



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 42/13
[2013] ZACC 21

In the matter between:

JOHN BUTI MATLADI on behalf of the MATLADI FAMILY Applicant

and

GREATER TUBATSE LOCAL MUNICIPALITY First Respondent

ANGLORAND HOLDINGS LTD Second Respondent

RESILIENT PROPERTIES (PTY) LTD Third Respondent

PEERMONT GLOBAL (TUBATSE) (PTY) LTD Fourth Respondent

GILLYFROST 56 (PTY) LTD Fifth Respondent

REGIONAL LAND CLAIMS COMMISSIONER:
LIMPOPO PROVINCE Sixth Respondent

GEDEELTE 19 VAN DIE PLAAS LEEUWVALLEI CC Seventh Respondent

ALL TITLE HOLDERS OF VARIOUS PORTIONS
OF LAND IN THE FARM LEEUWVALLEI 297 KT
(including HARRIOT PROPERTIES, FRANS
LABUSCHAGNE AND S MAKOFANE) Further Respondents

Decided on : 14 June 2013

JUDGMENT

THE COURT:

Introduction

[1] This is an application for leave to appeal the decision of the Supreme Court of Appeal¹ refusing to grant the applicant leave to appeal against the decision of the Land Claims Court.² The Supreme Court of Appeal did not furnish reasons beyond stating that the appeal bears no prospects of success. In effect, the application for leave to appeal in this Court is against the decision of the Land Claims Court.³

[2] The applicant is acting in his personal capacity and as a direct descendant of his late mother. Furthermore, he claims that he is acting as a representative of the Matladi family, comprising the applicant and four of his siblings.

¹ Order dated 15 March 2013, per Lewis JA and Plasket AJA in Supreme Court Appeal Case No: 030/13.

² *John Buti Matladi on behalf of the Matladi Family v Anglo Rand Holdings Ltd and Others* [2012] ZALCC 13.

³ *Mabaso v Law Society, Northern Provinces, and Another* [2004] ZACC 8; 2005 (2) SA 117 (CC); 2005 (2) BCLR 129 (CC).

Background

[3] The applicant's deceased mother lodged, in terms of the Restitution of Land Rights Act⁴ (Restitution Act), a claim for restitution of rights in the land known as Farm Leeuwvallei 297, Registration Division KT Limpopo (farm) within the jurisdiction of the Greater Tubatse Local Municipality (Municipality). Thereafter, on 30 March 2007, the Regional Land Claims Commissioner (Limpopo Commissioner) gave notice of the land claim in the *Government Gazette*.⁵

Land Claims Court

[4] Subsequently, the applicant brought an application in the Land Claims Court in terms of section 6(3)⁶ read together with section 11(7)⁷ of the Restitution Act for an

⁴ 22 of 1994.

⁵ Government Gazette 29744, Government Notice 385, 30 March 2007. Section 11 of the Restitution Act, relating to the procedure after lodgment of claim, 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 shall take steps to make it known in the district in which the land in question is situated.”

⁶ Section 6(3) of the Restitution Act provides:

“Where the regional land claims commissioner having jurisdiction or an interested party has reason to believe that the sale, exchange, donation, lease, subdivision, rezoning or development of land which may be the subject of any order of the Court, or in respect of which a person or community is entitled to claim restitution of a right in land, will defeat the achievement of the objects of this Act, he or she may—

- (a) after a claim has been lodged in respect of such land; and
- (b) after the owner of the land has been notified of such claim and referred to the provisions of this subsection, on reasonable notice to interested parties, apply to the Court for an interdict prohibiting the sale, exchange, donation, lease, subdivision, rezoning or development of the land, and the Court may, subject to such terms and conditions and for

interdict prohibiting any development on the farm and that the Municipality be restrained from authorising or allowing any development on the farm. The applicant argued that further development on the farm would prejudice the prospect of the farm being restored to him and his family. The Court dismissed the application.⁸ Subsequently, the applicant unsuccessfully applied for leave to appeal in the Land Claims Court against the decision.⁹

such period as it may determine, grant such an interdict or make any other order it deems fit.”

⁷ Section 11 of the Restitution Act, relating to the procedure after lodgement of claim, in relevant parts provides:

- “(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 in respect of—
 - (i) any sale, exchange, donation, lease, subdivision or rezoning of land and the Court is satisfied that such sale, exchange, donation, lease, 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 Chief Land Claims Commissioner;
 - (d) no claimant or other person may enter upon and occupy the land without the permission of the owner or lawful occupier.”

⁸ *John Buti Matladi on behalf of the Matladi Family v AngloRand Holdings Ltd and Others*, Case No 119/2010, Land Claims Court, 6 January 2012, unreported (*Matladi*).

⁹ See above n 2.

[5] The Municipality has been duly established in terms of the applicable laws on local government.¹⁰ The town Burgersfort is located within its jurisdiction. The Municipality opposed the application on the basis that restitution was not feasible because of the existing and continuing development on the farm on which the town of Burgersfort is also situated. At the time of the litigation in the Land Claims Court the second to the fourth and seventh respondents were owners of different portions of the farm but in the meantime townships have been proclaimed over their portions. The fifth respondent's interest is that it is involved in the development of townships proclaimed on different portions of the farm. Apart from the Commissioner, the other respondents also opposed the application.

[6] The Land Claims Court conducted an inspection on the farm to ascertain the extent of the developments and other topographic features on the farm. Thereafter, the Land Claims Court dismissed the application for an interdict on the ground that some of the procedural prerequisites set in section 6(3) and 11(7) of the Restitution Act had not been satisfied. The Court further directed that the Commissioner pay the costs of the respondents.

[7] On the merits of the interdict application, the Court held that the balance of convenience or fairness does not favour the granting of an order restraining further developments because if the land claim ultimately were to succeed, the applicant may be

¹⁰ Chapter 7 of the Constitution and the Local Government: Municipal Structures Act 117 of 1998.

granted an undeveloped or another piece of land or other equitable redress.¹¹ It went further to hold that; on the other hand, if the interdict were to be granted it would halt multi-million rand projects undertaken by the respondents and other private entities and stall the development of any land by or within the jurisdiction of the Municipality.¹² The planned development included the construction of roads, water and electricity reticulation and housing for thousands of the inhabitants of the Municipality.¹³

[8] Aggrieved by the decision, the applicant lodged an application for leave to appeal in the Supreme Court of Appeal. Leave was refused.

In this Court

[9] The applicant is impugning the order and reasoning of the Land Claims Court on several grounds. The first is that, in reaching its decision, the Land Claims Court relied, in part, on the Supreme Court of Appeal decision in *King Sabata*,¹⁴ which has since been set aside by this Court.¹⁵ The second is that the Land Claims Court should have granted the interdict because it was compulsory for the Municipality to apply for an order in terms of section 34(1) of the Restitution Act, but had not done so. Thus, goes the

¹¹ *Matladi* above n 8 at para 24.

¹² *Id.*

¹³ *Id.*

¹⁴ *King Sabata Dalindyebo Municipality and Others v KwaLindile Community and Others* [2012] ZASCA 96 (*King Sabata*).

¹⁵ *Kwalindile Community v King Sabata Dalindyebo Municipality and Others; Zimbane Community v King Sabata Dalindyebo Municipality and Others* [2013] ZACC 6; 2013 (5) BCLR 531 (CC) (*Kwalindile Community*).

contention, the Municipality cannot even begin to claim that the developments on the claimed land are in the public interest. Third, the applicant contends that the Court was wrong in holding that (a) he had not complied with the notice procedures required by section 6(3) to (7) of the Restitution Act; and (b) that the first to fourth respondents had given the Commissioner notice as required by section 11(7)(aA). Lastly, the applicant argues that the adverse costs order of the Supreme Court of Appeal against him must be set aside on the authority of *Biowatch*¹⁶ and *Walele*¹⁷.

[10] The Municipality and the other respondents, with the exception of the Commissioner, oppose the application in this Court. They have filed extensive opposing affidavits. The Commissioner has filed a notice to abide. Without leave of this Court, the applicant has filed a supplementary affidavit.¹⁸

Should leave to appeal be granted?

[11] It is trite law that this Court will grant leave to appeal only where two conditions are met. First, the matter must raise a constitutional issue. Second, it must be in the interests of justice to grant leave to appeal. Prospects of success of an appeal is an important, but not decisive factor whether leave to appeal should be granted.

¹⁶ *Biowatch Trust v Registrar Genetic Resources and Others* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC).

¹⁷ *Walele v City of Cape Town and Others* [2008] ZACC 11; 2008 (6) SA 129 (CC); 2008 (11) BCLR 1067 (CC).

¹⁸ Rule 11(3)(d) of the Rules of the Constitutional Court provides that “the Chief Justice may, when giving directions under subrule (4), permit the lodging of further affidavits.”

[12] A claim for the restitution of rights in land is an important constitutional issue.¹⁹ Here the applicant has moved the Court in terms of section 6(3) and 11(7) of the Restitution Act.²⁰ He seeks an interim interdict prohibiting the Municipality and other respondents from developing the farm pending the final determination of his claim for restitution. The relief the applicants seeks is, in an appropriate case, permissible.

[13] Despite the wording of section 6(3) of the Restitution Act that appears to limit the right to seek an interdict to the regional land claims commissioner, an interdict may be sought by an interested party such as a person claiming restoration of the land in question.²¹ There must be reason to believe that the development sought to be interdicted would frustrate the realisation of the objects of the Restitution Act. The section also prescribes notice requirements.

[14] Section 11(7) of the Restitution Act requires that once a regional land claim commissioner has published a notice in respect of a claim for restitution of land, no person may develop the land in question without having given the regional land claims commissioner a notice of his or her intention to do so. Where no notice of the

¹⁹ *Kwalindile Community* above n 15 at para 33.

²⁰ See above n 6 and n 7.

²¹ *Ga-Magashula Community Trust v Marsfontein and Others* 2001 (2) SA 945 (LCC) at para 43 and *Singh and Others v North Central and South Central Local Councils and Others* [1999] 1 All SA 350 (LCC) at 353f-i.

development was given and the court is satisfied that the development was not done in good faith, it “may grant any order it deems fit”.²²

[15] In dismissing the application, much of the reasoning of the Land Claims Court related to procedural requirements. After enquiring whether the respondents had given notice of the intended developments as required by section 11(7)(aA),²³ it held that the first to the fourth respondents in the Land Claims Court had in fact done so.²⁴ The Court further held that the applicant had not given notice to all interested parties as required by section 6(3).²⁵ Given the decision we reach on the merits of the appeal it is unnecessary to express an opinion on the factual findings related to notice requirements.

[16] Even if we were to assume in favour of the applicant on the notice requirements, the application for leave to appeal would still falter on the ground that the appeal has no prospect of success. The contentions of the applicant do not meet head on the reasoning of the Land Claims Court that the balance of convenience or fairness does not favour the applicant. The Land Claims Court was right that if the applicant were to succeed in establishing the right to restitution of the farm, he may be awarded a portion of the claimed land which has not yet been developed, or an alternative piece of land or compensation or other equitable redress. However, if the interdict were to be granted it

²² See above n 7.

²³ Id.

²⁴ See *Matladi* above n 8 at para 25.

²⁵ Id at para 21.

will have several deleterious consequences for the Municipality, the respondents and the residents living on the farm within the jurisdiction of the Municipality. The interdict would stop the Municipality from approving or undertaking any developments or even building-alteration plans within its area of control. Given its breadth, the interdict would prevent the Municipality from installing new water sewerage and electricity services and roads. It would thus have the effect of preventing the Municipality from fulfilling its constitutional obligations towards its residents.

[17] The respondents would also be prevented from undertaking any development and thereby halting multi-million rand work related to township development. The interdict he seeks is wide and covers the full extent of the farm and all possible developments of a private or public nature. This burgeoning town will have to go into slumber whilst the adjudication of the applicant's land claim slowly winds its way to finality.

[18] The applicant claims that the Municipality authorised the developments without complying with section 34(1) of the Restitution Act.²⁶ The Land Claims Court was correct in finding that the provision of section 34(1) does not support this line of argument. In line with the decision of this Court in *Kwalindile Community*,²⁷ the Land Claims Court correctly held that the section 34(1) provision is permissive, not

²⁶ Section 34(1) of the Restitution Act provides:

“Any national, provincial or local government body may, in respect of land which is owned by it or falls within its area of jurisdiction, make application to the Court for an order that the land in question or any rights in it shall not be restored to any claimant or prospective claimant.”

²⁷ Above n 15 at para 40.

peremptory.²⁸ The Municipality was therefore not obliged to make an application for a non-restoration order. However, its choice or failure to seek an order under section 34(1) cannot mean that an otherwise unmeritorious interdict ought to be allowed.

[19] The Municipality, unlike in *Kwalindile Community*, has set out the exact dimension, topography and main roads of the farm; its integrated development plan (IDP); its population and its expected growth; details of over 10 residential townships proclaimed on the farm before and after the Commissioner's *Gazette* and developments on each township and the extent of private and public funding.

[20] On the other hand, the applicant has not adduced facts to controvert all this. In a supplementary affidavit, he states blandly that some of the land on the farm is vacant. He misses the point. The IDP shows that all the land on the farm is integral to the expansion of Burgersfort and the rest of the area of the Municipality.

[21] The applicant makes much of this Court's decision in *Kwalindile Community*.²⁹ It is distinguishable. That decision dealt with section 34³⁰ and not sections 6(3) and 11(7) (aA) of the Restitution Act. Moreover, in *Kwalindile Community*, there was evidence of undeveloped land available for restoration.³¹

²⁸ Above n 2 at para 13.

²⁹ Above n 15.

³⁰ Id at para 34.

³¹ Id at para 55.

[22] Thus, the interdict was properly refused. It would therefore not be in the interests of justice to grant leave to appeal.

Costs

[23] The Supreme Court of Appeal granted costs against the applicant. He sought to vindicate a constitutional right. Moreover the statute permits, in a proper case, the relief of an interdict against development over land under a gazetted claim.³² However, there are no grounds to interfere with the discretion of that Court.

Order

[24] In the event, the following order is made:

1. Leave to appeal is refused.
2. There is no order as to costs.

³² See above n 6.

For the Applicant:

TM Serage Attorneys.

For the First Respondent:

Noko Maimela Attorneys.

For the Second to Fifth Respondent:

Steenekamp Broekman Inc.

For the Sixth Respondent:

The State Attorney, Pretoria.

For the Seventh Respondent:

Chanta Van der Walt Attorney.

For the Further Respondents:

TG Fine Attorneys.