IN THE LAND CLAIMS COURT OF SOUTH AFRICA
HELD AT RANDBURG

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

28/4/2022

LCC42/2022C

In the matter between:

ZIMBANE LAND CLAIM COMMITTEE	Applicant
and	
EASTERN CAPE DEVELOPMENT CORPORATION	First Respondent
REGIONAL LAND CLAIMS COMMISSIONER	Second Respondent
KING SABATA DALINDYEBO MUNICIPALITY	Third Respondent

JUDGMENT

COWEN J

Introduction

1. The Applicant is the Zimbane Land Claim Committee. It represents the Zimbane Community, which lodged a land claim under the Restitution of Land Rights Act 22 of 1994 (the Restitution Act). Amongst the relief sought is restoration of various subdivided portions of property in Mthatha originally described as Erf 912. Notice of the land claim was published in terms of section 11 of the Restitution Act in the government gazette. In the proceedings before me, instituted on an urgent basis, the Applicant seeks to interdict the First Respondent from selling eleven erven under land claim (being subdivided portions of Erf 912).

2. The First Respondent, the Eastern Cape Development Corporation, is the current owner of these eleven erven in the Eastern Cape. The properties are described in Annexure I to the founding affidavit.[1] The Second Respondent is the Regional Land Claims Commissioner (the Regional Commissioner) and the Third Respondent is the King Sabata Dalindyebo Municipality (the Municipality). Only the First Respondent is opposing and participating in these proceedings.

3. The Applicant instituted these proceedings on 28 March 2022. On that date, the Acting Judge President granted a rule *nisi* calling upon the Respondents to show cause on 20 April 2022 why an order should not be granted interdicting and restraining the First Respondent, its agent or anyone acting on its behalf from proceeding with the sale by auction of the properties referred to Annexure I. The

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[1] While reference should be made to Annexure I, the properties are broadly described as follows (replacing Umtata with Mthatha): Erf 2821, 905 Indwe Street, Southernwood, Mthatha; Erf 2873, 39 Finch Street, Southernwood, Mthatha; Erf 3005 Mthatha, Extension 9; Erf 3006 Mthatha Extension 9; Erf 3007 Mthatha Extension 9; Erf 12171, 11A Ukhozi Street, Southernwood, Mthatha; Erf 12191 Mthatha Extension 44; Erf 12296, 7 Starling Crescent, Southernwood, Mthatha; Erf 12311, Mthatha Extension 46 and Erf 12322 Mthatha Extension 46.

sale of the properties was restrained pending the return date. The Acting Judge President also issued directions regulating the further conduct of the proceedings. The matter came before me on 20 April 2022. Mr Krige appeared for the Applicant and Mr Molotsi SC (with him Mr Xozwa) appeared for the First Respondent. After hearing the parties, I reserved judgment and extended the interim interdict pending the delivery of this judgment.

4. The hearing of the land claim is due to commence before Judge Spilg on 9 May 2022 and is set down for three weeks. During the course of the proceedings before me, it became apparent that the First Respondent is not yet a party. Mr Krige undertook to raise the issue promptly with the Presiding Judge.

Background

5. The matter has a long history, one chapter of which features here. In 2008, the Municipality (the Third Respondent) instituted proceedings in this Court in terms of section 34 of the Restitution Act in respect of property in Mthatha including subdivided portions of Erf 912. Section 34 of the Restitution Act provides that

> "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."

6. The section 34 proceedings culminated in the Constitutional Court,[2] which ultimately overturned a non-restoration order that had been granted in this Court. In a unanimous decision (per Moseneke J), the Constitutional Court held that:

> "The primary object of section 34 is to pre-empt land restoration that threatens or prejudices public interest. The object accords with the statute's objective to achieve equitable redress whilst avoiding major social disruption which might substantially prejudice the public interest."[3]

7. When a Court considers a section 34 application, it must be cognisant of the primacy of restoration of land in the scheme for restitution set out in the Restitution Act. In this regard, the Constitutional Court held:

> "Whilst a claimant for restitution of land rights is not always entitled to restoration of rights in the land claimed, restoration of the land claimed must enjoy primacy when feasible. That much is clear from the scheme of the Act and relevant jurisprudence. A non-restoration order is invasive of restitution rights, and for that reason, the statute requires that it may be made only when the threshold requirements have been met. (Footnotes omitted.)"[4]

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[2] Kwalindile Community v King Sabata Dalinyebo Municipality and Others; Zimbane Community v King Sabata Dalinyebo Municipality and Others [2013] ZACC 6; 2013 (5) BCLR 531 (CC); 2013 (6) SA 193 (CC).
[3] At para [41].
[4] At para [43].

8. On the affidavits before me, the Applicant emphasises that it seeks restoration of the eleven portions of land that the First Respondent now intends to sell by auction. They say that this is undeveloped and vacant land and point out that it was because some of the land that forms part of Erf 912 is undeveloped and vacant land that the Constitutional Court overturned the non-restoration order that had been granted in respect of the entire erf. They contend that this Court must determine whether the eleven portions of land should be restored to the Applicant during the proceedings due to commence shortly before Judge Spilg. If they are, the Applicant wishes to develop the properties themselves. The right to claim restoration will be irreparably harmed, they say, by the imminent sale of the properties to private parties who will presumably wish to develop the properties and will purchase at market value.

9. In this regard, reference is made in the founding affidavit to various related findings of the Constitutional Court. Mr Molotso submitted during the hearing before me that the properties in question are in fact developed and for that reason non-restorable, a status that has been confirmed to the First Respondent by the Regional Commissioner. I return to this below.

Events leading to these proceedings

10. The salient facts leading to the institution of these proceedings are common cause. That a sale of the First Respondent's eleven properties by auction was imminent – due to take place on 5 March 2022 – came to the attention of the Applicant through its attorney. On 17 and 18 February 2022, the Applicant's attorney then wrote to the auctioneers (Riley Auctioneers) and the First Respondent, respectively. In the letters, the Applicant's attorney informed the First Respondent that the properties

were under land claim and drew attention to the fact that under the Restitution Act, no property under claim may be sold without giving notice to the Regional Commissioner and interdict proceedings were threatened should no proof of notice be furnished.

11. This is a reference to section 11(7)(aA) of the Restitution and it is convenient to refer now to its provisions, which state that once a notice has been published in respect of land,

> " (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;
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> (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; ..."

12. The Second Respondent, which had been alerted to the correspondence of 17 February 2022, replied to the Applicant's attorney that same day indicating that according to "the set plan which is before the Land Claims Court" in the land claims, they have determined that the properties to be auctioned are "deemed as non-restorable". The Applicant was advised further that the Regional Commissioner had requested the First Respondent to comply with section 11(7) of the Restitution Act "before they proceed with the sale of the properties." Moreover, in e-mail correspondence of 17 February 2022, the Regional Commissioner advised the

Applicant that correspondence would be addressed to the First Respondent to demand that the sale be stopped and notice be given under section 11(7) of the Restitution Act.

13. On 23 February 2022, the First Respondent wrote to the Regional Commissioner and in doing so gave notice in terms of section 11(7) of the Restitution Act of its intention to sell the eleven properties. The letter concluded:

> "We will as such withdraw the above 11 listed properties from the auction to be held on the 5th March 2022 and will include them in a new process after the lapse of the 30 day period in compliance with s11(7) of the [Restitution Act]."

14. On 24 February 2022, the Applicant wrote again to Riley Auctioneers and the First Respondent advising that the Applicant is opposed to the intended sale because, amongst other reasons, the properties are vacant and undeveloped and they seek restoration of them in the land claim. The letter concludes as follows:

> "We call upon the Corporation to stop the intended sale of the properties it given notice to sell. If by noon on the 25th March 2022 you have not indicated that you will not sell those properties our instructions are to proceed and launch an application to the Land Claims Court for an appropriate interdict plus costs."

15. No such intention was indicated and these proceedings were then instituted on the 28th March 2022.

The relief sought and the requirements for interim relief

16. The relief that is sought in the notice of motion is cast as final relief interdicting the sale of the properties. However, during the course of argument Mr Krige conceded that the relief sought would need to be interim in nature pending the finalisation of whether the properties are restorable to the Applicant, and, if so, transferred to it. I adjudicate this application on this basis, and thus as an application for interim not final relief.

17. The requirements for interim relief in this Court are well-established,[5] being

> "a) that the right which is the subject matter of the main action and which the applicant seeks to protect is clear or, if not clear, is *prima facie* established though open to some doubt;
> b) that, if the right is only *prima facie* established, there is a well-grounded apprehension of irreparable harm to the applicant if the interim interdict is not granted and he ultimately succeeds in establishing his right (it is implicit in this requirement that the harm apprehended must be the consequences of an actual or threatened interference with the right referred to in (a);
> c) that the balance of convenience favours the granting of interim relief; and
> d) that the Applicant has no other remedy."

18. In applying these principles this Court follows the approach expounded in *American Cyanamid Co v Ethican Ltd.*[6] That approach departs from a rigid approach of a 'strong prima facie right' and emphasises flexibility and the importance of the balance of convenience criterion. The Court must be satisfied that the claim is not frivolous or vexatious, in other words, that there is a serious question to be tried. In this regard, the House or Lords held in *American Cyanamid*:

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[5] Chief Nchabeleng v Chief Phasha 1998(3) SA 578 at paras [6] to [18].
[6] [1975] 1 All ER 504 (HL).

"It is no part of the Court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial."[7]

19. As this Court held in *Macassar Land Claims Committee v Maccsand CC*[8]:

"According to this approach, where the grant of the interim interdict results in significant inconvenience for the respondent, a higher standard of proof is required of the applicant under the 'serious question to be tried' criterion. Conversely, where the inconvenience to the respondent is insignificant, a lesser standard of proof may be accepted."

20. The Applicant seeks relief relying on the common law right to seek relief by way of interim interdict. The Applicant does not expressly refer in its founding affidavit, nor in the correspondence leading to the institution of these proceedings, to the provisions of section 6(3) of the Restitution Act.[9] During the course of proceedings, I requested the parties to address me on whether an interested party seeking to interdict a sale of land under claim is obliged to rely on section 6(3). However, in

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[7] At p 510.
[8] (LCC37/03) [2003] ZALCC 21 (22 September 2003) at page 14.
[9] Section 6(3) provides as follows:

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

the view that I take of the matter, it is not necessary for me to resolve that question. It does not admit of obvious answer, and I am satisfied on the facts before me that the Applicant would be entitled to the relief I grant even if the answer is in the affirmative, albeit on a finding of substantial compliance.[10]

Urgency

21. Mr Molotsi submitted that the application is not urgent and that any urgency is self-created. I disagree and am satisfied that the application is indeed urgent. In this regard, the application was instituted on 28 March 2022 in circumstances where the First Respondent declined to confirm that the sale would not proceed. Any legal protection against a sale afforded by section 11(7)(aA) itself would and did lapse by 8 April 2022. In the answering affidavit, the First Respondent pertinently did not disavow any intention to sell stating rather that at this stage and following the withdrawal of the eleven properties from the 5 March 2022 auction, the First Respondent "has not yet issued [a] new instruction to the Auctioneers to advertise auction of the properties as listed in the Government Gazette." That may be so, but read with the letter of 23 February 2022, the intention to sell following the lapse of the 30 day notice period required by section 11(7)(aA) cannot has not been refuted. It would have been an easy matter for the First Respondent to say in its answering affidavit (or at least prior to or when the hearing commenced) that there was no immediate intention to sell the properties and that should a new instruction be issued, the Applicant would be given reasonable advance notice. Indeed,

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[10] The requirements for compliance with section 6(3) of the Restitution Act are set out in Matladi v Anglorand Holdings Ltd and others (LCC119/2010) unreported judgment delivered on 6 January 2012; Singh and others v North Central and South Central Local Councils and Others [1999] 1 All SA 350-(LCC) at 353; Ga-Magashula Community Trust v Marsfontein and others 2001(2) SA 945 (LCC) at para [43] and Koshi ML Mamadinno v ML Mosela and others LCC 110/2008.

during the course of argument, Mr Molotsi himself accepted that absent an interdict, the instruction could be given immediately and he confirmed that his clients intended to auction the properties although he did not know the intended timing.

Non-joinder of Riley auctioneers

22. In its answering affidavit, the First Respondent raised the non-joinder of the auctioneers, Riley Auctioneers (Riley), contending that they are a necessary party.[11] The Applicant has not conceded that Riley, as First Respondent's agent, is a necessary party, but nevertheless instituted a joinder application and requests its joinder. In response, Mr Molotsi sought to persuade me that joinder application was defective. He submitted that while there is no current instruction to sell the properties on any particular date, they remain the intended auctioneers. On the day of the hearing, Mr Krige read a letter from Riley to the Applicant's attorneys which indicated, at least, that Riley has no objection to their joinder. In these circumstances, I exercise the Court's power to join Riley, and do not consider it necessary to decide whether they are a necessary party or if the application is defective. I agree, however, with Mr Molotsi that if joined, Riley must be afforded a fair opportunity to participate in the matter and I make provision for this in my order. At this juncture, and in circumstances where no new instruction to sell has yet been issued, there can be no prejudice to them in extending the interim interdict.

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[11] Relying on SA Riding for the Disabled Association v Regional Land Claims Commissioner 2017(5) SA 1 (CC).

Entitlement to an interim interdict

23. Against this background I turn to consider whether the Applicant is entitled to an interim interdict. I conclude it is.

24. There is no dispute between the parties that the Applicant has claimed a right to restitution in the form of restoration of (amongst others) the eleven properties and that this is a serious issue to be tried. Rather, Mr Molotsi submitted that the right is not a clear or cognisable right because on the papers, the eleven properties are developed and thus non-restorable to the Applicant. This stance, he submits, accords with the communication from the Second Respondent, referred to above.

25. I am unable to accept this contention for two related reasons. First, on the evidence before me I am unable safely to conclude that the properties are developed. The Applicant pertinently alleges that they are not, and this is not clearly disputed in the answering affidavit: indeed, it is admitted that the properties are vacant. However, there is only scant information in this regard. Secondly, and in any event, the question whether the properties should be restored to the Applicant is one of the issues that a trial Court is empowered to determine. Moreover, on the authorities cited above, this Court should avoid making factual findings of this sort at this stage including as regards the development status of the land, which may be material to a finding on restorability. Thus, the Applicant both makes the necessary averments in its founding affidavit, which for present purposes have not been seriously disputed, and these are serious issues that must be determined at trial by admissible evidence.

26. Moreover, even proceeding on the basis that there is a serious issue to be tried, I am satisfied that, on the facts of this case, there is a well-grounded apprehension of irreparable harm if an interim interdict is not granted and the Applicant succeeds in establishing the right. The trial is to commence very shortly: the proceedings are susceptible to protracted disruption should a sale ensue at this particular point in time. That will most likely result in a need for joinder of any new owner with attendant trial delay, costs and disruption prejudicing not only the Applicant but all involved. Moreover, both the Regional Commissioner and the First Respondent have themselves adopted the view that the properties are non-restorable to the Applicant. The First Respondent intends to proceed with the sale on that understanding, and the Regional Commissioner has evinced no intention to intervene. Whether there are circumstances or conditions of any sale that would preclude or limit prejudice, or whether necessary disclosures are made, concerns facts that reside within the knowledge of the First Respondent.[12] But no such information has been forthcoming: rather, the stance is adopted that the properties are non-restorable.

27. In my view there is genuine scope for such prejudice in the circumstances of this case. I have mentioned the impact on the imminent trial. Furthermore, while a land claim attaches to the property and would survive any sale, this does not mean that a sale does not affect the adjudication of a land claim. Existing rights of ownership do not take precedence over claims for restitution[13] but the balance of

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[12] An example of a necessary disclosure is mentioned in Transvaal Agricultural Union v Minister of Land Affairs and another [1996] ZACC 22; 1996(12) BCLR 1573; 1997(2) SA 621 (CC) (TAU v Minister of Land Affairs) at para [28].

[13] TAU v Minister of Land Affairs at para [33].

equities that a court must engage with in a case of this sort can be affected thereby. One such consideration relates to compensation payable to a new purchaser, in this case likely to be a private party purchasing from a public body. In this case, the situation is complicated further by the fact that the First and Second Respondent assert that the property is non-restorable to a claimant, an issue which is for the Court to determine in imminent proceedings.

28. I am satisfied too that there is no other satisfactory remedy. Mr Molotsi submitted that the Applicant can approach the Court in due course for an interdict when it is known precisely when a sale is imminent. But I have already accepted that the application is urgent and there is no suggestion that a different remedy would suffice.

29. As regards the balance of convenience and in circumstances where the trial is imminent, I am of the view that the restriction I place on the auction of the property does not cause any serious inconvenience to the First Respondent. Furthermore, the First Respondent has failed to set out any claimed prejudice in any particularity and none that would result from mere delay. On the other hand, the inconvenience to the Applicant is both real and potentially serious and the threatened harm can be immediately realised. The balance of convenience may, however, shift as the trial proceeds. It is partly for this reason that in my order I grant leave to parties, on good cause shown, to approach the Court to uplift the interdict on duly supplemented papers.

30. My reasons for doing so extend to enabling Riley to be independently heard on the merits of the interdict should it elect to participate, as it has not at this stage been so heard, and because there may be information upon which a party can satisfy the Court that the interim interdict should be lifted at an appropriate time. For example, they may be able to demonstrate that a sale can proceed in circumstances and under conditions that will not prejudice the Applicant's right to claim restoration of the eleven erven. Moreover, the status of the properties as restorable or non-restorable may become clearer as trial preparation and the trial itself ensues. Ultimately, it is the Judge presiding over the trial who is likely to be best placed to determine these issues and who should thus be in a position to retain control over when the interdict should appropriately be lifted

31. I make the following order:

(1) Non-compliance with the rules prescribed for ordinary applications is condoned.

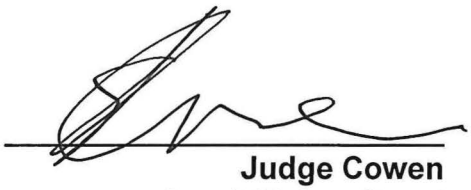
(2) Riley Auctioneers is joined as the Fourth Respondent.

(3) Should Riley Auctioneers wish to participate, it must file a notice of appearance in terms of Rule 25 within 10 (ten) days of service of the application and this order on it.

(4) The First Respondent, its agent or anyone acting on its behalf is interdicted and restrained from proceeding with the auction or sale of the eleven properties referred to in Annexure I to the founding affidavit pending the determination by this Court of whether each or any of the properties are restorable to the Applicant, and if so, their transfer to the Applicant,

alternatively at such date as may be determined in proceedings in terms of (5) below.

(5) Any party may, on good cause shown, apply to the Court for an order lifting the interim order in (4) at an earlier date, and for directions regulating such application. Any such application should be made, in the first instance, to the Judge presiding at the trial.



Judge Cowen
Land Claims Court

Date of hearing: 20 April 2022

Date of judgment: 28 April 2022

Appearances:

Applicant:	Adv L J Krige instructed by Chris Bodlani Attorneys
First Respondent:	Adv H Molotsi SC and Adv MMJ Xozwa instructed by Sokutu Attorneys