



IN THE LAND CLAIMS COURT OF SOUTH AFRICA
HELD AT RANDBURG

CASE NO: LCC 31/2021

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES / NO	
(2) OF INTEREST TO OTHER JUDGES: YES / NO	
(3) REVISED: YES / NO	
1/10/2021 DATE	 SIGNATURE

Heard on: 17 SEPTEMBER 2021

Delivered on: 01 October 2021

In the matter between:

MPHELENG COMMUNITY PROPERTY ASSOCIATION APPLICANT

and

ABRAM THIPE MOKWANA 1ST RESPONDENT

ALL UNLAWFUL OCCUPIERS OF LAND SITUATED
AT ZONDAGSFONTEIN JS32, PORTION C 2ND RESPONDENT

UNKNOWN PERSONS WHO INTEND OCCUPYING
ZONDAGSFONTEIN JS32 3RD RESPONDENT

ELIAS MOTSOLEDI LOCAL MUNICIPALITY	4 TH RESPONDENT
CHIEF LAND CLAIMS COMMISSIONER (LIMPOPO PROVINCE)	5 TH RESPONDENT
REGIONAL LAND CLAIMS COMMISSIONER (LIMPOPO PROVINCE)	6 TH RESPONDENT
CHIEF DIRECTOR: LAND CLAIMS COMMISSIONER (LIMPOPO PROVINCE)	7 TH RESPONDENT

JUDGMENT

FLATELA AJ

Introduction

- [1] The Applicant seeks interim relief against the First to the Third Respondents in the following terms:
1. That the First, Second and Third Respondents are hereby interdicted from occupying, invading, cutting stands and erecting fencing on the land situated at Zondagsfontein JS32, Portion C, situated within Elias Motsoaledi Local Municipality, Limpopo Province, pending finalisation of a land claim under reference number R/5/121/455/46267;
 2. Directing the First, Second and Third Respondents not to erect or build temporary and/or permanent structures on Zondagsfontein JS32, Portion C, pending finalisation of the land claim under reference number R/5/121/455/46267;
 3. Directing the First, Second and Third Respondents to remove or demolish any temporary structures within 10 (ten) days of this order;

4. That the First, Second and Third Respondents (if any) be ordered to pay the costs of this application, jointly and severally the one paying the other to be absolved only in the event of opposition.
 5. Directing the Applicant to erect a board on the four corners of the land Zondagsfontein JS32, Portion C, in order to effect service of the court order upon the third Respondent herein;
 6. Granting the Applicant further and/or alternative relief.
- [2] The urgent application was necessitated by the unlawful occupation of the land by the First to Third Respondents. The First to Third Respondents have been clearing the land and building temporary structures.

The Parties

- [3] The Applicant is Mpheleng Community Property Association a voluntary association formed by the members of the families whose land was dispossessed. It was formed to lodge the land claim on behalf of the community and related matters thereto.
- [4] The First Respondent is Thipe Abram Mkwana, an adult male person, currently residing at Mapekereng Village, next to Bantwane Tribal Authority within Elias Motsoaledi Local Municipality, Limpopo Province. It is alleged that the first respondent is demarcating the stands in the property and giving the right to occupy them to second and third respondents without authority.
- [5] The Second Respondent is the unlawful occupier(s) of the land situated at Zondagsfontein JS32, Portion C.

- [6] The Third Respondent is the unknown people or person who intend(s) occupying the land situation at Zondagsfontein JS32, Portion C, within Elias Motsoaledi Local Municipality, Limpopo Province.
- [7] The Fourth Respondent is Elias Motsoaledi Local Municipality, a local municipality established in terms of the municipal structures act with its principal place of business at 2 Grobler Avenue, Groblersdal, Limpopo Province. The fourth Respondent, who is the current owner of the land has not taken any steps to stop the invasion.
- [8] The Fifth Respondent is The Chief Land Claims Commissioner, cited herein in his capacity as such with principal place of business at 70 Hans Van Rensburg, ABSA Building, Polokwane, Limpopo Province.
- [9] The Sixth Respondent is The Regional Land Claims Commissioner cited in his official capacity as such with his principal place of business at 61 Biccard Street, Polokwane, Limpopo Province.
- [10] The Seventh Respondent is The Director: Regional Land Claims Commissioner Limpopo Province, cited in his official capacity as such with his principal place of business at cnr Rissik and Schoeman Street, Polokwane, Limpopo Province.
- [11] The application is not opposed.

Background

- [12] On 30 January 2015 Monaiwe Jerry Nnawe lodged a land claim on behalf of the Mpheleng Community in terms of the Restitution of Land Rights Amendment Act 15 of 2014 ("Amendment Act") for the restitution of rights as

envisaged by section 25(6) of the Constitution of the Republic of South Africa, 1996 ("Constitution").

- [13] The lodgement was acknowledged under number R/5/121/455/46267.
- [14] The validity of the Amendment Act was challenged in *Land Access Movement of South Africa and Others v Chairperson of the National Council of Provinces and Others*¹(LAMOSA 1). The applicants argued that the National Council of Provinces failed to facilitate public participation as envisaged by section 72(1)(a) of the Constitution when the Bill which preceded the enactment of the Amendment Act was passed thereby *rendering* the Amendment Act unconstitutional. On 28 July 2016, the Amendment Act was declared invalid by the Constitutional Court on the basis that the National Council of Provinces' public participation process did not comply with the requirements of section 72(1)(a) of the Constitution.
- [15] The Commission on the Restitution of Land Rights was interdicted from processing the land claims lodged as a result of the Amendment Act.
- [16] At the time of the hearing of LAMOSA 1 there were about 75000 to 80000 claims that had been lodged since the enactment of the Amendment Act (i.e. the new claims).
- [17] The Applicant's claim was amongst the claims that were lodged before the declaration of the invalidity of the Amendment Act.
- [18] Regarding the new claims that were already lodged, the Constitutional Court stated that to order invalidity with retrospective effect will be disruptive and will be prejudicial to the claimants who already filed the new claims in good faith believing that the Amendment Act was valid. Critically, Madlanga J for the court

¹ 2016 (5) SA 635 (CC); 2016 (10) BCLR 1277

said the Amendment Act sought to vindicate the right to restitution of rights guaranteed in section 25(7) of the Constitution.

- [19] The Constitutional Court further stated that it would be unjust to invalidate the claims that had been already lodged without limiting the retrospective effect of the declaration as the right of restitution of the new claimants would be extinguished, as the right to restitution in terms of section 25(7) of the Constitution only exists to the extent provided by an Act of Parliament.

The following order was granted:

- "1. It is declared that Parliament failed to satisfy its obligation to facilitate public involvement in accordance with section 72(1)(a) of the Constitution.*
- 2. The Restitution of Land Rights Amendment Act 15 of 2014 is declared invalid.*
- 3. The declaration of invalidity in paragraph 2 takes effect from the date of this judgment.*
- 4. Pending the re-enactment by Parliament of an Act re-opening the period of lodgement of land claims envisaged in section 25(7) of the Constitution, the Commission on Restitution of Land Rights, represented in these proceedings by the Chief Land Claims Commissioner (Commission), is interdicted from processing in any manner whatsoever land claims lodged from 1 July 2014.*
- 5. The interdict in paragraph 4 does not apply to the receipt and acknowledgement of receipt of land claims in terms of section 6(1)(a) of the Restitution of Land Rights Act 22 of 1994.*
- 6. Should the processing, including referral to the Land Claims Court, of all land claims lodged by 31 December 1998 be finalised before the re-enactment of the Act referred to in paragraph 4 above, the Commission may process land claims lodged from 1 July 2014.*
- 7. In the event that Parliament does not re-enact the Act envisaged in paragraph 4 within 24 months from the date of this order, the Chief Land Claims Commissioner must, and any other party to this application or person with a direct and substantial interest in this order may, apply to this*

Court within two months after that period has elapsed for an appropriate order on the processing of land claims lodged from 1 July 2014.”

- [20] Parliament failed to enact an Act of Parliament within 24 months as ordered by the Constitutional Court. Two months prior to the lapsing of the time given to the Parliament, the Speaker of the National Assembly approached the Constitutional Court for extension of the period in *Speaker of the National Assembly and Another v Land Access Movement of South Africa and Others*.
- [21] The application was dismissed and the following orders were granted:
- “1. *The application by the applicants for an extension is dismissed.*
 2. *The counter-application by the first to sixth respondents is upheld to the following extent, subject to the Parliament of the Republic of South Africa legislating otherwise:*
 - (a) *The Commission on Restitution of Land Rights (Commission) is prohibited from processing in any way any claims lodged in terms of section 10 of the Restitution of Land Rights Act 22 of 1994 (Restitution Act) between 1 July 2014 and 28 July 2016 (interdicted claims) until the earlier of the dates when—*
 - (i) *it has settled or referred to the Land Claims Court all claims lodged on or before 31 December 1998 (old claims) by way of a referral of the claim in terms of section 14; or*
 - (ii) *the Land Claims Court, upon application by any interested party, grants permission to the Commission to begin processing interdicted claims, whether in respect of the whole or part of the Republic of South Africa and whether in respect of part or all of the process for administering an interdicted claim.*
 - (b) *Until the date referred to in paragraph (a), no interdicted claims may be adjudicated upon or considered in any manner whatsoever by the Land Claims Court in any proceedings for the*

restitution of rights in land in respect of old claims, provided that interdicted claimants may be admitted as interested parties before the Land Claims Court solely to the extent that their participation may contribute to the establishment or rejection of the old claims or in respect of any other issue that the presiding judge may allow to be addressed in the interests of justice.

- (c) *Notwithstanding the provisions of section 11(5) and 11(5A) of the Restitution Act, no interdicted claimant shall be entitled to any relief having the effect of—*
 - (i) *altering or varying—*
 - (a) *the relief granted to any claimant in terms of section 35 of the Restitution Act in respect of a finalised old claim;*
 - (b) *the terms of an agreement concluded in terms of section 42D of the Restitution Act; or*
 - (c) *an award in terms of section 42E(1)(a) or (b) of the Restitution Act,*
 - unless the Land Claims Court in exceptional circumstances orders otherwise; and / or*
 - (ii) *awarding to such interdicted claimant land or a right in land that is subject to a pending claim for restoration by an old claimant.*
- (d) *The Chief Land Claims Commissioner must file a report with the Land Claims Court, to be dealt with as the Judge President of that Court may deem fit, at six-monthly intervals from the date of this order, setting out—*
 - (i) *the number of outstanding old claims in each of the regions on the basis of which the Commission's administration is structured;*
 - (ii) *the anticipated date of completion in each region of the processing of the old claims, including short-term targets for the number of old claims to be processed;*

- (iii) *the nature of any constraints, whether budgetary or otherwise, faced by the Commission in meeting its anticipated completion date;*
 - (iv) *the solutions that have been implemented or are under consideration for addressing the constraints; and*
 - (v) *such further matters as the Land Claims Court may direct; until all old claims have been processed.*
- (e) *The Land Claims Court may make such order or orders as it deems fit to ensure the expeditious and prioritised processing of old claims."*

Locus Standi

- [22] The applicant's claim falls within the ambit of "LAMOSA 1" and "LAMOSA 2", judgments of the Constitutional Court.
- [23] When the matter came before me I requested Mr Kekana to file supplementary heads of argument to address the *locus standi* and the jurisdiction of this Court regarding the adjudication of matters arising from the rights of the new land claimants in the light of LAMOSA 1 and LAMOSA 2 judgements . I am grateful to counsel for submitting full heads. They were helpful.
- [24] The matter was postponed to 20 September 2021 but was heard on 17 September 2021.
- [25] The Applicant submitted that it is not asking this court to entertain a new or a competing claim against the claims lodged by 31 August 1998 nor seeking declaratory order pertaining to its claim. The applicant seeks an order to protect their interest in the claimed land that is invaded by unknown people.
- [26] In his supplementary affidavit, Monaiwe Jerry Nnawe attached a statement of claim that was filed together with the Applicant's claim form. The statement of claim states the following:-

- 26.1. It is stated that that their forbearers lived in the Zondagsfontein area known as Mpheleng in the 1860s after fleeing from the Bapedi. The forebearers belonged to the Pedi and Ntwane tribes who fled from the Bapedi.
- 26.2 According to the history of ownership of the land, it was transferred for the first time as a farm in 1871 to Hendrick Frederick & Zoon. The farm has since been subdivided into many portions. The land dispossession took place over a period of time starting from 1933 and ending in 1964 when the land was registered in the name of the South African Native Trust. They were removed forcefully from the area in terms of the Native Trust and Land Act 18 of 1936 to the trust land in the neighbouring area. A list was compiled of the people and animals that were forcefully removed.
- 26.3 They had rights to commonage from which they used to obtain firewood and water, they also grazed their livestock (cattle, goats and sheep). According to records held by the National Archives of South Africa, there were 137 African families about 750 black people 115 man, 127 wives including 11 widows ,485 children who lived on the farm by the 1960s. they also commanded combined livestock of about 750 cattle ,641 sheep and goats and 34 donkeys.
- 26.4 The land was used as a Native labour reservoir for white people's farms in Bethal. In a letter written by G.v.d Aaaedweg, Agricultural Office dated 15 November 1955 addressed to Native Commissioner, it is stated that:
- "There are plus minus 30 Native Families squatting on this portion of Sondagsfontein who are supposed to render 90 free labour to the owners, but which is not being done according to Muller ..some 50 morgen of semi cleared grounds comprises the native lands.*
- 26.5 In another letter, Minute Number N2/7/3/28(c) dated 25 November 1955 by D.O Bowen, Native Commissioner, addressed to law firm Harvey,

Mostert, Muller, regarding the Remaining Extent of Farm Zondagsfontein which belonged to Messrs G.J Moolman and L.C Muller it is stated that: *"Such portions have been used as Native labour reservoir where labour can be obtained for their farms in Bethal. Apparently the Native occupiers are now becoming difficult with the results that the owners can no longer obtain labour as required and desire to be rid of their portions. They very seldom visit the farm which has been in Native occupation for many years."*

26.7 The land was transferred to the SANT and the process took place between 1952 and 1964. The claimant's forbears lost the land and the resident were removed through "trek passes". They only returned as job seekers.

[28] In *casu*, the Applicant brought this application to protect the community's interest in the land as section 11(1) and s 11(7) of the Restitution Act would have afforded the community that protection. I am satisfied that the Applicant has established the *locus standi* to bring these proceedings.

[29] Spilg J considered the locus standi of the new claimants in *Farao and Another v The Regional Land Claims Commissioner and Others*². He stated that:

"23. It is evident therefore that Farao on behalf of the Hanse family sought to bring the present application in order to protect such rights as a Gazette Notice published under s 11(1) and the provisions of s11(7) would have secured but for the invalidity of the Amendment Act; namely that a claimant cannot be evicted from land in respect of which a claim has been lodged and gazetted."

² [2020] ZALCC 16

Discussion

- [30] The Constitution guarantees the right to restitution or to equitable redress to any person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices to the extent provided by an Act of Parliament.³ The Restitution of Land Rights Act 22 of 1994 ("Restitution Act") addresses the matter of restitution.
- [31] In terms of section 2 of the Restitution Act, persons, families and communities were afforded an opportunity to lodge claims on or before 31 December 1998.
- [32] Madlanga J in LAMOSA 1 held that:
The right to restitution of land is sourced from the Constitution itself.⁴ The Amendment Act gives effect to this right. As I state in the introduction, the subject to which the right relates touches nerves that continue to be raw after many decades of dispossession. The importance of the right to restitution, therefore, cannot be overstated. Restitution of land rights equals restoration of dignity.
- [33] Although the applicant's claim is interdicted however it is not invalidated. The applicant has an interest in the land that needs protection. Section 11 of Act 22 of 1994 does afford the protection of the interest in the land that has been claimed. I am satisfied that the plaintiff has proven that it has an interest in the land in question and it would have been protected by section 11 of Act 22 of 1994 if the Amendment Act was not invalidated.

The requirement of an interdict

- [34] In his heads of argument, the Applicant argued that he has fulfilled the requirements of interim interdict and quoted the usual common law requirements and *Setlogela v Setlogela* 1914 AD 221

³ Section 25(7) of the Constitution.

⁴ Section 25(7).

[35] The requirements of an interdict are governed by section 6(3) of the Restitution Act. There are six requirements which must be fulfilled. In *Singh and Others v North Central and South Central Local Councils and Others*,⁵ the court neatly summarised the requirements of the interim interdict as envisaged by section 6(3) of the Restitution Act as follows:

1. The applicant must be an interested party.
2. The applicant must have reason to believe that the development sought to be interdicted will defeat the achievement of the objects of the Act.
3. A claim must have been lodged in respect of the land concerned.
4. The owner of land must have been notified of the land claim and of the provisions of section 6(3).
5. Reasonable notice must have been given to all interested parties.
6. 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.

[36] I now deal with whether the Applicant has fulfilled these requirements:

- 36.1 The Applicant is an interested party. Its claim was lodged on 30 January 2015. Its receipt was acknowledged by the Regional Land Claims Commissioner Limpopo. The claim was not invalidated. The Applicant has fulfilled requirements 1 and 3 above.
- 36.2 The Applicant has reasons to believe that the land invasion sought to be interdicted will defeat the achievement of the object of the Act. The Applicants submitted that the First Respondent has been unlawfully invading, dividing and sub-dividing the land, erecting fences and building

⁵ [1999] 1 ALL SA 350 (LCC).

temporary structures since 8 October 2020. The Applicant convened several meeting between the First respondent and those representing the unlawful occupiers. The unlawful occupiers vowed to continue with their unlawful occupation unless they are interdicted by the Court.

- 36.3 The Applicant further submitted that the unlawful occupiers are persisting in their unlawful conduct of building structures. It will be difficult to restore the land to the Applicants in the event that their claim is successful. This will defeat the objects of the Act as it will be impossible to evict people who settled in the land for more than six months.
- 36.4 There has been reasonable notice to all interested parties. The Applicant consulted with the Respondents on several occasions in an attempt to resolve the matter amicably. Regarding this application, the Respondents were served and they are not participating.
- 36.5 I am of the view that the Applicant has an interest in the claimed land that must be protected. The balance of convenient favours granting an order against the unlawful occupiers.
- 36.5 The Applicant argued that the unlawful land occupation will prejudice the prospect of the land being transferred to the beneficiaries in the event that their claim is successful.
- 36.6 It must be clearly stated that the granting of this order is only to protect the Applicant's interest in the land so claimed. The order does not give the Applicant the right in land. The effect of the order is that the *status quo* of the land is frozen pending the determination of the Applicant's claim.

[38] In the circumstances I make the following order:

1. The First, Second and Third Respondents are hereby interdicted from occupying, invading, demarcating, selling, fencing or dealing with the land in any manner whatsoever on the land situated at Zondagsfontein JS32, Portion C, situated within Elias Motsoaledi Local Municipality, Limpopo Province pending finalisation of a land claim under reference number R/5/121/455/46267.
2. The First, Second and Third Respondents are hereby directed to demolish and remove all structures, fences and everything that has been erected on the land within 10 (ten) days of this order.
3. The Sheriff is authorised to demolish and remove any structures built by the First to Third Respondents in the event of failure by the Respondents to demolish such structures within 10 (ten) days of this order.
4. Directing the members of the South African Police Services to render whatever assistance is required by the Sheriff in the execution of an order in terms of paragraph 2.
5. The Applicant is granted leave to serve this order by affixing copies to the structures and to erect a board on each of the four corners of the land Zondagsfontein JS32, Portion C, in order to effect service of the court order upon the First to the Third Respondent herein.

A handwritten signature in black ink, appearing to read 'Flatela L', written over a horizontal line.

Flatela L

Acting Judge

Land Claims Court

APPEARANCES

APPLICANT : Adv Kekana

Instructed by :Kgadima Kekana Attorneys
Midrand