

SOUTH AFRICA / JUDGMENT

Van Der Meulen v Dladla and Others (LCC264/2016) [2023] ZALCC 18 (26 May 2023)

[2023] ZALCC 18

COURT

Land Claims Court

BEFORE

Flatela

CASE / FILE NUMBER

LCC264/2016

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IN THE LAND CLAIMS

COURT OF SOUTH AFRICA

HELD AT RANDBURG

LCC264/2016

Before the Honourable

Flatela J

Heard on: 24 March

2023

Delivered

on: 26 May 2023

In

the matter between:

ADAM

JOHANNES VAN DER MEULEN

APPLICANT

And

MILTON

DLADLA

1st

RESPONDENT

CHRIS

DLADLA

2nd

RESPONDENT

JOEL

DLADLA

3rd

RESPONDENT

MINISTER: DEPARTMENT OF RURAL
DEVELOPMENT
& LAND REFORM
4th
RESPONDENT
HEAD
OF DEPARTMENT: RURAL DEVELOPMENT &
LAND
REFORM (MPUMALANGA)
5th
RESPONDENT

JUDGMENT

FLATELA J

Introduction

- [1] This is an opposed rescission application brought in terms of section 35(11) of the Restitution of Land Rights Act 22 of 1994 (“the Act”) read together with rule 64(2) of the Land Claims Court Rules >(“the Rules”). The Applicant seeks to rescind and set aside an order granted by Makhanya J on 31 July 2017, alternatively, the variation thereof.
- [2] On 16 November 2016, the first to third respondents brought an urgent application against the Applicant (the Respondent in the urgent application) for an order in the following terms:
- - a. The Respondent be ordered to allow the Applicants grazing rights for their livestock as well as available land;
 - b. The Respondent be ordered to allocate a grazing field for the applicants in the farm where they reside;
 - c. The Respondent be ordered to allow access to the occupants through the main gate.
 - d. Order of costs if opposed.
- [3] The application was served upon the Applicant, and for reasons undisclosed, the Applicant did not oppose the application. On 31 July 2017, the matter served before Makhanya J, and he granted an order in the following terms (quoted verbatim without correction):
1. The Respondent be interdicted from reducing the Applicants grazing rights or livestock as well as available land;
 2. The Respondent be ordered to allocate a grazing field for the Applicants in the farm where they reside;

3. The Respondent be ordered to allow access to the occupants through their main gate;
 4. No order as to costs.
- [4] The order was served upon the Applicant on 11 October 2017 by the Sheriff. On 17 August 2018, the respondents instituted a contempt of court application against the Applicant for non-compliance with Makhanya J's order. The Applicant opposed the application. The Applicant delivered his opposing affidavit in November 2018, and the respondents delivered replying affidavits in December 2018. Thereafter the matter laid dormant for two years and only served before Cowen J on 19 October and 30 November 2020.
- [5] On 11 February 2021, Cowen J found the Applicant to be in contempt of court for failing to comply with the second order of Makhanya J granted on 31 July 2017, in which the Court ordered the first Respondent to allocate a grazing field for the Applicant on the farm where they stay. She granted the respondents leave to approach the Court for further relief on the same papers, supplemented where necessary, should the Applicant persist with non-compliance with the second order.
- [6] On 28 April 2021, the Applicant instituted these proceedings in which he seeks to rescind and or vary Makhanya J's order and an order to suspend Cowen J's order on the basis that:
- a. The orders were granted without any factual and legal foundation, and they lacked the hallmark of a court order and did not bring the case to finality, nor were they capable of enforcement.
 - b. The respondents made no case for the granted prohibitory and mandatory relief.
 - c. The relief of orders 1 and 2 are contradictory, given the respondents' case in the interdict application.
 - d. The mandatory relief of the second order needs to be clarified, it is vague, and indeterminable that it is impossible to discern the meaning of that order. In this respect, it is argued that the contents of the founding affidavit are of no assistance.
- [7] The Applicant avers that he will suffer prejudice if the interdict is allowed to remain in operation because he will be kept bound to a prohibitory interdict and is compelled to provide land to the respondents without cause.

The Parties

- [8] The Applicant is Adams Johannes van der Meulen, a major male farmer, resident, and operating his farming activities at Portion 5 of the Farm Klipfontein 326, Ermelo, Mpumalanga.
- [9] The first Respondent is Milton Dladla, a major male occupier resident at Portion 5 of the Farm Klipfontein 326, Ermelo, Mpumalanga.

- [10] The second Respondent is Chris Dladla, a major male occupier resident at Portion 5 of the Farm Klipfontein 326, Ermelo, Mpumalanga.
- [11] The third Respondent is Joel Dladla, a major male occupier resident at Portion 5 of the Farm Klipfontein 326, Ermelo, Mpumalanga.
- [12] The first to third respondents are collectively referred to as "the respondents."
- [13] The fourth Respondent is the Minister of the Department of Rural Development and Land Reform in charge of the Department of Agriculture, Rural Development and Land Reform (the Minister) cited in their official capacity.
- [14] The fifth Respondent is the Provincial Head of the Department of Agriculture, Rural Development and Land Reform (the Department), Mpumalanga, cited in their official capacity.
- [15] The Minister and the provincial Department are cited herein as they were part of any other proceedings under case number LCC 264/2016 and insofar as they have an interest in the matter.

Factual background

- [16] The facts are primarily a common cause. Van der Meulen Family Trust owns Portion 5 of the Farm Klipfontein 326, Ermelo. The farm is 463 hectares in extent and is owned by the Applicant's family trust. The Trust also owns Portion 6 of the farm De Emigraite 327 Mpumalanga, which is 499 hectares in extent. The Applicant purchased the farm on or about 2013/2014 from the previous owner, Mr. Burhman. The Applicant conducts intensive farming operations on the farm, including cultivating soya and maize and also cattle and sheep farming.
- [17] Mr. Burhman, the former farm owner, granted the respondents and one Mr. Stephan Mtshangan 100 hectares for housing and grazing purposes. Mr. Burhman also fenced off that area. This portion of the land is the subject of this application.
- [18] Mr. Mtshangan and the respondents utilised the 100-hectare camp according to the number of livestock each had. Mr. Mtshangan utilized almost 50% of the 100-hectare portion, and the respondents shared the remaining 50%. The Applicant contends that since his 2008/2009, the respondents jointly kept an average of not more than 40 head of cattle, ten horses and 50 goats, amounting to approximately 67 large stock units, while Mr. Mtshangan kept an average of 58 head of cattle and five horses amounting to 63 large stork units.

- [19] The Applicant contends that Mr. Burhman relocated Mr. Mtshangan to another farm, leaving the respondents as the only occupiers in terms of ESTA. The Applicant avers that Mr. Mtshangan voluntarily gave up his grazing rights to the grazing camp. Consequently, the Applicant then reduced the 100-hectare camp and extended his cultivation fields to 40 hectares of the camp. During 2015/2016, the Applicant prepared the land for cultivation and has been planting crops thereon.
- [20] The Applicant contends that since the reduction of the camp, the respondents continued to reside and graze their livestock on the remaining 60-hectare camp without any complaints. Then in an about turn, the respondents instituted the contempt of court proceedings against the Applicant for non-compliance with the order granted on 31 July 2017. The Applicant avers that he never interfered with the respondents' use of the 50-hectare camp.

The Applicant's

submissions

- [21] The Applicant avers that upon being served with the order on 11 October 2017, he acquainted himself with it and was satisfied that he had not acted contrary to its terms before the granting of the order. The Applicant contends that he did not reduce the Respondent's grazing rights for their livestock or available land, and the Respondents were allocated the land where they reside. He was, therefore, not required to take any action. However, about a year later and on 17 August 2018, the respondents instituted contempt proceedings which sought to hold the Applicant in contempt for not complying with the court order.
- [22] The Applicant opposed the contempt application. His submissions before Cowen J were similar, if not at all the same, as expounded in the introduction and factual background.
- [23] Further submissions were that he was never advised of the hearing date of the interdict application. The interdict order only came to his attention after being served by the Sheriff on 11 October 2017, more than two months after the interdict had been granted on 17 July 2017.
- [24] Upon acquainting himself with the order, the Applicant avers that he was surprised by the respondents' action in obtaining that order when the applicants have access to a grazing field for their livestock and access to the main gate. He says the whole interdict order was granted on false allegations in the founding affidavit. For instance, he avers that he never interfered with the Respondent's access to the farm as set out by them in their interdict application founding papers.

- [25] The Applicant contends that if it is assumed that the relief granted in the second order of the interdict means that he must allocate additional grazing land for the respondents, such an order is incompetent, ineffective, and unenforceable due to its vagueness, and for the following reasons, namely that, the second order does not direct him to allocate additional grazing land to the applicants, nor does it in any way specify the nature, extent, and location of such grazing field.
- [26] The respondents continued to graze their livestock on the 50-hectare camp without interference or disturbance. They should have taken steps to rectify or clarify the paragraph of the second order.
- [27] There was no duty incumbent upon him to take any steps insofar as the relief is concerned; as a result, the Applicant averred that he did comply with the order, or if he did not, then that was due to its vagueness.
- [28] Furthermore, it is submitted on behalf of the Applicant that the allegations in the contempt affidavit were so vague and unsubstantiated that he does not know what part of the interdict order he did not comply with.

Before Cowen J

- [29] I have had the pleasure of reading the parties' submissions before Cowen J in the contempt application. I am grateful to the Applicant for attaching the entire court bundle of the proceedings. A brief summary of the submissions and findings of those proceedings would put this matter in context.
- [30] The respondents raised the point that the Applicant keeps attacking how the Respondent's papers were drafted. The applicant's main point is that the respondent's allegations in the contempt application were vague and embarrassing, so much so that no case was made out in fact and or in law. However, the Applicant should have raised an exception on the founding papers (which I assume are the contempt application founding papers) before filing the answering affidavit.
- [31] Explaining the second order, the respondents stated that they sought the exact amount of the grazing land that the Respondent reduced. This allegation can be inferred or deduced from their founding papers of the interdict application.
- [32] Cowen J found that first and second orders, adequately construed, impose, respectively, prohibitory restraints and a mandatory requirement.

“the first order prohibits the first Respondent from limiting grazing rights and grazing land. The second order requires that the first Respondent allocate a grazing field for the applicants on the farm where they reside. The second order requires positive action on his part being required by the respondent” (the Applicant in this matter).

[33] The learned Judge rejected the submission that the second order did not require the Applicant to allocate additional grazing land. She further rejected the submission that it was so vague to the extent that it could be disregarded as unenforceable. She found that the evidence establishes that the Applicant did not comply with the second order and that he cannot be content with the fact that the respondents already have approximately 50 hectares of grazing land following the reduction of the 99-hectare camp by the

Applicant for the cultivation of his crop onto the usurped land. Stressed once more was that this is the conduct that led to the

restoration proceedings and is the very same conduct that the Applicant sought to justify in the contempt proceedings.

[34] Cowen J went further and stated that it is true that the second order does not specify the size of the land to be allocated nor the number of livestock it should be able to accommodate. However, she held that reasonably construed, the mandamus required the Applicant to allocate suitable grazing land by restoring what was previously usurped by him (of which the size thereof is known by all) or supplying a different but similarly sized and suitable tract of grazing land.

[35] Fundamentally, Cowen J was of the view that the impugned order was neither vague nor materially uncertain. In passing, she also remarked that from the Applicant's submissions, it was clear that his core gripe was with Makhanya J's order. However, he had not sought to rescind or appeal that order.

[36] On the first order, she found the Applicant not in contempt. On the second order, however, she found, by deducing from the Applicant's answering affidavit, the requirements of fairness, and in the context of the pleadings and issues raised therein, that it is the Applicant's reduction of the 99-hectare grazing camp to 50.19 hectares to extend his cultivation on that other land that led to the "restoration proceedings" (Cowen J's reference) that served before Makhanya J and the relief granted there.

[37] In respect of the third order, Cowen J held that she is unable to conclude that more is required by Makhanya J's order other than that which was explicitly said, that is, for the Applicant to provide vehicular access to the main gate, something that the Applicant had then not provided.

[38] Finally, she granted costs on a 50% party and party scale in favour of the respondents (applicants therein).

[39] The Court further held that court orders must be obeyed even if the party bound by them believes that they are wrong, and even if they are wrong, they stand until set aside by a court of competent jurisdiction.

Before this court

[40] The Applicant seeks the following relief:

- a. The late filing of the application is condoned.
- b. The order of Cowen AJ dated 11 February 2021 be suspended pending finalization of the application.
- c. The order of Makhanya J dated 17 July 2017 be rescinded and set aside.
- d. Alternatively, the order of Makhanya J dated 17 July 2017 be varied as follows to read:
 - i. 'the use of the applicants of the grazing field in the allocated camp, consisting of 60 hectares, [is] lawful and in the exercise of their grazing rights in terms of ESTA and the Respondent is interdicted from unlawfully and/or without following due process reducing and/or interfering with the applicants' grazing rights for their livestock on that portion of land.
 - ii. The Respondent is ordered to allow access to the applicants through their main gate.
 - iii. No order as to costs.'

Legal Framework

[41] Rescission and variation of court orders are governed by section 35 of the Act and Rule 64 of the Rules of this Court.

[42] The relevant section 35 of the Act reads as follows: -

- (11) The Court may, upon application by any person affected thereby and subject to the rules made under section 32, rescind or vary any order or judgment granted by it –
 - (a) in the absence of the person against whom that order or judgment was granted;
 - (b) which was void from its inception or was obtained by fraud or mistake common to the parties;
 - (c) in respect of which no appeal lies; or
 - (d) in the circumstances contemplated in section 11(5):

Provided that where an appeal is pending in respect of such order, or where such order was made on appeal, the application shall be made to the Constitutional Court or the Appellate Division of the Supreme Court, as the case may be.

Rule 64: Variation and Rescission of Orders

- (1) Subject to section 35(11) of the Restitution of Land Rights Act, the Court may suspend, rescind, or vary, of its own accord or upon the application of any party, any order, ruling, or minutes of a

conference which contains an ambiguity or a patent error or omission, in order to clarify the ambiguity or to rectify the patent error or omission.

(2) Any party seeking the rescission or variation of an order in terms of section 35(11) or (12) of the Restitution of Land Rights Act or in terms of subrule (1) may do so only upon—

(a) application delivered within 10 days from the date upon which he or she became aware of the order; and

(b) good cause shown for the rescission or variation

(3) Any party applying under this rule must deliver notice of his or her application to all parties whose interests may be affected by the rescission or variation sought.

[43] The facts and arguments advanced for the rescission application were outlined above. Where not, I shall deal with additional submissions after the condonation application.

Condonation

[44] Whether it is in the interests of justice to condone a delay in bringing the application for rescission depends entirely on the facts and

circumstances of each case.[1] The relevant factors[2] in that inquiry generally include: -

- a. the nature of the relief sought,
- b. the extent and cause of the delay,
- c. its effect on the administration of justice and other litigants,
- d. the reasonableness of the explanation for the delay, which must cover the whole period of delay,
- e. the importance of the issue to be raised, and
- f. the prospects of success

The nature of the relief sought.

[45] The grounds of rescission have already been canvassed above, namely, that the interdict should have never been granted in the first place as no case in fact or law was made out for it. Secondly, it was granted on unsubstantiated falsehoods. Furthermore, the second order is wholesomely vague and indiscernible, such that it is rendered unenforceable.

[46] The alternative prayer is that the interdict be varied in terms and wording that would not find him in contempt.[3] In this matter the Applicant does not restrict himself to the impugned second order but rather the whole interdict. The nature of this relief is undoubtedly an appeal. Here the Applicant is not asking for variation of the interdict to give its orders their

intended substance meaning, but rather to change it in toto. I will return to this later.

The extent and cause of the delay

- [47] It is common cause that the Applicant became aware of the order he seeks to rescind on 11 October 2017. The Applicant was supposed to institute his rescission application on or about 25 October 2017. He explains that after having acquainted himself with the interdict on 11 October 2017 he was satisfied that he did not act in breach in any of the ways of the interdict orders before or after granting the interdict.
- [48] The mental attitude of the Applicant towards the court order that he now seeks to rescind is that he was unconcerned or insouciance about its consequences; hence he did not rescind it after the order was served upon him.
- [49] When the Applicant received the pleadings in the contempt application, he opposed the contempt of court application but saw no reason to file a rescission application of the interdict because his legal counsel opined that the contempt of court application was without any merit. He states that the contempt of court application was so defective that the prospects of it being granted were slim to none. It was only when he received the adverse judgment against him that he, again acting on the advice of his counsel, resorted to instituting these proceedings.
- [50] The judgment was handed down on 11 February 2021 but was only seen by his attorneys on 15 February 2021, and this is the date upon which the Applicant became aware of the judgment. Nevertheless, the rescission application was only instituted on 28 April 2021. The Applicant says this was because, on 16 February 2021, his son tested positive for Covid-19. He went into self-isolation, but just before his 10-day isolation period ended, his other grandchild also tested positive. The Applicant remained in further self-isolation up to 12 March 2021. Consequently, the Applicant avers that he could not consult his legal team during this period. He only consulted his team on 15 March 2021.
- [51] I accept that the Applicant's reason for self-isolation was precautionary and in the interests of safety and health for everyone because, as he says, they all live on the same farm. However, what I do not accept is, and as the respondents rightfully argue, that the Applicant could not consult counsel in other ways, virtual consultation being one obvious example. There is furthermore no further explanation as to why the rescission application was only filed on 28 April 2021, another month and thirteen days late from the consultation of 15 March 2021.
- [52] In *Silber v Ozen Wholesalers (Pty) Ltd*^[4] It has been held that the explanation for the default must be sufficiently full to enable the Court to understand how it came about and assess the Applicant's conduct and motives. An application which fails to set out these reasons is not proper,^[5] But where the reasons appear clearly, the fact that they are not set out in so many words will not disentitle the Applicant to the relief sought.^[6]
- [53] If I were to put it simply, the Applicant's case is that the interdict was hopelessly meritless. This attitude is reflected in the submissions before this court and those advanced before Cowen J.

- [54] He, therefore, saw no reason to act on it nor seek to rescind it. The Applicant considered the interdict as *brutum fulmen* (of empty effect). He submitted that pursuing a rescission application would have been purely an academic exercise and a waste of legal resources.
- [55] In the contempt application, Cowen J's judgment dealt with this contention. She held (with the support of case law authorities) that court judgments are binding and must be obeyed by parties bound by them even if they believe them to be wrong, and even if they are genuinely wrong, they nonetheless still stand until such time they are set aside by a court of competent jurisdiction.

Therefore, for a party to merely disregard a court order because she or he considers it vague, uncertain, and unenforceable upon them would subvert the rule of law.

- [56] I align myself fully with those remarks. Accordingly, the Applicant's explanation for not bringing rescission of the interdict application is unreasonable and worrying regarding his attitude and respect for the rule of law.

The issue and prospects of success.

- [57] This application has no merit and no prospects of success have been shown if condonation were to be granted. On the contrary, if entertained, the substantive averments of the application suggest that a disgruntled litigant can cherry-pick whether to be bound by a court order or not based on their subjective beliefs and views about it.
- [58] Moreover, the submissions of the Applicant constitute grounds of appeal. His proposed variation does not seek to clarify the impugned second order but replaces the whole interdict, contrary to its intended effect. In any event, where the Applicant needed clarification about the substantive intent and force of the interdict before the contempt proceedings, this has since been clarified to him in no uncertain terms by Cowen J.
- [59] I consider my findings above as dispositive of the matter, but for completeness, I must consider whether the Applicant has shown good cause that warrants consideration.

Good cause

- [60] In terms of Rule 64 (2)(b), an application for rescission must be brought within ten days from the date the Applicant became aware of the order and on good cause shown.
- [61] For the Applicant to succeed with the application for rescission he/she must show good cause or sufficient cause by giving a reasonable explanation for the delay and showing that application for rescission was bona fide and showing a bona fide defence to the claim with *prima facie* prospects of success.

[62] In *Chetty v Law Society, Transvaal*[7] Miller J dealing with the concept of "sufficient cause" or "good cause," stated that "these concepts defy precise or comprehensive definition, for many and various factors require to be considered." The learned Judge stated that "it is clear that in principle, the two essential elements of "sufficient cause" for rescission of a judgment by default are:

‘(i) that the party seeking relief must present a reasonable and acceptable explanation for his default; and

(ii) that on the merits, such party has a bona fide defense which, prima facie, carries some prospect of success.

It is not sufficient if only one of these two requirements is met; for obvious reasons, a party showing no prospects of success on the merits will fail in an application for rescission of a default judgment against him, no matter how reasonable and convincing the explanation of his default. An orderly judicial process would be negated if, on the other hand, a party who could not explain his default other than his disdain of the Rules was nevertheless permitted to have a judgment against him rescinded on the ground that he had reasonable prospects of success on the merits."

[63] I only need to dispose of the first requirement as the consideration of whether, on the merits of the rescission application, the Applicant has a bona fide defence which, prima facie, carries some prospect of success. That requirement has been dealt with expansively above in my findings on the condonation application.

[64] The party seeking relief must present a reasonable and acceptable explanation for his default. This means the Applicant has to present a reasonable explanation as to why he did not oppose the interdict application.

[65] The Applicant conceded he was served with the papers but elected to do nothing about the order as he believed that he did not act contrary to its terms. Other than attacking how the application was drafted and how the Court granted the draft court order without considering merits, no reasons are advanced regarding the prospects of success. On the whole, the application is not proper. It must fail.

Costs

[66] It is trite that the general practise of this court not make cost ordered "in the ordinary sense". Dodson J explaining the rationale behind practise said:

‘The Act [ESTA] was passed specifically to deal with the legitimate demands for remedial action to deal with past, large-scale breaches

of the human rights of a class of rural, black people. In my view, that places this matter squarely in the sphere of public interest

litigation, notwithstanding that the parties to litigation under the Act will usually be private persons.’[8]

[67] Molemela J writing for the majority in Khumalo[9], however emphasised that despite this general practise , this court has an unrestrained discretion regarding the awarding of cost

orders

. She expressed herself as follows:

“...It is well-established that in the ordinary courts, the general rule is that ‘costs follow the result’. It is settled law that the general practice in the Land Claims Court is not to make award of costs unless exceptional circumstances justify an adverse costs order. It bears emphasising that notwithstanding the aforesaid practice, all courts have an unfettered discretion in relation to the award of costs”

[68] I have given careful consideration to whether an adverse costs order should be granted in view of the litigation history of this matter and whether it constitutes special circumstances warranting a costs order. This application, in my view, is without merit in view the body of case law governing rescission application. I have analysed the nature of issues raised above , I won’t repeat them in this section. It is my considered view that this application has been wasteful of the Department’s scarce resources, a costs order would in my view be justified.

ORDER

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

The application is dismissed with costs.

L FLATELA

JUDGE

LAND CLAIMS COURT

Appearances

Counsel for the Applicant: Adv Vorster Instructed by: Pagel Schulenburg Inc Counsel for the Respondents: Adv Kwena Mashaba Instructed by: Mthimunye Attorneys

[1] See Van Wyk v Unitas Hospital (Open Democratic Advice Centre as Amicus Curiae) [2007] ZACC 24; 2008 (2) SA 472 (CC), para 20.

[2] For the above-listed factors found in Ethekewini Municipality v Ingonyama Trust [2013] ZACC; 2014 (3) SA 240 (CC), para 28; Van Wyk v Unitas Hospital (Open Democratic Advice Centre as Amicus Curiae) [2007] ZACC 24; 2008 (2) SA 472 (CC), para 22; Camps Bay Rate Payers’ and Residents Association v Harrison [2010] ZASCA 3; [2010] (2) All SA 519 (SCA) para 54.

- [3] The proposed variation reads that 'the use of the applicants of the grazing field in the allocated camp, consisting of 60 hectares, [is] lawful and in the exercise of their grazing rights in terms of ESTA and the Respondent is interdicted from unlawfully and/or without following due process reducing and/or interfering with the applicants' grazing rights for their livestock on that portion of land.
- [4] 13 1954 (2) SA 345 (A) at 353A.
- [5] Marais v Mdownen 1919 OPD 34.
- [6] Cf Behncke v Winter 1925 SWA 59.
- [7] Chetty v Law Society, Transvaal (1985).
(2) SA 756 (A) at 765 A-E
- [8] Hlatshwayo & others v Hein 1999
(2) SA 834 (LCC) para 24; 1998 (1) BCLR 123 (LCC).
- [9] Khumalo v Twin City Developers (328/2017)
[2017] ZASCA 143 (2 October 2017)

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