IN THE LAND CLAIMS COURT OF SOUTH AFRICA

HELD AT RANDBURG

CASE NO: LCC 164/2021B

In the matter between:

MPOFANA COMMUNITY LAND CLAIMANTS	FIRST APPLICANT
(aka AMANGWE 2)	
JONNY SITHOLE	SECOND APPLICANT

and

THE REGIONAL LAND CLAIMS COMMISIONER	
KWAZULU-NATAL PROVINCE	FIRST RESPONDENT
THE CHIEF LAND CLAIMSCOMMMISIONER	SECOND RESPONDENT
THE MINISTER OF AGRICULTURE, RURAL	
DEVELOPMENT AND LAND REFORM	THIRD RESPONDENT

JUDGMENT

COWEN J

1. The applicants seek to compel compliance with an order made by this Court, per Justice Ncube, on 29 November 2021 (the 2021 order). They apply in terms of Rule 32(5)(b)(iv) of the Rules of this Court.

2. The primary import of the 2021 order was to require the first respondent, the Regional Land Claims Commissioner (KwaZulu-Natal) to publish the first

applicant's land claim in the Government Gazette in terms of section 11(1) of the Restitution of Land Rights Act 22 of 1994 (the Restitution Act).[1]

3. The application came before me on 15 June 2023. On 21 June 2023, I made an order in the matter, foreshadowed during the hearing. I also indicated during the hearing that I would subsequently provide my reasons.[2] My order was in the following terms:

> '1. The first respondent is directed to comply with the order of this Court dated 29 November 2021 within ten (10) days of the date of this order by:
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> 1.1 Causing notice of the claim lodged by the first applicant to be published in the Government Gazette;
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> 1.2 Within 5 (five) days of its publication, advising the owners of the land claimed by the first applicant or any other party which the first respondent is of the opinion might be interested in the claim, that the land claimed by the first applicant has been published in the Gazette.
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> 1.3 By making available the following information to the applicants;
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> 1.3.1 The Gazette Notices;
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> 1.3.2 The Research Reports;
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> 1.3.3 The Validation Report;
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> 1.3.4 The Verification Report.
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> 1.4 This order must be complied with irrespective of any decision of the first respondent taken or communicated in terms of section 11(3) of the Restitution of Land Rights Act 22 of 1994.
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> 1.5 The first respondent shall pay the applicants' costs on a party and party scale.
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> 1.6 The applicants are granted leave to apply to the Court on the same papers duly supplemented for further relief in the event that the order of this Court is not complied with.'

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[1] Section 11 (1) provides:
(1) If the regional land claims commissioner having jurisdiction is satisfied that-
(a) the claim has been lodged in the prescribed manner;
(b) the claim is not precluded by the provisions of section 2; and
(c) the claim is not frivolous or vexatious,
he or she shall cause notice of the claim to be published in the *Gazette* and in the media circulating nationally and in the relevant province, and shall take steps to make it known in the district in which the land in question is situated.

[2] The delivery of the judgment has regrettably been delayed by two weeks due to a burglary.

4. The effect of my order is to require compliance with paragraphs 5 to 8 of the 2021 order. It should be noted that an unusual feature of the 2021 order is that the prayers found in paragraphs 5 to 8 were granted 'in the alternative' to paragraphs 1 to 4. During the hearing, I heard the parties regarding the resultant import of the order. There is no dispute that paragraphs 5 to 8 were immediately enforceable, and were so understood by the parties.

5. It is also common cause that the first respondent has not complied with paragraphs 5 to 8 of the 2021 order. The reason given is that after the 2021 order was made, the first respondent caused the first applicant's land claim to be researched and investigated and after receipt of the research report, the first respondent decided that the claim should be dismissed in terms of section 11(3) of the Restitution Act. Section 11(3) provides: 'A frivolous or vexatious claim may be dismissed by the regional land claims commissioner concerned.' In the result, it was contended that there is no claim to publish.

6. I concluded that the applicants were entitled to the relief they sought for three related reasons.

7. First, on the affidavit before me, at the time the matter was heard, the first respondent had not communicated any decision to dismiss the claim to the claimants. Indeed, on the papers before me, it is not clear whether the decision has been formally taken.[3] It is established that a decision is not final until

[3] Although it is stated in the answering affidavit that a notice of dismissal of the claim has been issued, purportedly attached, there is no attachment.

communicated to the affected party.[4] In *Manok Family Trust*, the SCA dealt with this issue and held, '[o]f course finality "is a point arrived at when the decision is published, announced or otherwise conveyed to those affected by it," and a decision is revocable before it becomes final.'[5] In that case, the regional commissioner had declined to accept a claim in terms of section 11(1) of the Restitution Act and that decision was communicated to the affected claimants thereby becoming final and irrevocable. In this case there had been no such communication of any decision. In the result, there is no reason why the first respondent should not comply with the court order.

8. Secondly, it was not open to the first respondent merely to decline to comply with the 2021 order for over a year while an investigation into the claim ensued. As the Constitutional Court has recently re-emphasised, court orders must be complied with unless properly set aside:[6]

> 'It cannot be gainsaid that orders of court bind all to whom they apply. In fact, all orders of court, whether correctly or incorrectly granted, have to be obeyed unless they are properly set aside. This, in addition to typifying common sense, the Constitution itself enjoins.'

9. This is fundamental to the protection of the authority of the judiciary to perform its constitutional functions in terms of section 165 of the Constitution and to the rule of law. The Constitutional Court explained this in *Pheko*[7] when it held:

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[4] *President of the Republic of South Africa v South African Rugby Football Union* 2000(1) SA 1 (CC) para 49; *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye and Laser Institute* 2014(3) SA 219 (SCA) at para 15. *Manok Family Trust v Blue Horison Investments* 2014(5) SA 503 (SCA) (*Manok Family Trust*) at para 14.
[5] *Manok Family Trust* at para 14.
[6] *Secretary, Judicial Commission of Inquiry into Allegations of State Capture v Zuma and Others* 2021(5) SA 327 (CC) at para 59. See too paras 1, 24 to 27.
[7] *Pheko and Others v Ekurhuleni City* 2015(5) SA 600 (CC); 2015(6) BCLR 711; [2015] ZACC 10 (*Pheko*) at paras 1 to 2.

"'(t)he rule of law, a foundational value of the Constitution, requires that the dignity and authority of the courts be upheld. This is crucial, as the capacity of the courts to carry out their functions depends upon it. As the Constitution commands, orders and decisions issued by a court bind all persons to whom and organs of state to which they apply, and no person or organ of state may interfere, in any manner, with the functioning of the courts. It follows from this that disobedience towards court orders or decisions risks rendering our courts impotent and judicial authority a mere mockery. The effectiveness of court orders or decisions is substantially determined by the assurance that they will be enforced.

Courts have the power to ensure that their decisions or orders are complied with by all and sundry, including organs of state. In doing so, courts are not only giving effect to the rights of the successful litigant but also and more importantly, by acting as guardians of the Constitution, asserting their authority in the public interest.''

10. In *Meadow Glen Homeowners*[8] the SCA emphasised that where a party encounters difficulties complying with a court order, that party should come to court for appropriate relief. It is not appropriate for the non-complying party to sit back and wait for the aggrieved party to come to court to complain of non-compliance.[9] The SCA held:

> 'Having said that, the municipality consented to the court making an order in those general terms. That obliged it to make serious good faith endeavours to comply with it. That is what we are entitled to expect from our public bodies. If

[8] *Meadow Glen Home Owners Association and Others v City of Tshwane Metropolitan Municipality and Others* [2014] ZASCA 209 (*Meadow Glen Home Owners)*.
[9] *Id* at para 22.

it experienced difficulty in doing so, then it should have returned to court seeking a relaxation of its terms.

If there were a dispute between them and the appellants regarding the scope of the order and what needed to be done to comply with it, it was not appropriate for the municipality to wait until the appellants came to court complaining of non-compliance in contempt proceedings. It should have taken the initiative and sought clarification from the court. Its failure over a protracted period to take these steps is to be deprecated.'

11. The first respondent has neither sought to rescind, vary or clarify the 2021 order. The rule of law requires that the order be complied with.

12. Thirdly, the applicable legislation itself provides the first respondent with a remedy should the research and investigation process subsequent to publication reveal that a claim should be dismissed.[10] Indeed, the scheme of the Restitution Act entails that thorough investigation generally ensues after publication.[11] This is not a matter of mere form, as publication of a claim in the Government Gazette has a material impact on the rights of parties, both protective and restrictive, as envisaged by section 11(7) and (8) of the Restitution Act.[12]

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[10] See *Manok Family Trust*, supra, at para 12.

[11] *Gamevest (Pty) Ltd v Regional Land Claims Commissioner for the Northern Province and Mpumalanga and Others* [2002] ZASCA 117 at para 7.

[12] Section 11(7) and (8) provide:

'(7) Once a notice has been published in respect of any land –

(a) No person may in an improper manner obstruct the passage of the claim;

(aA) No person may sell, exchange, donate, lease, subdivide, rezone or develop the land in question without having given the regional land claims commissioner one month's written notice of his or her intention to do so, and, where such notice was not given respect of –

(i) Any sale, exchange, donation, lease, subdivision or rezoning of land and the Court is satisfied that such sale, exchange, donation, lese, subdivision or rezoning was not done in good faith, the Court may set aside such sale, exchange, donation, lease subdivision or rezoning or grant any other order it deems fit,

(ii) Any development of land and the Court is satisfied that such development was not done in good faith, the court may grant any order it deems fit.

(b) No claimant who occupied the land in question at the date of commencement of this Act may be evicted from the said land without the written authority of the Chief Land Claims Commissioner;

(c) No person shall in any manner whatsoever remove or cause to be removed, destroy or cause to be destroyed or damage or cause to be damaged, any improvements upon the land without the written authority of the child Land Claims Commissioner;

13. The first respondent's explanation for failing to comply with the 2021 order thus does not stand scrutiny. The first respondent ought to have complied with the court order.

14. The first respondent delivered a counter-application centrally aimed at securing a dismissal alternatively an adjournment of the application to enable it to finalise the process of dismissing the claim, specifically to furnish the applicants with the section 11(3) decision. The applicants, they say, should then review that decision. That application cannot, in my view, succeed in light of my conclusions above. Indeed, to grant such application in the circumstances of this case would subvert the authority of the judiciary and the rule of law.

15. The remaining issue is costs. Subject to *Biowatch Trust*,[13] this Court only orders costs in special circumstances dealing as it does with social legislation. In my view, the applicants are entitled to their costs both on the *Biowatch* principle and because this is a matter that concerns protracted non-compliance with a court order. The applicants submitted that costs should be awarded on an attorney and client scale. I am not persuaded that such an order is

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(d) No claimant or other person may enter upon and occupy the land without the permission of the owner or lawful occupier.

(8) The regional land claims commissioner may, at any time after the publication of a notice contemplated in subsection (1), if he or she has reason to believe that any improvement on the land is likely to be removed, damaged or destroyed or that any person resident on such land may be adversely affected as a result of the publication of such notice, authorize any person contemplated in section 8 or 9 to enter upon such land for the purpose of drawing up an inventory of any assets on the land,, a list of persons employed or resident on the land, or a report on the agricultural condition of the land and of any excavations, mining or prospecting thereon.

[13] *Trustees for the Time Being of the Biowatch Trust v the Registrar Genetic Resources and others* 2009(6) SA 232 (CC). Importantly, in para 24, the Constitutional Court held, in context of constitutional litigation, that '… 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.'

warranted on the affidavits before me.[14] Notably, this is not a contempt application and in the result, matters relating to wilfulness of non-compliance and whether it was tainted by bad faith have not been duly canvassed. Different considerations may apply should the non-compliance persist.

SJ Cowen

Judge

LAND CLAIMS COURT

Date of hearing: 15 June 2023

Date of order: 21 June 2023

Date of judgment: 21 July 2023

Appearances

For the Applicant:

Mr M Mzila Mzila HM Inc

For the First Respondent:

Adv S Giba instructed by State Attorney, Durban

[14] *Plastic Converters Association of South Africa obo Members and Others v National Union of Metalworkers of South Africa and Others* [2020] ZALAC 39; (2016) 37 ILJ 2815 (LAC) at para 46; *Public Protector v South African Reserve Bank* [2019] ZACC 29 (*SARB*) at para 8 and 225; *Tjiroze v Appeal Board of the Financial Services Board* [2020] ZACC 18 at para 23.