decision on costs. The mere existence of such grounds suffices to ward off interference by the Appeal Court. The test was laid down by the English Court in Ritter v Godfrey (1920) 2 (KB) 47 in the following terms:

"The discretion must be judicially exercised and there must be some ground for this exercise, for a discretion exercised on no ground cannot be judicial. If however, there be any grounds, the question of whether there are sufficient is entirely for the Judge at the trial and this Court cannot, interfere with his discretion."

[20] In *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa* [18] the Constitutional Court considered the power of the Appellate Court to interfere with the High Court's discretion on costs.

Khampepe J held at paragraph 83

"In order to decipher the standard of interference that an appellate court is justified in applying, a distinction between two types of discretion emerged in our case law. That distinction is now deeply-rooted in the law governing the relationship between appeal

courts and courts of first instance. Therefore, the proper approach on appeal is for an appellate court to ascertain whether the

discretion exercised by the lower court was a discretion in the true sense or whether it was a discretion in the loose sense. The

importance of the distinction is that either type of discretion will dictate the standard of interference that an appellate court must apply."

At paragraph 85 it was held:

"A discretion in the true sense is found where the lower court has a wide range of equally permissible options available to it. This type of discretion has been found in this Court in many instances, including matters of costs, damages and in the award of a remedy in terms of section 35 of the Restitution of the Land Rights Act. It is 'true' in that the lower court has an election of which option it will apply and any option can never be said to be wrong as each is entirely permissible."

[21] In 2018, the Constitutional Court confirmed principles applicable to the exercise of discretion by the trial courts in *Hotz and Others v University of Cape Town*, [19] where it was held:

“It is established that a court of first instance has a discretion to determine the costs to be awarded in light of the particular

circumstances of the case. Indeed, where the discretion is one in the true sense, contemplating that a court chooses from a range of options, a court of appeal will require a good reason to interfere with the exercise of that discretion. A cautious approach is therefore, required. A court appeal may have a different view on whether the costs award was just and equitable. However, it should be careful not to substitute its own view for that of the High Court because it may, in certain circumstances be inappropriate to interfere with the High Court’s exercise of discretion.”

In casu, this court exercised a true discretion and there is no ground for interference by the appeal court.

Shoddy work by the Regional Land Claims Commissioner

[22] The manner in which the RLCC conducted its investigation leaves much to be desired.

Section 6(1)(CA) of the Restitution of Land Rights Act prescribes as one of the functions of the Commission the investigations of the merits of the claims lodged to or transferred to it. Even at the trial of this case the RLCC and the Minister still supported the claim as being the claim to the whole of the Klipplaatdrift and not only Portion 9. The claim to Portion 9 had been settled. The State had acquired that land and transferred it to the second plaintiff. Had the RLCC properly considered the claim form and the accompanying affidavits submitted in support thereof, they would have ascertained during their investigation that the claim was actually confined to Portion 9 which had been already settled. Had they considered the representations by landowners filed as far back as 2007 and considered the response, they could have ascertained that the claim did not cover, the whole of Klipplaatdrift, but only Portion 9.

[23] The Minister, in her response also, just like the RLCC supported the plaintiff’s claim to the whole of the Klipplaatdrift farm. The Heads of Argument submitted on behalf of the RLCC and the Minister conclude with the statement:

“.....whole heartedly supports the plaintiff’s and respectfully seek that this Honourable Court will grant an order in favour of the plaintiffs.”

[24] The claim was referred to court for adjudication as a community claim. Had the RLCC properly read the claim form and affidavits, they would have immediately ascertained that at the time of evictions in 1959 or 1960, there was no longer any community but people were by that time labour tenants, not a community. At least the claims should have been referred as individual labour tenants claims.

[25] Mr Mokeke Hofni Modise (“Hofni”) in his affidavit in support of the claim said:

“Klipplaatdrift Community (Ramorula) settled on the claimed land as far back as 1800’s and they used the land for grazing, burial and cultural rights. We were the first people to settle on Ramorula. In 1918 white people arrived and was in the time of the falling of diseases. The first white men to arrive were

Hendrick Johannes Boshoff and Mr and Mrs Bezuidenhout. They immediately divided Ramorula into portions.” The community was turned into labour tenants. They were forced to work for white people. [20] “In 1960 October 1st all community members of Ramorula were given Trekpass to leave the farm because were refusing to work for ‘Morekom’....”

It is clear from Hofni’s affidavit that in 1960 when people were evicted, they were already labour tenants not a community. The land which they might have possessed in common had been taken from them in 1918 and divided into portions. By 1960, it was the white man who was making rules determining access to his land. The land was no longer held in common by a group of persons whose rights in land are derived from shared rules determining access to land as envisaged in the definition of “community” in section 2 of the Act.[21]

[26] The relationship between the landowner and labour tenant is an individualized type of a relationship. In *Department of Land Affairs and Others v Goed Gelegen Tropical Fruits (Pty) Ltd*[22] Moseneke DCJ, as he then was, said at 215 G- 216 A

“In any event, at its very core, labour tenancy under the common law arises from a so-called innominate contract between the landowner and the labour tenant, requiring the tenant to render services to the owner in return for the right to occupy a piece of land, graze cattle and raise crops. In name, it is an individualized transaction that requires specific performance from the contracting parties. This means that labour tenancy does not sit well with commonly held occupancy rights. It is a transaction between two individuals rather than one between the landlord and a community of labour tenants.”

[27] What is worse is that landowners, at least second and third defendants did make representations which were ignored. They filed a response to the referral raising same issues as in the representations and all that was ignored and only to be threatened with an expropriation if they did not sell their land to the State. In light of all the evidence there is no likelihood of the Supreme Court of Appeal interfering with the costs order which I made.

Order

[28] In the result, I make the following order;

1. The Application for Leave to Appeal to the Supreme Court of Appeal is dismissed with costs including costs of Senior Counsel.

Ncube J

Judge of the Land Claims Court of South Africa

Date of hearing: 11 October 2023

Date judgment delivered: 3 November 2023

Appearances

For First and Second Applicants:

Adv Notshe SC

Adv Seneke

Instructed by:

The State Attorney

Pretoria

For First and Second Respondents:

Adv Havenga SC

Joubert Scholtz Inc.

Kempton Park

[1] Rule 69(1)(b)

[2] Act 10 of 2013

[3] See *Mont Chevaux Trust v Goosen* 2014 JDR 2325 para 6, *Acting National Director of Public Prosecutions v Democratic Alliance In Re: Democratic Alliance v Acting National Director of Public Prosecutions* (1957/09)

[2016] ZAGPPHC 489 (24 June 2016) para 25.

[3] See *Mont Chevaux Trust v Goosen* 2014 JDR 2325 para 6, *Acting National Director of Public Prosecutions v Democratic Alliance*

In Re: Democratic Alliance v Acting National Director of Public Prosecutions (1957/09)

[2016] ZAGPPHC 489 (24 June 2016) para 25.

[4] 2012

(1) SACR 567 para 7.

[5] 1221/15

[2016] ZASCA 176 (25 November 2016).

[6] 2019

(3) SA 451 (SCA) para 34.

[7] 2009

(6) SA 232 (CC)

[8] *Restitution of Land Rights Act*, 22 of 1994, *Land Reform (Labour Tenants) Act*, 3 of 1996 and *Extension of Security of Tenure Act*, 62 of 1997.

- [9] See for instance *Quinella Trading (Pty) Ltd and Other v Minister of Rural Development and Other* 2010 (4) SA 308 (LCC), *Greater Tembosch Land Claims Committee and Others v Regional Land Claims Commissioner and Others* LCC (74/06) [2010] ZALCC, 15 September 2010.
- [10] *Supra* (n7) at 247 B-C.
- [11] LCC 04/2009 [2010] ZALCC 30 (18 November 2010).
- [12] My own emphasis.
- [13] Rule 64(1)
- [14] *Administrator, Cape and Another v Ntshwaqela and Others* 1990 (1) SA 705 (A) at 715 D-F.
- [15] 1948
- (2) SA 679 at 702.
- [16] My own emphasis.
- [17] [2003] JOL 1 2005 (TK).
- [18] 2015
- (5) SA 245 (CC) paras 83- 89.
- [19] 2018
- (1) SA 369 (CC) para 28.
- [20] My own emphasis.
- [21] Act 22 of 1994.
- [22] [2007] ZACC 12; 2007
- (6) SA 199 (CC).

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