




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

**CASE NUMBER: LCC 114/2021**

<b>DELETE WHICHEVER IS NOT APPLICABLE</b>	
(1) REPORTABLE: YES / NO	
(2) OF INTEREST TO OTHER JUDGES: YES / NO	
(3) REVISED: YES / NO	
30/7/2021 DATE	 SIGNATURE

In the matter between:

**BA PHALABORWA BA GA SELWANE**

Applicant

and

**MAJEJE TRADITIONAL AUTHORITY**

First Respondent

(This judgment is handed down electronically by circulation to the parties' legal representatives by email. The date for hand-down is deemed to be 30 July 2021.)

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**JUDGMENT**

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**MIA J**

- [1] This is an urgent application where the applicant seeks the following effective relief:

- "2. Pending the finalisation of the land claims lodged by the applicant with the Land Claims Commissioner in respect of the subject property which appear in the Government Gazette annexed hereto marked "FAI", and or pending finalisation of the application lodged with this Honourable Court in respect of the land claims dispute that exists between the applicant and the first respondent before this Honourable Court, it is ordered that:
  - 2.1 the first respondent or any person acting on behalf of the first respondent or on its stead and or acting in concert with the first respondent or any other person thereto, is/are interdicted and or restrained from selling, exchanging, donating, leasing, subdividing, rezoning or developing and/or clearing vegetation, causing deforestation, digging trenches, and/or building, and/or constructing any structure of whatever nature, including a citrus processing plant under Majeje Citrus Development Project in the land and/or farm described as Portions 7,8 & 9 of the farm Waterbok 721, Registration Division LT, situated in the Phalaborwa district area, Limpopo Province;
  - 2.2 directing the first respondent or any person acting on first respondent's behalf or in concert with the first respondent to take steps to rehabilitate
  - 3. the site of portions of 7, 8 and 9 of farm Waterbok 721, registration division LT, situated in the Phalaborwa area.
- 3. Costs against the first respondent on the scale of attorney and client and any other respondent opposing this application."

- [2] The deponent to the application is an executive committee of the Ba-Phalaborwa Ba Ga Selwane Community Property Association(CPA). The applicant is the Ba-Phalaborwa Ba Ga Selwane tribe (the Selwane tribe) which lodged several land claims with the land claims commissioner. The applicant lodged a claim in respect of several properties. The land claims commissioner successfully processed portions 4,5,6 of the farm Waterbok(721LT), the farm Khondowe(741LT) and Portion 6 of the farm Nondwene (720LT), which were transferred to the applicants in 2008. A CPA was established for the purpose of taking transfer of the properties. The Selwane tribe await finalisation of their claim in respect of the remaining thirteen farms on Waterbok.

- [3] According to the applicants, it was resolved at a meeting on 9 December 2007 convened by the Regional Land Claims Commissioner under s 10(4) of the Restitution of Land Rights Act 22 of 1994( Restitution Act), that CPA would be the sole representative of the applicant in all legal matters. Thus, they contend the CPA represents the community and has the power to act in its interest and public interest. The minute of that meeting reflecting the decision alternately, the resolution of the community was not attached. It is unclear whether the community took the decision and whether it was adequately represented by members in attendance to take such a decision.
- [4] The first respondent is the Majeje Tribal Authority (the Majeje tribe), a traditional council established and recognised for the traditional community in terms of the Traditional Leadership and Governance Framework Act 41 of 2003 (the Framework Act). The third respondent is the Regional Land Claims Commissioner, who is responsible for receiving and processing land claims in terms of the Restitution Act. The third respondent is the Chief Land Claims Commissioner. The fourth respondent is the MEC: Department of Agriculture, Land Reform, Limpopo. The fifth respondent is the Minister of Agriculture and Land Reform. The applicant did not seek relief against the State respondents, namely the second to the fifth respondents.
- [5] The applicants seek to interdict the second respondent from clearing trees, vegetation, indigenous plants on the portion of the farm situated in the district of Phalaborwa, Limpopo Province described as portions 7,8,9 of the farm Waterbok 721, registration division LT. According to the applicants, this land is the subject of a pending land claim. For this reason, the applicants require this court to deal with the matter urgently to prevent harm being caused by the first respondents to the above-mentioned portion of land, which is the subject of a pending claim and which the first respondents have also laid claim to. The matter has been referred to the court by the RLCC for determination and is awaiting finalisation.
- [6] The first respondents oppose the relief sought as it contends that the relief sought in paragraph 2.2 is couched as a final interdict for which no case has been made out. In addition, the first respondents assert that they are the *de facto*

owner of the property of the contested property. Its ownership has been known since the first respondent filed an objection to the applicant's land claim in 2007 in response to their claim filed in LCC74/2004. The first respondents contended that portions 7,8, and 9 of the farm Waterbok form part of the landholding of the Majeje Tribe. These properties are remote rural areas where the community are poor and unemployed, but the land is valuable. In any event, the first respondents contend the applicant has been aware since the meeting with the RLCC held on 6 March 2019 that the Selwane Tribe's claim to Waterbok had been relinquished. According to the first respondents, the farm is no longer subject to a pending land claim, and s 11(7) of the Restitution Act was no longer applicable when the development commenced. The RLCC ought to have published this in the gazette. In view of the delays and the matter having been referred to court already, it was possible that the RLCC did not do so.

- [7] The first respondents, as the *de facto* owner, is developing the three portions of the farm Waterbok, which previously had established citrus orchards. Invader species have since overgrown the orchards. This is being cleared to allow the re-establishment of the orchards. The Majeje Citrus Development Project forms part of a broader government agricultural development plan called the GRASP Agricultural Master Plan. It has been in planning phases through the Limpopo Provincial Government since 2016. Funding for the project was obtained through the Motsepe Foundation for the first phase in the amount of thirty million. The project requirement is that a proven successful commercial farmer be involved and a traditional council who benefits from the development that must be economically viable. Thus Majeje Citrus (Pty) Ltd was formed as one part and held forty per cent of the shares, the Komati Group hold fifty per cent of the shares, and an experienced economist holds ten per cent through his company and is not a party to the application.
- [8] The issues to be determined were:
  - 8.1 Whether the applicant had satisfied the requirements for the relief requested, namely the granting of an interdict on an urgent basis.
- [9] Section 11(7) of the Restitution Act 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 re-zoning of land and the Court is satisfied that such sale, exchange, donation, lease, subdivision or re-zoning was not done in good faith, the Court may set aside such sale, exchange, donation, lease, subdivision or re-zoning 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."

[10] Section 6(3) of the Restitution Act provides as follows:

- "(3) Where the regional land claims commissioner having jurisdiction or and interested party has reason to believe that the sale, exchange, donation, lease, subdivision, re-zoning 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, re-zoning or development of the land, and the Court may, subject to such terms and conditions and for such period as it may determine, grant such an interdict or make any other order it deems fit."

## URGENCY

[11] Counsel for the applicant submitted that the matter was inherently urgent. This was so he argued as the area was being cleared of forestation and bush whilst the property dispute remained unresolved. Furthermore, he argued that the development of the land by the first respondent might not be in accordance with the applicant's plans for the land if they were successful in their claim. The result, therefore, was that they would suffer irreparable harm. Counsel for the first respondents argued the contrary position that the matter was not urgent. Furthermore, he submitted that based on the first respondent's reliance on the applicant's relinquishment of the claim to the land following Professor Delius' report, the applicant's had no claim to the land and would not suffer irreparable harm. Considering that the land clearing was ongoing, I was satisfied to consider the matter as sufficiently urgent to consider the remainder of the submissions proffered by counsel.

[12] The applicant seeks an interim interdict to prevent the first respondents from clearing the land and re-establishing or restoring the land to its position as a citrus orchard. In considering whether an interim interdict may be granted, I have considered the six requirements set out in *Singh and others v North Central and South Central Local Councils and others* [1999] 1 All SA 350 (LCC) which are set out at paragraph [108] as follows:

"[108] Applicants seek an interdict preventing further development by the first and second respondents on the land claimed by the applicants. The interdict is sought under section 6(3) of the Act.<sup>64</sup> In the context of this case, that section requires the following before the court will grant an interdict:

- (i) The applicant must be an interested party.
- (ii) He or she must have reason to believe that the development sought to be interdicted will defeat the achievement of the objects of the Act.
- (iii) A claim must have been lodged in respect of the land concerned.
- (iv) The owner of the land must have been notified of the land claim and of the provisions of section 6(3).
- (v) Reasonable notice must have been given to all interested parties.

- (vi) The court must exercise a judicial discretion and decide whether it should grant an interdict or any other form of relief in the particular circumstances of the case. This requirement follows from the use of the word "may". In exercising its discretion, the court would need to consider those factors listed in section 33 of the Act which are relevant."

[13] Counsel for the applicants referred to the photographs and indicated the extent of land that was being cleared. He argued that this made the matter urgent as the applicant's claim was pending, and it would suffer harm as the foliage was being removed. This also had implications for restitution as the first respondents would seek compensation for the developed land. He noted that the matter had been referred to the court by the RLCC, but the delay in finalising the claim has resulted in the applicants having to approach this court for relief on an urgent basis. This was so as the first respondents had not given notice in terms of s 11(2) of the Restitution Act of their intention to develop the land. If they had given notice, there would have been no need to approach this court as there would have been consultations. He argued furthermore, that the first respondent was engaging with other state departments to develop the property, but this did not preclude them from giving the required notice in terms of s 11(2) of the Restitution Act. The delay in finalising the claim had compelled them to approach this court on an urgent basis.

[14] Counsel for the respondent questioned the *locus standi* of the applicant to launch the application. He submitted that the annexure attached did not give the CPA authority to act on behalf of the claimant community. A perusal of the document did not indicate whether the CPA was the applicant or the claimant community. In addition to the aforementioned, he argued that the merits of the claim were defective as the recent historical report filed with the RLCC indicated that the Selwane Tribe did not occupy the land. At that meeting held with the RLCC, the Selwane Tribe relinquished their claim to the land. He continued, therefore, the Majeje Tribe, who had always been the owners of the land and did not need to inform the RLCC that they intended to develop

the land in terms of s 11(2) of the Restitution Act. He also raised the issue of non-joinder as the Limpopo Department of Economic Development, Environment and Tourism had an interest in the matter as it has approved the development of the project. The interdict will affect this Department's efforts in developing the region and affect their project directly.

[15] The application must satisfy the six grounds in s 6(3) of the Restitution Act. I turn now to consider the grounds in issue. The first ground the applicants must prove is whether they have an interest. The applicants have a claim pending in respect of the land. This claim was disputed by the first respondents, who relied on the meeting held on 6 March 2019 with the RLCC when the Selwane Tribe's claim to Waterbok had been relinquished upon consideration of the reports filed by Professor Delius in 2016. The first respondents hold the view that the farm is no longer subject to a pending land claim in terms of s 11(7) of the Restitution Act even though the RLCC has not published the change in circumstances regarding the claimed land in the gazette. Even though the RLCC has not filed a gazette reflecting the changed position, the applicant's claim is pending before this court under case LCC 74/2004. The finalisation of the claims under LCC 74/2004 will determine the Selwane Tribe's claim, and until then, despite the alleged relinquishment of the claim, the applicants may be an interested party.

[16] On the second ground, the applicants must satisfy the court that the development sought to be interdicted will defeat the achievement of the objects of the Act. The applicants have not made an averment in their founding affidavit stating that the development will defeat the objects of the Act. The court cannot conclude that the Majeje are developing the land in bad faith. In *Singh* above, the court stated at paragraph [111]:

"It is met if the applicants have reason to believe that the development in this case will defeat the objects of the Act. The applicants' say-so (as expressed in their letter to the National Housing Board) that the development in this case will defeat the objects of the Act, is not sufficient compliance with this requirement. The court must be satisfied that the applicants' belief is valid and reasonable. It is obvious that a primary object



of the Act is to provide restitution to persons who lost rights in land under racially discriminatory laws or as a result of racially discriminatory practices before this country's democratisation. However it is equally clear that an object of the Act is to achieve restitution in a way which is in harmony with the public interest, including the need for the development of the country as a whole. Thus restitution may take a variety of forms, including awards other than the physical restoration of the precise rights in land which were originally lost. Section 34 of the Act, the very section in terms of which the court made an order in relation to the land concerned, specifically envisages the exclusion of the restoration option where this is in the public interest. The factors which the court must take into account in deciding any matter in terms of section 33 also point to a balancing of the need to address the injustices of the past in relation to land rights, on the one hand, with the broader public interest and the need for development, on the other.

[17] In the absence of the averment that the development sought to be interdicted will defeat the achievement of the objects of the Act, the applicants assert that the clearing of the land will cause irreparable harm. However, there is no evidence to indicate that the trees and bush being removed are not invader species being removed to allow the orchards to be re-established, as stated by the first respondents. The development of the land does not lead to the conclusion of irreparable harm or that the development sought to be interdicted will defeat the achievement of the objects of the Act.

[18] The view expressed in *Singh* above is still applicable and more so now that:

“...it is equally clear that an object of the Act is to achieve restitution in a way which is in harmony with the public interest, including the need for the development of the country as a whole. Thus restitution may take a variety of forms, including awards other than the physical restoration of the precise rights in land which were originally lost. Section 34 of the Act, the very section in terms of which the court made an order in relation to the land concerned, specifically envisages the exclusion of the restoration option where this is in the public interest. The factors which the court must take into account in deciding any matter in terms of section 33 also point to a balancing of the need to address the injustices of the past in relation to

land rights, on the one hand, with the broader public interest and the need for development, on the other.

- [19] In *Matladi obo the Matladi Family v Greater Tubatse Local Municipality and others* 2013 (8) BCLR 909 CC the Court expressed the view as follows:

"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 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.

- [20] The next issue of relevance is that the applicants ought to have given reasonable notice to all interested parties. The notices sent to the parties did not refer to s 6(3) of the Restitution Act, and reasonable notice was not given that the applicants intended to launch an application in terms of s 6(3).
- [21] Having regard to the factors listed in section 33 of the Restitution Act, the outstanding claim under case LCC 74/ 2004 is still pending. The respondents' statement that the land was cultivated as a citrus orchard indicates the historical use of the land. The development envisaged seeks to restore the previous use. If the applicants are ultimately successful, the options that may be considered include restoration or equitable redress in the form of financial compensation. Considering all the factors above, the

balance of convenience does not favour the applicants who have not shown that it will suffer irreparable harm.

- [22] The issue of costs is normally dealt with having regard to the unique function of this court. In similar matters, the court usually refrained from making an order. The parties are usually reliant on legal- aid or pro-bono legal assistance. Both parties have been historically disadvantaged by racially discriminatory laws and practices. However, the applicants have been successful in a number of their claims and are commercially active and thriving. The first respondents equally are owners of substantial tracts of land. In the present matter, there is no reason why a cost order should not follow.

#### **ORDER**

- [23] For the reasons above, I grant the following order:

1. The application is dismissed.
2. The applicants shall pay the costs of the application.

A handwritten signature in black ink, consisting of a large, stylized 'M' followed by a 'J'.

**Mia J**

Acting Judge :

Land Claims Court

**APPEARANCES**

For the Applicants:	Adv WR Mokhari SC
	Adv N Ramakgoakgoa
Instructed by	Raphesu JL Attorneys

For the First Respondents:	Adv H Havenga SC
Instructed by	Joubert and May Attorneys
Hearing	7 July 2021
Judgment	30 July 2021