



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable

Case No:
1078/2017

In the matter between:

THE DOMBO COMMUNITY

APPELLANT

and

TSHAKHUMA COMMUNITY TRUST

FIRST RESPONDENT

M W MADZIVHANDILA

SECOND RESPONDENT

**THE REGIONAL LAND CLAIM COMMISSION FOR
THE PROVINCE OF LIMPOPO
RESPONDENT**

THIRD

CHIEF LAND CLAIMS COMMISSIONER

FOURTH RESPONDENT

**MINISTER OF THE DEPARTMENT OF RURAL
DEVELOPMENT AND LAND REFORM**

FIFTH RESPONDENT

Neutral citation: *Dombo Community v Tshakhuma Community Trust & others*
(1078/2017) [2018] ZASCA 190 (19 December 2018)

Coram: Tshiqi, Seriti, Mbha and Zondi JJA and Nicholls AJA

Heard: 22 November 2018

Delivered: 19 December 2018

Summary: Rescission of judgment in terms of s 35(11) of the Restitution of Rights Act read with rule 64(2) of Land Claims Court Rules following the grant of the order reviewing the Regional Land Claims Commission decision certifying the claim compliant in terms of s 11(1).

ORDER

On appeal from: Land Claims Court, Randburg (Molefe J sitting as court of first instance):

1 The appeal succeeds.

2 The order of the Land Claims Court dismissing the application for rescission is set aside and is substituted by the following:

‘(a) The application for rescission of the default judgment granted against the applicant on 29 May 2014 is granted;

(b) The late filing of the rescission application is hereby condoned;

(c) The applicant is granted leave to file the answering affidavit within 14 days from the date of this judgment.’

3 No order is made as to costs.

JUDGMENT

Zondi JA (Tshiqi, Seriti and Mbha JJA concurring):

[1] This is an appeal against the judgment of the Land Claims Court (the court below) dismissing the appellant’s application for the rescission of default judgment granted by Bertelsmann J on 29 May 2014. The application for rescission was dismissed on the grounds that there was no reasonable explanation shown for the delay and that there were no reasonable prospects of success. The appeal to this court is with leave of the court below.

[2] In 1995, two communities, Dombo Community, the appellant (Dombo) and Tshakhuma Community, both based in Venda, Limpopo Province lodged separate land claims with the Limpopo Regional Land Claims Commission (RLCC), in terms of

the Restitution of Land Rights Act 22 of 1994 (the Restitution Act), in respect of the same and/or overlapping pieces of land in the Levubu area. With the assistance of the Regional Land Claims Commission the two claims were merged. The deponent to the founding affidavit, Mr Stephen Dombo alleges that Dombo agreed to the merger because it was told by the RLCC that a Trust would be formed for the purposes of acquiring, holding and managing the property. Dombo was assured that members of both communities would be beneficiaries and each community would be represented on the board of trustees. According to Mr Dombo the RLCC informed Dombo that the merger would expedite settlement of the land claims, in particular in view of the fact that there existed a possibility that Dombo might not be able to prove that it was an independent community at the time of dispossession. To that end the Tshakhuma Community Trust, the respondent (the Trust), on which Dombo had representation, was created and took transfer of the land that was restituted in due course.

[3] Subsequently, a dispute arose amongst the trustees regarding the manner in which the affairs of the Trust were being conducted. The trustees from Dombo felt they were constantly side-lined by the Trust when decisions affecting them and their community members were taken. As a result, they resigned from the Trust and with that Dombo took a resolution to re-lodge its land claim, which it had agreed to abandon in favour of the creation of a Trust. Attempts to resolve the dispute between the two communities through mediation by Tokiso, a dispute resolution organisation and meetings with the officials from the RLCC, failed. The RLCC agreed to allow Dombo to submit its land claim afresh and to investigate same.

[4] In due course and on 12 October 2010 the RLCC filed its report (compliance report). In short, the report concluded that Dombo satisfied the requirements of s 2 of the Act regarding the Procedure of the Commission on Restitution of Land Rights; that although the Tshakhuma Traditional Authority lodged the claim on the entire Levubu 15 LT for their subjects, the findings of the research showed that the restored properties belong to Dombo who were dispossessed of informal or unregistered rights in relation to the land.

[5] Pursuant to this report Ms Ratshitanga, the project co-ordinator recommended that the Regional Land Claims Commissioner should:

- '1. Accept the Dombo land claim as compliant and approve same;
- 2 .Accept that Dombo community be awarded the portions of the farm Levubu 15 LT where they were dispossessed from;
3. Negotiate with the Dombo claimants with regard to the portions that were already restored to Tshakhuma Community Trust;
4. Approve the amendment of the Gazette Notice No 21074 of April 2000 to include the Dombo Community claim and withdraw those which were gazetted to Tshakhuma erroneously; and
5. Condone the manner of lodgment by the Dombo Community.'

The recommendations were supported by all concerned in the administration of Land Claims including the Regional Land Claims Commissioner.

[6] The report together with the recommendations were sent, inter alia, to the respondent. Dombo's land claim was thereafter gazetted on 2 November 2012. It is this decision which triggered the launch of the review proceedings by the respondent, in respect of which Dombo failed to file its answering affidavit resulting in the grant of the order sought by Tshakhuma Trust. The review was served on Dombo's erstwhile attorneys, Lawyers for Human Rights on 17 January 2014. On 30 January 2014, Dombo through its attorneys filed a notice of its intention to oppose. Nothing happened thereafter.

[7] On 1 April 2014, the respondent set the matter down for hearing on 29 April 2014. It seems that the notice was not served on Dombo's attorneys because Lawyers for Human Rights were on record at that time but there is no proof that service was effected on them. The probability therefore is that Dombo's attorneys' non- appearance was due to the fact they were not aware of the court date. The court below (Bertelsmann J) on 29 April 2014 postponed the matter to 29 May 2014 and issued directions with regard to the further conduct of the matter. In terms of the directions Dombo had to file its answering affidavit by 25 May 2014 to which the respondent had to reply by 27 May 2014 and the costs were reserved. The court order was faxed to Lawyers for Human Rights on 29 April 2014. Pursuant to this order, the review application was heard on 29 May 2014. It is common cause that Dombo did not file its answering affidavit and neither did it attend the court below on 29 May 2014.

[8] As the court below was satisfied that the matter had been properly set down, it proceeded to hear the matter on an unopposed basis and in that event granted the order in terms of which it reviewed and set aside the decision of the RLCC to accept and approve Dombo's land claim and its decision to accept the recommendations in the 'Ratshitanga Report'. Dombo was ordered to pay the costs. It is this order which Dombo sought to have rescinded in the application dated 31 January 2017.

[9] Section 35(11)(a) of the Restitution Act provides for the rescission of any order or judgment granted by the court in the absence of the person against whom that order or judgment was granted. The period within which the rescission application should be brought and what must be established are stipulated in rule 64(2) of the Rules of the court below. Such an application should be brought within ten days from the date upon which the applicant became aware of the order and on good cause shown.

[10] Under the common law, in order to succeed an applicant in an application for rescission of a default judgment must show good cause. In *Colyn v Tiger Food Industries* 2003 (6) SA 1 (SCA) at 9E this court observed that although the authorities emphasise that it is unwise to give a precise meaning to the term 'good cause', it was clear that the courts generally expect an applicant to show good cause; by giving a reasonable explanation of his or her default; by showing that his application is made bona fide; by showing that he or she has a bona fide defence to the plaintiff's claim, which prima facie has some prospect of success. The court has a wide discretion in evaluating 'good cause' in order to ensure that justice is done and that discretion must be exercised after a proper consideration of all the relevant circumstances.

[11] The respondent opposed the application. It contended that the application had to be dismissed on the grounds that it was late and yet there was no application to condone the lateness and that no bona fide defence to the review application was shown.

[12] The application for rescission was way out of time. The relief sought in prayer 2 of the notice of motion is inelegantly formulated. In prayer 2 Dombo sought an

order ‘to condone non-compliance with the court rules relating to the time limits for the filing of an Answering Affidavit. . .’ But what can be deciphered from it is that Dombo intended to apply for condonation for the late filing of the rescission application.

[13] Factors which usually weigh with the court in considering an application for condonation include the degree of non-compliance, the explanation therefor, the importance of the case, a respondent’s interest in the finality of the judgment, the convenience of the court and avoidance of unnecessary delay in the administration of justice.¹

[14] Dombo alleges that its failure to attend court on 29 May 2014 and to file its answering affidavit was caused by the fact that Bertelsmann J’s order dated 29 April 2014 was not brought to its attention by its erstwhile attorney, Ms du Plessis. The attorney concerned alleged in a letter dated 7 November 2016, addressed to Dombo’s attorneys of record that the notice of set down was not brought to her attention by her staff. There is no explanation at all as to how the court processes were handled at the attorney’s firm and who was responsible for handling such processes and why the notice of set down was not received.

[15] Mr Dombo, the deponent to the founding affidavit, contends that the neglect was not wilful. He argues that Dombo always wanted to defend the review application. Mr Dombo outlines all the efforts Dombo made in order to ensure that the review application was opposed. The correspondence shows that Dombo, at all material times, communicated with its erstwhile attorneys when the Dombo Community asked about progress of the matter.

[16] It appears from the correspondence that on 6 September 2016 the current attorneys of record were appointed by the service provider on behalf of the RLCC to represent Dombo. The current attorneys of record again let Dombo down in that they also delayed in filing the application for rescission. What is, however, glaring in this matter is that Dombo was at all times following up on the progress of the matter. The

¹ *Federated Employers Fire and General Insurance Co Ltd & another v McKenzie* 1969 (3) SA 360 (A) at 362F-G.

delays were caused by ineptitude on the part of their attorneys and also by the delays by RLCC in processing Dombo's request for funding of its legal representation.

[17] As regards the prospects of success, Dombo contends that the review application suffered from a number of procedural defects, which it argues, arise from the respondent's failure to comply with the requirements of the rules of the court below relating to reviews, in particular rule 35. The contention is that because of non-compliance with the applicable rule, the relief sought in the review application should not have been granted. It is correct that in terms of rule 35(1) upon receipt of the review application the Commission was required to file the record of the 'proceedings and all documents relevant to the decision or action sought to be reviewed' together with his or her reasons for the decision or action. The application for the review and the record of the proceedings referred to in rule 35 (1) that served before the court below are not before this court. It therefore does not behove the appellant to take this point when the documents that served before the court below when it determined the review application are not before this court. This point must therefore fail.

[18] As regards the merits, it was submitted by the respondent that Dombo's rescission application should fail as Dombo has no bona fide defence to the review application. The respondent contended that the RLCC was precluded from considering Dombo's claim, because Dombo had agreed to merge its claim with that of the respondent. The respondent argued that the entire land that is claimed by Dombo was restituted to Tshakhuma Community, which is now the owner not the Trust. It further contended that what was merged were the claims not the pieces of land. The merger was done orally not in terms of s 14(3). Following the merger, the Trust Deed was executed. The respondent alleged that the relationship between the two communities soured after the Trust suspended the deponent to Dombo's founding affidavit and Mr Mbangiseni Maraga for misappropriation of funds.

[19] The respondent argued that the rescission would prejudice it. It contended that since its formation it had embarked on a progressive recapitalization plan with the assistance of the Department of Rural Development and Land Reform, which

includes a 30 year land swap agreement which was entered into with the Unlimited Group (Pty) Ltd in 2014, in terms of which the Group was granted the land use rights in return for their repayment of a loan of R18 million that was taken from the Industrial Development Corporation to finance operations on the restituted land. This agreement, the respondent contended, covers the land claimed by Dombo.

[20] It is not in dispute that the application for review was aimed at setting aside the decision of the RLCC to cause to be published in the Gazette, Dombo's land claim.

[21] Section 11(1) of the Restitution Act provides:

'Procedure after lodgement of claim

- (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 in the media circulating nationally and in the relevant province, and shall take steps to make it known in the district in which the land in question is situated.'

Section 2 entitles a person or community such as Dombo, dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws and practices, to restoration of that right. A claim for restitution is directed to the Commission, which is required, among other things, to investigate the merits of the claim, make a determination as to whether it is not precluded by the provisions of s 2, and whether it is not frivolous or vexatious. Once the claim has been accepted by the Commission, the claim will be published in the Gazette. It is then investigated further and either mediated with the view to reaching a settlement, or referred to the Land Claims Court for adjudication.

[22] The meaning of the term 'satisfied' appearing in s 11(1) was considered by the Land Claims Court in *Farjas (Pty) Ltd v Regional Land Claims Commissioner* 1998 (2) SA 900 (LCC). The court held at para 40 that the term 'satisfied' need not always signify proof. It is sufficient if the applicant can show in relation to both the factual and the legal issues that there is an arguable case, even if the arguments are relatively

weak. Nugent JA in *Mahlangu NO v Minister of Land Affairs & others* 2005(1) SA 451 (SCA) para 13 expressed the view that the threshold of 'an arguable case' might be too high.

[23] What Dombo has to establish in order to defend the review application is that its land claim was a certified compliant. It does not need to show that its land claim is valid. Therefore, had Dombo's attorneys not been negligent in relation to the filing of the answering affidavit, Dombo would have been able to put up an arguable case based on the fact that its land claim was certified compliant by the RLCC. There is no evidence that the RLCC investigated Dombo's claim before an oral agreement, in terms of which Dombo's claim merged with that of Tshakhuma Community, was concluded. I say so because Dombo's claim was not part of the claims that were gazetted in 2000. The agreement which facilitated the merger does not seem to have complied with s 14(3). This section provides:

'If in the course of an investigation by the Commissioner the interested parties enter into a written agreement as to how the claim should be finalised and the regional claims commissioner having jurisdiction certifies that he or she is satisfied with the agreement and that the agreement ought not to be referred to the Court, the agreement shall be effective only from the date of such certification or such later date may be provided for in the agreement.'

This validity of the agreement is one of the issues that will have to be determined by the court considering the review application.

[24] In any event, granting the rescission will not occasion the respondent any prejudice. After all, this land claim is still being investigated and there are other claimants who lodged a claim in respect of the same or adjoining properties.

[25] The court below in its judgment did not deal at all with the prospects of success which is one of the factors which the court hearing the rescission application should take into account in the exercise of its discretion. That being the case, it is not clear what factors the court below took into consideration in deciding in the exercise of its discretion to dismiss the application. This court therefore is entitled to interfere

with the exercise of the discretionary power by the court below.² The case is of importance to both parties. The dispute concerns the restitution of land in terms of the Restitution Act which is the legislation that was enacted in order to give effect to s 25 of the Constitution.

[26] The Restitution Act regulates the enforcement of the rights provided for in s 25(7) by creating special principles applicable to such rights, special processes and fora where these rights may be asserted. Implicit in the provisions and tone of the Restitution Act is the principle and value of fairness. In all the circumstances I have come to the conclusion that good cause exists for setting aside the default judgment.

[27] In regard to the question of costs, I do not consider the respondent's opposition to the appeal to have been unreasonable. Dombo has approached this court seeking its indulgence. In general, a party who seeks the court's indulgence must bear the costs not only of its application, but any reasonable opposition thereto. But since the first respondent did not ask for the costs, no costs order will be made.

[28] In the circumstances the order in the following terms is issued:

- 1 The appeal succeeds.
- 2 The order of the Land Claims Court dismissing the application for rescission is set aside and is substituted by the following:
 - '(a) The application for rescission of the default judgment granted against the applicant on 29 May 2014 is granted;
 - (b) The late filing of the rescission application is hereby condoned;
 - (c) The applicant is granted leave to file the answering affidavit within 14 days from the date of this judgment.'
- 3 No order is made as to costs.

D H Zondi

² *Ferris & another v Firstrand Bank Limited & another* [2013] ZACC 46; 2014 (3) BCLR 321 (CC); 2014 (3) SA 39 (CC) para 28.

Judge of Appeal

NICHOLLS AJA

[29] I have read the judgment of my colleague Zondi JA and although I agree with the order, my reasons for reaching that conclusion are different. The facts of this case have been set out in the first judgment and it is not necessary to traverse them further.

[30] The judgment correctly states that to successfully rescind a judgment in terms of the common law, three hurdles have to be overcome. The first is whether there is reasonable explanation for the default. The second is whether the application for rescission is made bona fide, and finally, the applicant has to have a bona fide defence which prima facie has some prospects of success.

[31] Although I have some reservations regarding the explanation for the default, I have no doubt that the application is made bona fide. I will therefore accept in favour of Dombo that it has complied with the first two requirements of rescission. It is the last aspect with which I have difficulty, namely whether the applicant has a bona fide defence.

[32] From what is possible to glean from the scanty information available, the Dombo community lodged a land claim against farm Levubu 15 LT on 31 May 1995. There were competing claims by other communities such as the Tshakhuma, Tshitwani, Ravele, Ratombo and Matumba communities over the same land. These claims were merged and settled in terms of s 42D read with s 14(3) of the Restitution Act. It is common cause that the merger of the Dombo's claim with the Tshakhuma

community's claim was not reduced to writing. However, that a merger occurred and that the land claim was settled is not disputed.

[33] The merged claims resulted in an agreement to create a trust for the benefit of all. The land is presently owned by the Tshakhuma Community Trust which was set up to acquire, hold and manage the farm. The Trust Deed was registered on 18 June 2004.

[34] Representatives from members of the Dombo community were appointed trustees of the Tshakhuma Community Trust together with the Tshakhuma community representatives. In 2008, disagreements arose amongst the trustees and two of the Dombo trustees were suspended for allegedly misappropriating Trust funds. As a result, two other Dombo trustees resigned in protest. Dombo alleges that the Trust excluded it from the decision making process and that it does not reap the benefits of the Trust. As I understand it, that is the thrust of its complaint and an important part of its defence to the main application.

[35] This led to an unsuccessful mediation process in 2009. Thereafter, the Dombo community approached the Regional Land Claims Commissioner (RLCC) to re-investigate its land claim. The RLCC researched the Dombo's land claim and submitted a 'compliance report' which found that there was merit in the Dombo community's land claim. The recommendation of the report was that the Dombo community's land claim be accepted and that it be awarded those portions of the farm which formed the land from which it was dispossessed; that RLCC negotiate with the Dombo community in respect of those portions that have already been restored to the Tshakhuma Community Trust; and that the RLCC approve the amendment of the gazette of 4 April 2000 'to include the Dombo community and withdraw those which were gazetted to the Tshakhuma erroneously'. After these recommendations were accepted by various functionaries in the RLCC, the Dombo's land claim was gazetted on 2 November 2012.

[36] On 28 November 2012, the Tshakhuma Community Trust lodged an application to have the RLCC's acceptance and approval of the Dombo's claim reviewed and set aside. In addition, it sought to have the recommendations in the report reviewed and set aside. The Tshakhuma Community Trust was successful in its review application which was granted on an unopposed basis on 14 May 2014. Although having been brought to the attention of the RLCC, the application was not opposed by them either. Nor have they, to date, sought to rescind that order.

[37] The Dombo community finally served its application for rescission on 1 February 2017. The reasons for the various delays are set out in the main judgment. Suffice to say that the application was dismissed by Molefe J on 2 June 2017. It was dismissed on the grounds that there was no reasonable explanation for the delay and no reasonable defence to the review application, without further explanation.

[38] There are several obstacles that the Dombo community will have to overcome in order to successfully resist the main application. The most obvious is the legal status of the settlement the communities entered into. The Constitutional Court in *Eke v Parsons*³ said the following:

'The effect of a settlement order is to change the status of the rights and obligations between the parties. Save for litigation that may be consequent upon the nature of a particular order, the order brings to finality the *lis* between the parties; the *lis* becomes *res judicata* (literally, "a matter judged").'

[39] Dombo has not said what the prospects of success are in the face of such established legal principle. Absent an allegation of fraudulent conduct, which is not contended for, there seems little prospect that the settlement agreement will be set aside. To the extent that Land Claims Court found otherwise in *Mdumane Community Trust & others v the Land Claims Commission & others*⁴, the facts of that case are entirely distinguishable. In that matter the community who were the original claimants

³ *Eke v Parsons* 2016 (3) SA 37 (CC) para 31. See also *Gollach and Gomperts v Universal Mills & Produce Co (Pty) Ltd* 1978 (1) SA 914 (A) at 922H where it was stated that the effect of a compromise is the same as *res judicata* on a judgment given by consent.

⁴ *Mdumane Community Trust & others v the Land Claims Commission & others* LCC Case 60/2012 judgment delivered on 19 November 2015.

had not consented to the consolidation of the claims and received no benefit from the consolidation. The court held that, although there was nothing objectionable in transferring land to subsequently created trusts, the Restitution Act could not countenance the consolidation of claims by unrelated parties without their consent. In those circumstances the consolidation of the various claims was set aside and the registration of the land in the name of the Trust was declared invalid and set aside. In this case, the Dombo community voluntarily elected to settle their claim, albeit on their version, reluctantly.

[40] The Dombo community accepted a compromise and settlement. It now seeks to re-assert its rights to the very same land which it agreed should be merged with other claims. That land has been restituted. The manner in which it has been done may not be to the Dombo community's liking any longer but this does not avail them of the opportunity to submit a claim for land which has already been restituted to it.

[41] I am of the view that neither *Farjas (Pty) Ltd v Regional Land Claims Commissioner*⁵ nor *Mahlangu NO v Minister of Land Affairs & others*⁶ is of assistance to Dombo. It is correct that both those cases held that it is not the function of the RLCC to adjudicate upon the merits of a land claim for restitution, and all that has to be shown in terms of *Farjas* is an 'arguable case', a threshold that this court in *Mahlangu* believed was too high. However, this cannot possibly mean that a land claim can be submitted a second time on the same piece of land by the same community. The test referred to in these cases can only, in my view, relate to situations where a land claim is being considered for the first time and not to situations where the land claim has been settled with the claimants as one of the parties.

[42] Insofar as the main judgment seeks to differentiate between the validity of the land claim and the requirement to show that its claim is certified compliant, it is in my respectful view, to draw an artificial distinction. The respondent successfully set aside the RLCC's gazetting of the Dombo claim. To succeed in the rescission application,

⁵ *Farjas (Pty) Ltd v Regional Land Claims Commissioner, Kwazulu-Natal* 1998 (2) SA 900 (LCC).

⁶ *Mahlangu NO v Minister of Land Affairs & others* 2005 (1) SA 451 (SCA).

Dombo has to show that it has some prospect of success to have this claim re-adjudicated alone and separate from the merged claims.

[43] The obvious remedy available to the Dombo community is to seek redress in terms of the Deed of Trust. While we have not been privy to this document, it must contain methods of dealing with the inevitable conflicts that will arise amongst trustees and amongst the various communities making up the beneficiaries. In general, it cannot be desirable to allow communities to renege on settlement agreements which they have entered into voluntarily. It plays into the hands of disgruntled individuals and can only foster uncertainty and instability.

[44] Notwithstanding the above, I would exercise the wide discretion that a court exercises in applications for rescission. There is a woeful paucity of information. The main application is not before us. The judgment of the court a quo does not shed any light. There is a suggestion that other land may be involved which does not form part of the merged land claim and against which the Dombo's may have a legitimate claim. This is not clear on the papers before us.

[45] Claims for restitution of land arise out of the country's horrendous history of land deprivation which the Restitution Act seeks to correct. It is important that the claims of each community are fully ventilated. In my view it is for the Land Claims Court to make a final determination once it has all the facts before it. For this reason, I concur with the main judgment.

C H Nicholls

Acting Judge of Appeal

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