



**THE EASTERN CAPE HIGH COURT OF SOUTH AFRICA
(PORT ELIZABETH)
JUDGMENT**

Not Reportable

Case no: 2667/2017

In the matter between:

**LAND AND AGRICULTURAL BANK
OF SOUTH AFRICA
MOOVILLE (PTY) LTD
WILLEM JANSEN VAN VUUREN**

and

**CPAD FARM HOLDINGS
MR MONGESI ALFRED MDE
THE NATIONAL DIRECTOR
PUBLIC PROSECUTIONS
THE MINISTER OF RURAL DEVELOPMENT
AND LAND REFORM
MIKE TIMKOE TRUSTEES
DONALD GEORGE DUKE JACKSON
THE MASTER OF THE HIGH COURT**

**FIRST APPLICANT
SECOND APPLICANT
THIRD APPLICANT**

**FIRST RESPONDENT
SECOND RESPONDENT**

THIRD RESPONDENT

FOURTH RESPONDENT

FIFTH RESPONDENT

SIXTH RESPONDENT

SEVENTH RESPONDENT

REGISTRAR OF DEEDS CAPE TOWN EIGHTH RESPONDENT

Coram: GOOSEN J.

Heard: 30 JUNE 2020

Delivered: 15 JULY 2020

(By agreement judgment delivered per email to the legal representatives of the parties and the Registrar)

Summary: Application for order clarifying an order granted by the court on 11 February 2020 by insertion of a qualifying phrase. Application premised upon the contention that the order made did not reflect the true intention of the court In the alternative, the fourth respondent sought an amendment of the order granting leave to appeal to the Full Court (leave having previously been granted) to allow an appeal against the whole of the judgment and order varying the original forfeiture order granted by Majiki J on 13 January 2013.

Held that the judgment delivered on 11 February 2020 was not ambiguous in its terms and that, in the circumstances, the court has no authority to vary the terms of the order granted by it. Main application dismissed with costs.

Regarding conditional application for leave to appeal - Held that the interests of justice favour the granting of leave to appeal on the additional ground.

ORDER

1. The Fourth Respondent's application for clarification of the judgment of 11 February 2020 is dismissed with costs.
2. The Fourth Respondent is granted leave to appeal to the Full Court of this Division upon the further ground,

'That the learned judge erred in amending and deleting paragraph 5 of the original forfeiture order granted by Majiki J, and more particularly that portion thereof directing that the relevant property be handed back to the Fourth Respondent for reallocation.'

3. That the Fourth Respondent's Notice of Appeal be amended and amplified accordingly.
4. That the costs of the conditional application for further leave to appeal shall be costs in the appeal.

JUDGMENT

Goosen, J.

[1] On 11 February 2020 I handed down judgment and issued orders varying a forfeiture order granted by Majiki J on 13 January 2013. Subsequent hereto leave to appeal against a specified aspect of the judgment was granted to the fourth respondent (to whom I shall henceforth refer as ‘the Minister’) and to the first applicant (to whom I shall henceforth refer as ‘the Land Bank’).

[2] The Minister now applies for an order clarifying paragraph 2 (which substituted paragraph 5 of the Majiki J order) which this court granted. What has given rise to the application is a declared intention on the part of the fifth respondent (the duly appointed *curator bonis*) to enter into a deed of sale with the third applicant on behalf of Mooville (Pty) Ltd (the second applicant in the original application before this court) in respect of the forfeited property (I shall hereafter refer to the second and third applicants as “Mooville”). This envisaged sale of the property would result in the Minister being unable to ‘retain’ the property and procure its disposal to certain beneficiaries in terms of a land restitution programme. Accordingly the Minister seeks to insert a clarifying phrase in the substituted paragraph 5 of the forfeiture order as reflecting the true intention of this court when making the order.

[3] It should be said that the application was initially brought on an urgent basis seeking an interim interdict restraining the conclusion of the sale agreement pending the finalisation of the clarification application. Both the Land Bank and Mooville filed notices of opposition to the application but upon Mooville furnishing an appropriate undertaking the interim application fell away.

[4] In the alternative to the main ‘clarification’ relief sought the Minister has filed a notice of intention to amend its notice of appeal. The effect is to seek leave to appeal against the order deleting paragraph 5 of the forfeiture order granted by Majiki J. This court is approached for the extended leave to appeal, albeit on a conditional basis, on the strength of the judgment in *Harlech-Jones Treasure Architects CC & Others v University of Fort Hare* 2002 (5) SA 32 (E). In that matter the court held that a full bench does not have the power to adjudicate grounds of appeal in respect of which leave to appeal was refused by the court *a quo*. It is submitted that whilst this court did not refuse leave to appeal in respect of that which it is now sought to challenge on appeal, leave was not sought on that basis. Accordingly, to avoid a potential hiatus on appeal it is in the interests of justice that the Minister be permitted to advance such additional ground of appeal in the event that the clarification application fails.

[5] As indicated the Land Bank and Mooville oppose the application. Mr *Buchanan SC*, for the Minister submitted, *en passant*, that Mooville has no legal interest in either the clarification application or the conditional leave to appeal. It is not a party to the appeal and, for this reason, can have no interest in the grounds of appeal which the Minister wishes to advance. I accept this. However, I am not persuaded that it has no interest in the clarification application. It was common cause that the qualifying phrase which the Minister wishes to import into the forfeiture order will put paid to any potential sale of the forfeited property until the appeal is finalised. Since it was also common cause that such a sale is presently envisaged to Mooville, it can hardly be denied that the determination of the clarification application will directly bear upon Mooville’s rights and interests sufficiently to confer upon

it a legal interest in the outcome. In any event, the application originally sought an operative order restraining both the *curator bonis* and Mooville from entering into a deed of sale.

[6] Paragraph 2 of this court's order provided as follows:

2. Paragraph 5 of the order is hereby deleted and replaced with the following:

“5. In terms of s 57 of POCA the *curator bonis* is authorised as of the date on which the forfeiture order take effect, to perform all the powers and functions specified in the Act including the following....

[7] What followed this introductory portion was an outline of powers which included the authority to dispose of the property by sale and to deal with the proceeds of such sale as required by the Prevention of Organised Crime Act 121 of 1998 ('POCA').

[8] The Minister seeks insertion of the following words at the commencement of paragraph 5, namely:

Subject to the rights of the Fourth Respondent to retain the property at a market related value (hereinafter referred to as 'proceeds of sale')...

[9] The effect of this insertion of words will be to confer upon the Minister a right of 'retention' of the forfeited property subject to payment of a market related value to the *curator bonis* for disposal thereof as proceeds of the sale in accordance with the provisions of the Act.

[10] A court's power to clarify or amend an order it has made is very limited. In *Zondi v MEC, Traditional and Local Government Affairs, and Others* 2006 (3) SA 1 (CC) par [28] and [29] it was stated:

[28] Under common law the general rule is that a judge has no authority to amend his or her own final order. The rationale for this principle is two-fold. In the first place a judge who has given a final order is *functus officio*. Once a judge has fully exercised his or her jurisdiction, his or her authority over the subject matter ceases. The other equally important consideration is the public interest in bringing litigation to finality. The parties must be assured that once an order of court has been made, it is final and they can arrange their affairs in accordance with that order.

[29] However our pre-constitutional case law recognised certain exceptions to this general rule. These exceptions are referred to the *Firestone* case. These are supplementing accessory or consequential matters such as costs orders or interest on judgment debts; clarification of a judgment or order so as to give effect to the court's true intention; correcting clerical, arithmetical or other errors in its judgment or order; and altering an order for costs where it was made without hearing the parties.

[11] Where it is sought to clarify a judgment or order so as to give effect to the true intention of the court a court may only do so if, properly interpreted, the meaning of the judgment or order is obscure, uncertain or ambiguous. The court may then clarify but not thereby alter the sense and substance of the judgment or order (see *Marks v Kotze* 1946 AD 29; *Firestone SA (Pty) Ltd v Genturico AG* 1977 (4) SA 298 (A); *Thompson v South African Broadcasting Corporation* 2001 (3) SA 746 (SCA)).

[12] Mr *Buchanan* did not, as I understood his argument, suggest that the judgment was ambiguous in its terms. On the contrary he accepted that the judgment clearly acknowledges and accepts the circumstances giving rise to the position the Minister finds himself in as a victim of criminal conduct. It was accepted also that the court had recognised the fact that the Minister was acting, in the forfeiture application, to protect the interests of the 39 named beneficiaries to whom it was intended that ownership in the property be

transferred. The argument however, was that the order had an unintended consequence inasmuch as it did not make provision for that which was expressly recognised, namely the intended transfer of the property to the beneficiaries. Thus it was argued, since the order did not reflect the true intention to protect the beneficiaries this court is entitled to clarify its order in the terms proposed.

[13] I am unable to agree with the submissions advanced on behalf of the Minister. While it is certainly correct that the position of the Minister and that of the 39 beneficiaries was recognised it is not so that there is a disjuncture between that recognition in the reasoning and the order which was framed. The recognition of the Minister's intention to proceed with the restitution of the land to the 39 beneficiaries cannot, it was held, translate into an order which results in the property, although declared forfeit to the state, being handed to the Minister for disposal in accordance with the original intention. That, in essence, is the basis upon which it was found that the order of Majiki J could not stand. It is for this reason that an order was framed to give effect to the provisions of s 57 of the Act, while accepting that disposal of the property to the Minister was not precluded by the operation of s 57.

[14] In my view Mr *Beyleveld SC*, for the Land Bank, is correct in submitting that the terms of the clarification sought would alter the 'sense and substance' of the judgment. It follows that I am not persuaded that an order clarifying the judgment an order, as sought, falls within the limited ambit of the authority to effect such clarification.

[15] Before disposing of this aspect of the application there is one further argument raised by Mr *Buchanan* which must be addressed briefly. It was

submitted that the relief sought by way of clarification falls within the ambit of section 50 (2) of POCA. The sub-section provides that,

(2) The High Court may, when it makes a forfeiture order or at any time thereafter, make any ancillary orders that it considers appropriate, including orders for and with respect to facilitating the transfer to the State of property forfeited to the State under such an order.

[16] Mr *Buchanan* submitted that this provision entitles a court at any time after it has granted a forfeiture order to make any ancillary order. Reference was made to the case of *Ex parte National Director of Public Prosecutions* 2011 (2) SACR 225 (ECP) par [9], where it was accepted that an amendment of the powers of a *curator bonis* “may well be construed as an ancillary order and therefore authorised in terms of section 50(2).”

[17] This proposition was accepted for the sake of argument in the judgment. It was not held that such an amendment would fall within the ambit of section 50 (2). The case involved a substantive application for relief in terms of s 50 (2) of POCA. An order was sought entitling the *curator bonis* to make available a rubber duck vessel which had been forfeited to the state to the law enforcement section of Marine and Coastal Management to be utilised for anti-poaching activities. It was held (at paragraph 5) that,

The order sought will certainly, if granted, regulate the use of the forfeited property, but in my view cannot be said to have any bearing upon the carrying into effect of the forfeiture order. In that sense it cannot properly be said to be ancillary to the order of forfeiture.

[18] The present application is not a substantive application brought in terms of s 50(2) of POCA. It is an application seeking clarification of a judgment or order. An order made pursuant to s 50 (2) would extend beyond the ordinary

scope of clarification of a court order. Provided it is held that the order sought is indeed ancillary to a forfeiture order and to give effect thereto such an order can, where appropriate, be made. In the present instance the words that are sought to be introduced into paragraph 5 of the forfeiture order do not, in my view, fall within the ambit of what is envisaged by s 50 (2). In the light of this conclusion it is unnecessary to consider whether a court which has made an order of forfeiture is entitled to exercise the power conferred by s 50 (2) even in circumstances where there is a pending appeal against aspects of that order.

[19] It follows that the application for clarification of this court's order cannot succeed.

[20] As indicated that is not the end of the matter since the Minister seeks conditionally and in the alternative that leave be granted to supplement the grounds of appeal. I accept that it is for this court to make such determination.

[21] The Minister wishes to supplement the grounds of appeal by substantially broadening the scope of the appeal. What is now sought is to challenge this court's finding that the original paragraph 5 of the forfeiture order is inconsistent with the scope and purpose of section 57. In order to obtain leave the Minister is required to establish that leave ought to be granted in terms of s 17 (1) of the Superior Courts Act 10 of 2013 on the basis that there is a reasonable prospect of success on appeal or that there is some other compelling reason to be granted leave to appeal.

[22] Mr *Beyleveld* argued that no reasonable prospect has been established. It was also submitted that no compelling reasons exist to grant the Minister leave on the extended basis sought.

[23] What constitutes a compelling reason is not defined. Generally it is accepted that the importance of the case to the parties; the interests that may thereby be affected and the interests of justice are factors which bear upon the decision. I need not be persuaded that there is a probability that the appeal will succeed. It is sufficient if there is a reasonable prospect that another court acting reasonably may come to a different conclusion regarding the variation of the original forfeiture order.

[24] In this instance significant interests are at stake. This much is apparent from the litigation history and the background which gave rise to the litigation, the details of which are set out in the main judgment. Mr *Buchanan* quite correctly points to the fact that broader interests than those represented by the Minister are at play. There are also the interests of the beneficiaries.

[25] The fact that I am not persuaded that there is no ambiguity in the judgment and orders or that I do not consider that there is any disjuncture between the acknowledged circumstances and the orders made does not mean that there is not scope for another court to frame a different order by which effect may be given to the forfeiture order. In the light of this I have come to the conclusion that it will be in the interests of justice to grant the Minister leave to challenge the full ambit of the orders made in this matter.

[26] Accordingly leave to appeal against the judgment of this court ought to be granted on the additional ground sought and the Minister granted leave to amend the notice of appeal to reflect the additional ground of appeal.

[27] In respect of costs there is no reason why the costs of the clarification application should not follow the result. In relation to the costs of the conditional application for further leave to appeal those costs should be costs in the appeal.

[28] I therefore make the following orders:

1. The Fourth Respondent's application for clarification of the judgment of 11 February 2020 is dismissed with costs.
2. The Fourth Respondent is granted leave to appeal to the Full Court of this Division upon the further ground,

‘That the learned judge erred in amending and deleting paragraph 5 of the original forfeiture order granted by Majiki J, and more particularly that portion thereof directing that the relevant property be handed back to the Fourth Respondent for reallocation.’

3. That the Fourth Respondent's Notice of Appeal be amended and amplified accordingly.
4. That the costs of the conditional application for further leave to appeal shall be costs in the appeal.


GOOSEN J

JUDGE OF THE HIGH COURT

Appearances

For Fourth Respondent: R. G. Buchanan SC

Instructed by: The State Attorney
Port Elizabeth
Ref; Ms H Glanvill

For First Applicant: A. Beyleveld SC

Instructed by: Greyvensteins
Port Elizabeth
Ref: Mr Greg Parker

For the Second

& Third Applicants: T. Zietsman

Instructed by: Schoeman Oosthuizen Inc.
Port Elizabeth
Ref: Mr J S Oosthuizen