

IN THE LAND CLAIMS COURT OF SOUTH AFRICA  
HELD AT RANDBURG

CASE NO: LCC 26/10

(1)	REPORTABLE: <del>YES</del> / NO
(2)	OF INTEREST TO OTHER JUDGES: <del>YES</del> / NO
(3)	REVISED.
30/6/2020 <i>[Signature]</i>	

In the matter between:

REGIONAL LAND CLAIMS COMMISSIONER

First Applicant

SEDICK SADIEN

Second Applicant

and

SOUTH AFRICAN RIDING FOR THE DISABLED ASSOCIATION Intervening Party

and

THE REGISTRAR OF DEEDS CAPE TOWN

Respondent

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JUDGMENT

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COWEN AJ

1. This application concerns the position of a lessee of state-owned land which is awarded as alternative land in order to restore dispossessed land in terms of the

Restitution of Land Rights Act 22 of 1994 (the Restitution Act). The land in issue is Erf 142 Constantia (the property).

2. South African Riding for the Disabled Association (SARDA) seeks relief in this application. SARDA is a non-profit organization that offers therapeutic horse riding to more than 200 school children and adults with disabilities including those from disadvantaged backgrounds. SARDA has occupied the property for some 38 years.
3. SARDA has been granted leave to intervene and is now a party to proceedings in terms of the Restitution Act between the Regional Land Claims Commissioner (the Commissioner) and Mr Sedick Sadien. Mr Sadien claimed restoration of land his ascendants lost as a result of discriminatory practices of the apartheid order. This court determined that claim in December 2012 and ordered the transfer of Erf 1783, Constantia to Mr Sadien (the initial restoration order). However, in circumstances where the awarded land (Erf 1783) was considerably smaller than the dispossessed land, this court then varied the initial restoration order and awarded Mr Sadien the property in issue in these proceedings, Erf 142, Constantia. This was pursuant to an order granted on 8 February 2013 by Mpshe AJ (the 8 February 2013 order).
4. SARDA had no notice of the proceedings which resulted in the 8 February 2013 order and thereafter sought leave to intervene. SARDA also sought, amongst other things, rescission of the initial restoration order as varied on 8 February 2013 in terms of section 35(11) of the Restitution Act. On 11 September 2015, this Court (per Mpshe AJ) dismissed SARDA's application for leave to intervene but made no order in respect of the rescission application. SARDA applied for leave to appeal. On 31 March 2016, Mpshe AJ dismissed SARDA's application for leave to appeal. SARDA

then sought leave to appeal to the Supreme Court of Appeal, which dismissed the application on 5 July 2016.<sup>1</sup>

5. SARDA then applied for leave to appeal to the Constitutional Court. The notice of motion seeks leave to appeal against ‘the judgment and order handed down by the Land Claims Court on 11 September 2015 in which the Applicant’s application for leave to intervene in Land Claims Court proceedings brought under case LCC 26/10 was dismissed with costs.’ In the founding affidavit SARDA’s deponent averred that the object of seeking leave to intervene was to apply for rescission of the amended order of 8 February 2013.

6. In directions dated 19 September 2016, the Chief Justice requested written submissions on whether SARDA has a direct or substantial interest in the amended order of the Land Claims Court dated 8 February 2013. The Constitutional Court decided the matter after receiving written submissions. In a unanimous judgment of Jaftha J delivered on 23 February 2017,<sup>2</sup> the Constitutional Court made the following order:

- ‘1. *Leave to appeal is granted.*
2. *The appeal is upheld.*
3. *The order of the Land Claims Court is set aside.*
4. *The South African Riding for the Disabled Association is allowed to intervene for the purposes of determining compensation payable to the Association.*

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<sup>1</sup> The order dismissing the application was made by Petse JA and Potterill AJA on the grounds that in their view there was no reasonable prospect of success and no other compelling reason why an appeal should be heard.

<sup>2</sup> Reported as *SA Riding for the Disabled Association v Regional Land Claims Commissioner and others* 2017(5) SA (CC).

5. *The matter is remitted to the Land Claims Court for determination of compensation payable to the South African Riding for the Disabled Association.*
7. *The Regional Land Claims Commission is ordered to pay costs in the Land Claims Court and this Court.'*
8. The Constitutional Court held that while SARDA *'had no interest in the subject-matter of the claim by the Sadiens and that the order issued by the Land Claims Court on 7 December 2012 affected none of its interests, the same cannot be said about the variation of 8 February 2013. The varied order had the effect of transferring Erf 142 to Mr Sedick Sadien without determination of compensation to the Association.'*<sup>3</sup>
9. In the application before me, the applicant seeks an order prohibiting the transfer of the property to Mr Sadien, pending the outcome of its claim for compensation alternatively an order that the order of 8 February 2013 be stayed pending the outcome of the compensation claim. The alternative relief is only claimed *'in the event that it is found that the order of this Court and under this case number, dated 8 February 2013, has not been set aside by the Constitutional Court under case number CCT 172/16'*.
10. The application was instituted on an urgent basis. Urgency arose in mid-November 2019, in circumstances where SARDA's attorney learnt informally that transfer of the property to the Sadiens was imminent and the State Attorney failed to provide an undertaking not to pass transfer until the issue of compensation had been settled. Thereafter, the Commissioner and Mr Sadien undertook to ensure that the property would not be transferred pending the outcome of these proceedings.

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<sup>3</sup> Paragraph 12.



11. The matter came before me on 18 March 2020. Mr Wagener appeared for SARDA.

Mr Jacobs SC (with Mr Krige) appeared for the Commission and Mr Joseph SC appeared for Mr Sadien. The matter was due to be heard in Cape Town. However, in order to curtail unnecessary domestic travel in the wake of the Covid-19 pandemic, an oral hearing was convened by SKYPE.<sup>4</sup> The parties agreed to proceeding in this way and steps were taken to ensure that the public or media, if interested, would have access to the SKYPE hearing. There was no such interest.

### **The primary relief**

12. The primary relief sought was sought solely on the basis that, properly understood, the effect of the Constitutional Court judgment was to 'set aside' the 8 February 2013 order. Importantly, although SARDA had made allegations to this effect in its affidavits, none of the parties ultimately contended during argument that there was any ambiguity in the Constitutional Court order. Had that been the contention, the question of this Court's jurisdiction to deal with the application would have arisen. I agree with the parties that there is no ambiguity in the Constitutional Court judgment on this issue.

13. The Constitutional Court did not set aside the 8 February 2013 order. Its order is quoted in paragraph 5 above. In paragraph 3 of its order, it set aside the Land Claims Court's order. This can only be a reference to the order of Mpshe AJ made on 11 September 2015. That order is found in paragraph 48 of the judgment of Mpshe AJ and reads:

*(a) Condonation for late filing of the application is granted.*

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<sup>4</sup> The need to curtail unnecessary domestic travel was by Directive of the Acting Judge President.

- (b) *Application to intervene is dismissed.*
- (c) *Intervening party is to pay costs including wasted costs occasioned by the withdrawal of the previous application on 30 July 2014. Regarding First Applicant, costs will be costs of two counsels.'*

14. It is quite clear from paragraph 42 of the judgment of Mpshe AJ that he did not decide the rescission application. He said: '*having made a finding on the intervening application, I find it unnecessary to attend to the rescission application.*' In turn, the notice of motion in the application for leave to appeal before the Constitutional Court refers only to the decision of Mphse AJ in which the application for leave to intervene was dismissed.

15. The Constitutional Court did not, in its order, dismiss the rescission application. Whatever the current status of the rescission application, which was not before the Constitutional Court and is not before me, the Constitutional Court's view on the matter appears from paragraphs 19 and 20 of Jaftha J's judgment:

*'[19] It is apparent from the papers that the Association misconceived the extent of its interest and sought the rescission of the varied order. As shown here it had no legal interest in the transfer of the land. Therefore, the Land Claims Court was right in holding that the Association had no direct and substantial interest in the property in question. But that Court was in error when it overlooked the statutory right to compensation conferred on a lawful occupier like the Association and that the transfer of the property was subject to the determination of just and equitable compensation. It follows that it was necessary to rescind the varied order. What was required was to allow the Association to intervene solely for the purpose of determining compensation.*

*[20] The fact that a final order had already been issued at the time of the application for intervention is immaterial. [Footnote 10]<sup>5</sup> ...'*

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<sup>5</sup> The first of three cases referred to in the footnote, *Sizwe Development*, arose during argument. The three cases are *Minister of Local Government and Land Tenure v Sizwe Development: In re Sizwe Development v Flagstaff Municipality* 1991(1) SA 677 (Tk) 679C; *Aquater (Pty) Ltd v Sacks* 1989(1) SA 56 (A) and *United Watch of Diamond Co v Disa Hotels* 1972(4) SA 409 (C).

16. In one of the cases the Constitutional Court referred to in footnote 10, *Sizwe Development*, the then Transkei High Court (per White J) granted two applicants (the Minister of Local Government and Auditor General of the Transkei) leave to intervene in a dispute between Sizwe and the municipality in which judgment had been granted by consent in favour of Sizwe for the balance owed under a service agreement. The applicants sought leave to intervene for purposes of setting aside the order already granted, which they alleged had been obtained by fraud. The Court granted leave to intervene but did not at that stage make any order regarding the setting aside of the order: the necessary action was still to be instituted. It was in that context that White J held that leave to intervene can still be granted even where a final order has been made *‘if the intervention is sought for some legitimate process which can be instituted subsequent to the issue of the judgment or final order.’*<sup>6</sup> The Constitutional Court’s reliance on *Sizwe Development* thus strengthens the conclusion that it did not consider itself seized with the rescission application.

17. The Constitutional Court’s reasoning was, moreover, informed by the interpretation it gave to section 35(9) of the Restitution Act which provides:

*“Any state-owned land which is held under a lease or similar arrangement shall be deemed to be in the possession of the State for the purposes of subsection (1)(a). Provided that, if the Court orders the restoration of a right in such land, the lawful occupier thereof shall be entitled to just and equitable compensation determined either by agreement or by the Court.”*

18. Specifically, the Constitutional Court held that *‘[w]hat this provision seeks to achieve is to mandate the Land Claims Court to order restoration of rights even where the state land is occupied by a third party. It accomplishes this objective by deeming that*

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<sup>6</sup> *Sizwe Development* at 679C.

*such land is in the possession of the State for purposes of restoration in terms of section 35(1). ...'*<sup>7</sup> It held further, at para 15, '*[s]ection 35(9) confers an entitlement upon lawful occupiers to have just and equitable compensation determined if transfer of the land they occupy is ordered. It is the determination of the right to compensation that gives rise to a direct and substantial interest.*' The Constitutional Court continued at paragraph 17: '*It cannot be gainsaid that the varied order adversely affected the Association's right to compensation. Section 35(9) authorizes transfer of the state land to a claimant without the involvement of the lawful occupier of the land in question. But the section safeguards the occupier's interests by conferring on it an entitlement to just and equitable compensation.*'

19. In light of the above, the only reasonable conclusion to draw is that the Constitutional Court did not set aside the 8 February 2013 order.

20. SARDA sought the primary relief on the basis that the Constitutional Court did set that order aside. I accordingly decline to grant it. In any event, as Mr Jacobs submitted, SARDA would face a difficulty establishing a *prima facie* right to ground the interdict sought regarding transfer because the Constitutional Court has already held that SARDA does not have a direct and substantial interest in the transfer of the property.

**The alternative relief: stay**

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<sup>7</sup> See para 14

21. The alternative relief sought is that I stay or suspend the 8 February 2013 order pending the determination of SARDA's compensation claim. This relief is sought only in the event that the Court concludes, as I have, that the Constitutional Court did not set aside the 8 February 2013 order.
22. The matter is now remitted to this Court to determine compensation payable to SARDA.
23. This Court has wide-ranging powers in respect of its orders and the timing of their implementation. Thus, in terms of section 35(2) of the Restitution Act, the Court has the power (in respect of its section 35(1) orders) to give any other directive as to how its orders are to be carried out, including the setting of time limits for the implementation of its orders (section 35(2)(e)).
24. In any event, in terms of Rule 65(3), the Court may, upon application by any party or of its own accord, suspend any order of the Court for a given period or until the happening of a particular event.<sup>8</sup>
25. These powers must be exercised having regard to all relevant circumstances which will include the factors in section 33 of the Restitution Act. In light thereof, the well-established requirements for the grant of interim interdicts – which inform the exercise of the High Court's discretion under Rule 45A – will be instructive, but not decisive.<sup>9</sup>

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<sup>8</sup> This rule may be compared to Rule 45A of the Uniform Rules of Court.

<sup>9</sup> *Setlogelo v Setlogelo* 1914 221 (AD) *Webster v Mitchell* 1948 (1) SA 1186 (W) *National Treasury v Opposition to Urban Tolling Alliance* 2012(6) SA 223 (CC).

26. In the circumstances of this case, I have concluded that justice and equity demand that I should grant an order that has the effect of suspending the implementation of the 8 February 2013 order until the issue of compensation to SARDA is determined by this Court. My reasons, informed both by the requirements of interim interdicts and the factors in section 33 of the Restitution Act follow.

27. First, during argument, the parties' representatives adopted divergent positions in respect of the current status of any lease agreement or other real right that SARDA has in respect of the property at this point. Where SARDA's representatives contended that the effect of the Constitutional Court judgment was that its real rights were extinguished by section 35(9), Mr Sadien's representatives contended that the principle of *huur gaat voor koop* still applied and any lease or common law lien would survive the transfer. In my view, it is not necessary or appropriate for me to decide this issue. The issue was not fully argued. Rather, limited submissions were advanced on my enquiry. To the extent necessary, the court dealing with compensation will be better placed to consider the divergent positions, factually and legally. For present purposes, the dispute even on this issue points in favour of maintaining the status quo pending determination of SARDA's compensation.

28. Second, sections 25(2) and (3) of the Constitution are, in my view, relevant. Section 25(2) provides:

*'Property may be expropriated only in terms of law of general application – (a) for a public purpose or in the public interest; and (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.'*

29. Section 25(3) provides:

*'The amount of compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances including (a) the current use of the property; (b) the history of the acquisition and use of the property; (c) the market value of the property; (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and (e) the purpose of the expropriation.'*

30. Compensation under section 35(9) must be just and equitable. It is difficult to see how a court can properly decide on the justice and equity of the amount, timing and manner of compensation if the affected party is placed in a position where he, she or it may have to vacate the property before the decision is taken.

31. The above two considerations (dealt with paragraphs 27 to 30) in turn provide the answer to the submission advanced on behalf of the Commission and Mr Sadien that SARDA should not be granted a stay because it has no right to protect, being an essential requirement for the grant of interim relief. More specifically, they say that they have no right to prevent transfer because the Constitutional Court has held that SARDA does not have an interest in the transfer of the property, only in compensation. This submission fails to appreciate, at least, the time-bound features of the right to compensation.

32. Third, although the issue was not before it, the Constitutional Court in this case made various findings that implicitly recognize the materiality of timing of awarding compensation. Thus in paragraph 6, the Court recognized that the fact that the 8 February 2013 order was made without SARDA's knowledge was at variance with section 35(9) itself which *'confers upon a lawful occupier of state land compensation determined by agreement or the Land Claims Court, if that Court orders restitution of*

*state land occupied by a lawful occupier.*'<sup>10</sup> In paragraph 17, the Court held that in the circumstances contemplated by section 35(9), '*entitlement to compensation is the pre-condition for authorizing transfer*' and in paragraph 19, it held that '*the transfer of the property was subject to the determination of just and equitable compensation.*'

33. Fourth, upon enquiry, Mr Joseph confirmed that but for court intervention, transfer (though not imminent) will be effected when this is possible and SARDA's departure from the property will be pursued. Ultimately, neither the Commission nor Mr Sadien were prepared to recognize any legitimate interest on the part of SARDA to have its claim for compensation determined before the property is transferred or vacant occupation procured. Indeed, it is apparent that notwithstanding the factual findings of the Constitutional Court in this very dispute, these parties may take issue with the lawfulness of SARDA's occupation. There is thus an appreciable risk that without court protection, the rights and interests asserted by SARDA will, if established in due course, be seriously harmed.

34. Fifth, I am not persuaded that Mr Sadien and his family will be unduly prejudiced financially or practically by some further delay in implementing the order. SARDA on the other hand will be so prejudiced. On the information before me, whatever the value of SARDA's claim, SARDA will probably require access to these monies in order to relocate and start afresh somewhere new. SARDA cannot afford to purchase property at a market rental or to pay a market related rental. While it is pursuing options to lease other state property, none are yet secured. It is a non-profit organization providing valuable services in the public interest. These should not be

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<sup>10</sup> At paragraph 6.



unduly disrupted. On the other hand, Mr Sadien has pleaded no specific financial prejudice to him or his family should there be a further delay nor did he plead that he requires immediate access for purposes of accommodating his family. Mr Sadien is the owner of other property in Plumstead in Cape Town.

35. Sixth, I have considered the prejudice that Mr Sadien and his family will suffer which, as pleaded and argued, is the prejudice that is attendant on delay in finalizing land claims generally. This must be acknowledged and given prominence as there is a strong public interest and constitutional imperative that past wrongs associated with dispossession of land under colonial and apartheid laws be redressed sooner rather than later.<sup>11</sup> However, there has already been a long delay in finalizing the matter which, on the information before me, cannot be attributed to SARDA which was not given notice prior to the grant of the 8 February 2013 order and which had to pursue protracted proceedings and ultimately approach the Constitutional Court in order to participate at all. Had SARDA been joined prior to the hearing that led to the 8 February 2013 order, its interests would already have been dealt with and these delays avoided. The information on the cause of delays since that order was granted is limited. However, what does stand out at this juncture is that it is both the Commission and Mr Sadien who have strenuously opposed this application rather than focused efforts on resolving the outstanding issue of compensation. Mr Sadien in his affidavits states that he wants SARDA to leave the property before compensation is assessed and dismisses SARDA's efforts to resolve its grievance as obstructive and dilatory, in my view without foundation.

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<sup>11</sup> Section 33(a) and (b) of the Restitution Act. *Re: Amaqamu Community Claim (Land Access Movement South Africa and others as amici curiae* 2017(3) SA 409 (LC) at para 4.

36. In these circumstances, I am of the view that a further delay to enable SARDA's compensation to be determined would not result in injustice provided that resolution of the issue of compensation is not unduly delayed.

37. Seventh, it is difficult to see what other remedy SARDA has, given it was not joined before the grant of the variation order.

38. In these circumstances, and in my view, justice and equity demand the suspension of the 8 February 2013 order to allow SARDA's compensation to be determined.

### **Further conduct**

39. During the course of the hearing, SARDA sought the Court's intervention on the further conduct of the proceedings to determine its compensation. The Rules of the Land Claims Court make provision for court managed process which in turn cater for the considerations I refer to in paragraphs 35 and 36 above. However, at this stage it is desirable that the parties meet in order to seek resolution of the issue of just and equitable compensation. If they are unable to do so, the matter may be referred for a conference in terms of Rule 30 of the Rules of the Land Claims Court. As Mr Sadien and his family stand to be prejudiced by delay, I have made an order that authorizes Mr Sadien to approach the court by 7 August 2020 to convene such a conference should no agreement be reached by 31 July 2020.

### **Application in terms of Rule 32**

40. The Regional Land Claim's Commissioner has issued an application in terms of Rule 32(5)(b)(i) which is related to SARDA's claim for compensation and which was also set down before me. The application, dated 31 May 2020, is to set aside SARDA's notice of motion and statement of action dated 1 March 2019 which were purportedly

filed in response to an order of Makhanya J of 8 February 2019 upholding an exception of the Commission and granting SARDA leave to amend these documents. The application was set down before me on the basis that it was unopposed. However, SARDA does oppose it and accordingly it should be postponed *sine die*. Should the parties be unable to resolve the underlying dispute, the further conduct of this application may appropriately be placed on the agenda for any Rule 30 conference that may need to be convened as foreshadowed above. It may then be expeditiously dealt with to the extent still necessary.

### **Costs**

41. The usual approach in this court is that each party carry its own costs. There is no reason in this application to depart from this approach.

### **Order**

42. I make the following order:

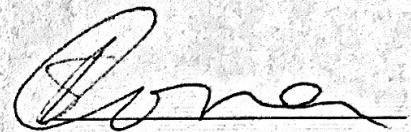
42.1. The order of this court of 7 December 2012 as varied on 8 February 2013 is suspended pending determination of SARDA's compensation by agreement or by this Court.

42.2. The Regional Land Claims Commissioner's application in terms of Rule 32(5)(b)(i) dated 31 May 2010 is postponed *sine die*.

42.3. The Parties shall meet by no later than 31 July 2020 to reach agreement on the issue of just and equitable compensation payable to SARDA.

42.4. In the event that the parties are unable to reach agreement on just and equitable compensation by 31 July 2020, the second applicant, Mr Sadien, shall, by 7 August 2020, file and serve a detailed practice note and thereafter liaise with the parties and notify the registrar of a suitable date for a conference to be convened in terms of Rule 30 of the Rules of the Land Claims Court. Should the second applicant fail to do so, these steps may be taken by the first applicant or the intervening party.

42.5. The parties shall pay their own costs to date.



**COWEN AJ**

**ACTING JUDGE**

**LAND CLAIMS COURT**

#### **APPEARANCES**

##### **For the First Applicant**

Adv D Jacobs SC

*with him*

Adv J Krige

*instructed by*

State Attorney, Western Cape

##### **For the Second Applicant**

Adv B Joseph

*instructed by*

Ighsaan Sadien Attorneys

##### **For the Intervening Party**

Mr M Wagener

*instructed by*

Mr M Wagener