



**IN THE LAND CLAIMS COURT OF SOUTH AFRICA
HELD AT RANDBURG**

CASE NO: LCC 55/2019

Before: The Honourable Acting Judge President Meer

Delivered on: 11 November 2020

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES / ~~NO~~
(3) REVISED: YES / ~~NO~~

11/11/2020
DATE


SIGNATURE

In the matter between:

DALASI COMMUNITY

Plaintiff

and

**THE MINISTER OF RURAL DEVELOPMENT
AND LAND REFORM**

First Defendant

T T FARMS CC

Second Defendant

THE TRUSTEES OF THE E V KRULL TRUST

Third Defendant

THE TRUSTEES OF THE GLEN KEI FARM TRUST

Fourth Defendant

**THE REGIONAL LAND CLAIMS COMMISSION:
EASTERN CAPE**

Participating Party

JUDGMENT

MEER AJP

[1] A claim for restitution of rights in land was lodged with the Regional Land Claims Commission: Eastern Cape, the Participating Party, by the Dalasi Community, the Plaintiff. The Participating Party processed the claim and at some stage the Plaintiff's current attorneys were appointed to represent the Plaintiff.

[2] Thereafter, contrary to the procedure as set out in the Restitution of Land Rights Act 22 of 1994 ("the Act") and the Rules of this Court for the prosecution of a land claim, the Plaintiff's attorney embarked upon a procedure to bring the claim to Court in the form of a notice of action. This is patently the incorrect procedure. Rule 38 of the Land Claims Court Rules specifies clearly and in detail the procedural steps to be taken. Once a claim has been lodged at the offices of a Regional Land Claims Commissioner it is the Commission that refers the claim to Court by way of a referral report whereafter the Plaintiff and all other parties respond to the referral report. Thereafter, their responses

together with the referral report comprise the pleadings and the matter proceeds before the Court with the Claimant as the Plaintiff. It is open to a Claimant to approach the Court by way of direct access in terms section 38B of the Act read together with Rule 53A of this Court's Rules. From the pleadings it is clear that this was not the route that the Plaintiff adopted in this matter when they lodged their claim with the Regional Land Claims Commissioner.

[3] It goes without saying that any legal practitioner litigating on behalf of a claimant in this Court, ought to take the trouble to acquaint himself/herself with the procedure for prosecuting a claim. This is especially so when an attorney is briefed at state expense, as in the instant case, to represent a land claimant. The Plaintiff's attorney appears not to have taken the trouble to acquaint themselves with the requisite procedure hence their approach to Court by way of notice of action.

[4] In response to the notice of action, the Second to Fourth Defendants took issue with the invalid procedure by way of a special plea filed on 19 June 2019. Notwithstanding having been alerted to the invalid procedure, the Plaintiff's attorney persisted with the invalid procedure and filed a replication wherein they recorded that they persisted with the notice of action. They continued on this course until a few days before the hearing of the special plea which had been set down for 17 September 2020. A pre-trial conference was held on 11 September 2020 and it was there that the Plaintiff's attorney finally conceded that they had followed the incorrect procedure.

[5] At the conference The Second to Fourth Defendants gave notice of their intention to claim costs *de bonis propriis* against the Plaintiff's attorney and the Participating Party. They were directed to file written submissions in this regard and any party wishing to

respond, was directed to do so within a week of receiving such submissions. Thereafter by notice dated 23 September 2020, the Plaintiff's attorney withdrew the notice of action. I note moreover that notwithstanding the fact that the claim had been lodged with the Participating Party many years ago, it took no steps to refer the claim to Court until prompted to do so at the pre-trial conference of 11 September 2020.

[6] The Second to Fourth Defendants in written submissions state that both the Plaintiff's attorney and the Participating Party were remiss in the circumstances. They seek the costs of the special plea jointly and severally against the Plaintiff's attorney *de bonis propriis* and the Regional Land Claims Commissioner. Brief submissions filed timeously by the Plaintiff's attorney are to the effect that the Participating Party alone should bear the costs. Why the Plaintiff's attorney should be exempt is insufficiently explained in the light of their concession that they had followed the incorrect procedure.

[7] Submissions were emailed by the Participating Party a month late. Discourteously, no application for condonation accompanied these submissions. Parties wishing to make submissions on costs were directed to do so a week after the Second to Fourth Defendants filed their submissions on 29 September 2020. I express my grave dissatisfaction and disquiet that the Participating Party not only filed submissions a month late but saw fit to do so without seeking condonation. The Participating Party claims that the Plaintiff's attorneys were advised to proceed by way of direct access in terms of section 38B of the Act. There is no evidence on the pleadings in this regard as aforementioned, and it is surprising that the Participating Party did not raise this at the pre-trial conference of 11 September 2020, at which it undertook to refer the claim to the Court.

[8] In *Ebenhaeser Communal Property Association and Others v The Minister of Department of Rural Development and Land Reform and Others* [2019] ZALCC 2 at paragraph 53 this Court expressed its dissatisfaction at dilatory conduct on the part of legal practitioners as follows:

“[l]egal Practitioners who are appointed to represent land claimants and indeed other litigants at the State’s, and ultimately the tax payer’s, expense have a responsibility to ensure that the trust placed in them is not misplaced. They must familiarise themselves with and abide by the requisite rules, practice directions and statutes, adhere to high standards of legal professionalism and care and prepare diligently and adequately.”

[9] The test for awarding costs *de bonis propriis* has been explained in *Multi-Links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd; Telkom SA SOC Limited and Another v Blue Label Telecoms Limited and Others* [2013] 4 All SA 346 (GNP) at paragraph 35 as follows:

“Such an order is reserved for conduct which substantially and materially deviates from the standard expected of the legal practitioners, such that their clients, the actual parties to the litigation, cannot be expected to bear the costs, or because the Court feels compelled to mark its profound displeasure at the conduct of an attorney in any particular context. Examples are, dishonesty, obstruction of the interests of justice, irresponsible and grossly negligent conduct, litigating in a reckless manner, misleading the Court, and gross incompetence and a lack of care.”

I am of the view that the conduct of the Plaintiff’s attorney did not measure up against the standard as set out in *Ebenhaeser* and materially deviated from the standard expected of legal practitioners as referred to in *Multi-Links*. Recently, this Court has also warned legal practitioners against embarking on fruitless litigation. See *Luhlwini Mchunu Community v Hancock v Others* [2020] ZALCC 2; *Mavundulu Community v Minister of Agriculture,*

Rural Development and Land Reform and others LCC 125/2008 (unreported decision). In *Minister of Rural Development and Land Reform v Normandien Farms (Pty) Ltd and Others* 2019 (1) SA 154 (SCA), the Court ordered costs *de bonis propriis* against attorneys based on dilatory conduct and baseless contempt of court proceedings.

[10] The costs occasioned by the Second to Fourth Defendants in the special plea were as a result of the Plaintiff's attorney proceeding incorrectly by way of notice of action. It was in response to this action that the special plea was raised. The special plea and the expenses associated therewith were not occasioned by any act or conduct on the part of the Participating Party. Whilst issue can be taken with the Participating Party's failure to refer the claim to Court before the conference of 11 September 2020, this failure did not give rise to the costs occasioned by the raising of the special plea. Those costs were occasioned directly as a consequence of the dilatory conduct of the Plaintiff's attorneys in not taking the trouble to acquaint themselves with the proper procedure as set out in the Act, Rules and practice directions of this Court. It is the Plaintiff's attorney that must, in my view, be liable for the costs occasioned by the raising of the special plea.

[11] I accordingly grant the following order:

The Plaintiff's attorney shall pay the costs *de bonis propriis* of the Second to Fourth Defendants occasioned by the special plea.



Y S MEER
Acting Judge President
Land Claims Court