IN THE LAND CLAIMS COURT OF SOUTH AFRICA
HELD AT RANDBURG

Case Number: LCC 17/2018

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED: YES / NO
17/8/2020
DATE SIGNATURE

Heard on: 30 July 2020

Delivered on:

In the matter between:

EMANTANJENI COMMUNITY	Applicant
And	
COMMISSION ON RESTITUTION OF LAND RIGHTS	First Respondent
MINISTER OF RURAL DEVELOPMENT AND LAND REFORM	Second Respondent
REGIONAL LAND CLAIMS COMMISSIONER, KWAZULU-NATAL	Third Respondent
CHIEF LAND CLAIMS COMMISSIONER	Fourth Respondent

EDWARD ALEXANDER CLOUSTON Fifth Respondent

DAVID EDWARD CLOUSTON Sixth Respondent

JUDGMENT

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[1] The Applicant seeks leave to appeal to the Supreme Court of Appeal against the whole of my judgment and order which I delivered on 8 November 2019: I made the following order:

> '1. The application is dismissed.
>
> 2. The application to strike out is granted and . . .
>
> 3. No order as to costs in line with the usual practice of this court
>
> 4. No fees or disbursements, including counsel's fees and disbursements, may be recovered by the Applicant, their attorneys or counsel, from the State under any legal aid regime provided for in section 29(4) of the Restitution of Land Rights Act, 22 of 1994, in respect of the proceedings before this Court under case number LCC 17/2018 following the filing of the answering affidavit.'

Leave to appeal is sought on the grounds contained in the application for leave to appeal.

[2] In terms of section 17(1)(a) of the Superior Courts Act 10 of 2013 leave to appeal may be granted when:

> '(i) the appeal would have a reasonable prospect of success; or
>
> (ii) there is some other compelling reason why the appeal should be held, including conflicting judgments on the matter under consideration.'

[3] The Supreme Court of Appeal in *Smith v S* 2012 (1) SACR 567 (SCA) at para [7] dealt with the issue of what constitutes reasonable prospects of success. The Supreme Court of Appeal held:

> '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 of success and that those prospects are not remote but have a realistic chance of succeeding. More is required to be established than 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 a sound, rational basis for the conclusion that there are prospects of success on appeal.'

[4] Simply put, there must not be just a mere possibility that another court, in this case the Supreme Court of Appeal, would not might, find differently. It is against this background that I consider the grounds of appeal raised by the Applicant. I deal with the grounds of appeal herein below.

[5] The Applicant submits that this court misdirected itself when it failed to appreciate that the relief sought centred on the interpretation of paragraph 2 of the consent order. At para [19] of my judgment I deal with that paragraph of the consent order. I repeat that it does not assist the Applicant. Paragraph 2 is a reservation of a right to claim equitable redress in the form of financial compensation. That this translates to the payment of financial compensation in the sum of R502 017 807 is inexplicable. Further, the text and language in the consent order is

clear and cannot support an interpretation that it contains an award of R502 017 807 by way of equitable relief as I have demonstrated in paras [27] to [29] of my judgment.

[6] The Applicant submits that the essence of its appeal is that this Court did not take into account the principle set out in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) ("*Endumeni*") when interpreting the consent order. Had I applied the principle set out in *Endumeni*, I would have arrived at a different conclusion, so the Applicant submits. I disagree. I re- read my judgment and did have regard to the principles set out in *Endumeni*. I do not intend repeating what I have already stated in my judgment. The Applicant submits that *Endumeni* rejected the parol evidence rule and my application of it amounts to a misdirection. The application of the parol evidence rule as the starting point when interpreting documents is reiterated in *KPMG Chartered Accountants (SA) v Securefin Ltd & another* 2009 (4) SA 399 (SCA) ("*KMPG*"). Counsel for the Respondents referred this Court to the case of *Jones v Road Accident Fund* 2020 (2) SA 83 (SCA) in which the Supreme Court of Appeal applied the principles in *KMPG* and correctly submitted that *KPMG* is still good law.

[7] The Applicant submits that section 30(1) of the Restitution of Land Rights Act, No. 22 of 1994 ("Restitution Act"), prevails over the parol evidence rule. Again, I have dealt with this submission in my judgment and nothing new has been raised. During argument, counsel for the Respondents correctly submitted that the parol evidence rule is not just a rule dealing with the admission of evidence but is a rule of substantive law. As I stated in my judgment, section 30(1) of the Restitution Act does not empower the Court to simply ignore the substantive law.

[8] The Applicant strongly submits that the sum of R502 017 807 amounts to equitable redress. I have thoroughly dealt with this issue in my judgment. The Applicant has not raised anything new and I therefore stand by my findings in the judgment, in particular the approach the Court must adopt when a party seeks financial compensation. The amount of R502 017 807 is the current market value, which the claimant is not entitled to in terms of the Constitutional Court decision *in Florence v Government of the Republic of South Africa* 2014 (6) SA 456 (CC) ("*Florence*"). Therefore this Court must have regard to the historical value spelt out in the various Constitutional Court judgments by which it is bound.

[9] The Applicant submits that Canca AJ expressly took into account the factors listed in section 33 of the Restitution Act in his order, which made the consent order an order of court. Neither in the application nor in Canca AJ's order is any reference made to the factors listed in section 33 of the Restitution Act.

[10] The Applicant further submitted that this court misdirected itself by failing to consider the valuation report which was handed up from the bar. Again, the valuation report deals with the current market value of the property with its improvements and flies in the face of the approach adopted by the Constitutional Court in *Florence*.

[11] The Applicant submits had this Court not adopted a strict adherence to the parol evidence rule instead of section 30 of the Restitution Act, it would have found that the Respondents were not entitled to the relief they were granted, including the order striking out certain portions of the Applicant's affidavit. Pertinently, it is argued that this Court would not have found that the application was ill advised and would not have made an order disallowing

the Applicant's fees or disbursements including the attorneys and counsels fees. By so doing this court misdirected itself.

[12] It is evident from my judgment that I applied a contextual approach when interpreting the consent order. Counsel for the Respondents correctly submit that no matter how much material was submitted neither paragraphs 1 and 2 of the consent order could ever bear the meaning contended for by the Applicant. I have given full justification for my order that the Applicant's legal team may not recover any fees or disbursements from the State under any legal aid regime in this case following the filing of the answering affidavit. Pertinently it was, or ought to have been, obvious to the Applicant's legal team that the application would not succeeded. The letter dated 19 June 2017 clearly showed that the attorney knew that there was no sound basis in law to launch the application.

[13] The Applicant submitted that had this Court applied its discretion properly and judiciously it would have found that there are exceptional circumstances warranting costs against the State Respondents on a scale as between attorney and client. There is no suggestion nor has the Applicant shown that this Court committed a 'demonstrable blunder' when it exercised its discretion by awarding the costs order that it has. (See *South African Broadcasting Corporation Ltd v National Director of Public Prosecutions and Others* [2006] ZACC 15 at para [46]). The Applicant's basis for seeking leave to appeal in respect of the cost order is premised on whether 'another court properly directing itself on the objective facts and the law, would have exercised its discretion differently'. The test postulated by the Applicant does not meet the threshold set out in *Minister of Rural Development and Land Reform and Another v Phillips* [2017] ZASCA 1. The test relied upon by the Applicant has been rejected as a basis

for interference with a decision of the Court. This also applies to cost orders granted on a punitive scale.

[14] In the alternative, the Applicant submits that this judgment is not only flawed in law but also in conflict with the decision in *Endumeni, Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA). This conflict constitutes compelling reasons why leave to appeal should be granted and it would be in the interests of justice. I disagree that my judgment is in conflict with the aforementioned judgments.

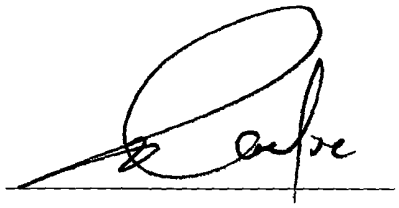
[15] The State Respondents seek costs on a punitive scale for the same reasons set out in my judgment. I stand by my judgment and I have dealt with all the issues raised in the appeal in my judgment.

[16] In my view there are no reasonable prospects of success in the appeal and neither is there any compelling reason to grant leave to appeal.

[17] In the result the following order is granted:

1. The application for leave to appeal is refused.

2. In line with this Court's practice, there is no order as to costs in respect of the appeal proceedings before this Court under case number LCC17/2018



Z CARELSE

Acting Judge

Land Claims Court

APPEARANCES

For the Applicant:

Adv G Shakoane SC

instructed by

Maseko Mbatha Inc

For the Respondent:

Adv A Dodson SC

instructed by

State Attorney, KwaZulu-Natal