

IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION: MTHATHA

CASE NO. 1708/2013

In the matter between:

BANGANI GETRUDE NONTSAPO

Plaintiff

And

MINISTER OF RURAL DEVELOPMENT &

LAND AFFAIRS

.

1st Defendant

THE REGIONAL LAND CLAIMS COMMISSION

2nd Defendant

JUDGMENT

DUNYWA AJ

[1] In these action proceedings the plaintiff seeks to enforce the agreement entered into between Mdlankomo-Moyeni Community and the defendants. The plaintiff is a spouse to Mlifi Bangani who registered as an original dispossessed

person and who is now deceased. The deceased was a resident of Mdlankomo-Moyeni community. The plaintiff alleges that she is representing an originally dispossessed claimant.

[2] The originally dispossessed claimant was entitled to equitable redress in full and final settlement of the restitution claim in the amount of R94 762.26. The payment was for financial compensation of the loss incurred by the claimant as a result of dispossession of land. The claimant has since passed on the plaintiff was then registered as the claimant in respect of Mlifi Bangani's homestead. This was directed by the order of this court dated 21 July 2011.

[3] The defendants have raised a special plea on the ground that the plaintiff was lacking *locus standi*. As appoint *in limine* the defendant submitted that the High Court has no jurisdiction to deal with a matter arising from the Restitution of Land Act 22 of 1994 (the Act).

[4] Mr Zono appeared on behalf of the plaintiff in his submission does not agree that only the Land Claims Court has jurisdiction to hear this matter. His argument is that the plaintiff does not require adjudication of her rights in accordance with this Act. He argues further that the plaintiff's cause of action is founded on the law of contract not on the provisions of the Act.

[5] Mr Msiwa on behalf of the defendants' submitted that section 22 of the Act read with section 166(c), (d) or (e) of the Constitution of the Republic of South Africa (the Constitution) gives exclusive jurisdiction to the Land Claims

Court on matters pertaining to this Act. Therefore the High Court has no jurisdiction to deal with this matter.

[6] Section 22 of the Act provides that;

‘There shall be a court of law to be known as the Land Claims Court which shall have power, to the exclusion of any court contemplated in section 166(c), (d) or (e) of the Constitution.

(a) to determine a right to restitution of any right in land in accordance with this Act.

(b) to determine or approve compensation payable in respect of land owned by or in the possession of a private person upon expropriation or acquisition of such land in terms of this Act.

(c) to determine the person entitled to title to land contemplated in section.’

[7] The maxim *expressio inius est exclusio alterius* when applied in relation to section 22 of the Act triggers the thinking that the exclusive inclusion of the Land Claims Court in the definitions of the Act clearly implies the exclusion of the other courts including High Court.

[8] This view is strongly supported by views expressed in ***Florence v Government of the Republic of South Africa*** 2014 (6) SA 456 (CC) at paragraph 117, where the court held that;

The rationale for this generous jurisdiction is not hidden. This Restitution Act is truly ambitious. It hopes to facilitate and regulate nationwide land-restoration claims that

have accrued in almost a century of dispossession. The dispossession of rights in land must have occurred under many diverse settings. Not all rights are registered or readily verifiable; nor would evidence to support claims be easy to garner. Whilst the equitable-redress claim had to occur under the colour of law, the adjudication process had to be flexible under a court with ample jurisdiction and with a strict and strong discretion to make prompt and permissible choices, provided they are just and equitable. These considerations and more, point to a strict discretion conferred only on the Land Claims Court. This court is constrained not to interfere with that court's remedial determinations unless they are shown to be vitiated by decision-making.

[9] There is no doubt from the language of the legislator that the Land Claims Court has an exclusive jurisdiction pertaining to land restoration matters. The major debate is comparing the exclusive jurisdiction of the Land Claims Court with the inherent jurisdiction which the High Court has on matters in general.

[10] Jerold Taitz in his book '**The Inherent Jurisdiction of the Supreme Court**' at page 1 states the following:

“the inherent jurisdiction of the Supreme Court may be described as the unwritten power without which the Court is unable to function with justice and good reason. On the same breadth; **Celliers et al The Practice of the High Courts in South Africa 5th Edition** page 49, provides that “The Superior Courts...have always had inherent jurisdiction to make orders, unlimited as to amount, in respect of the matters that come before them, subject to certain limitations imposed in some instances by common law, but more often by statute.

[11] The inherent jurisdiction of the High Court is premised on common law. This inherent power has also been endorsed by the Constitution. See section

173 of the Constitution. Section 21(1) of the Superior Courts Act 10 of 2013 also provides that:

*A Division has jurisdiction over all persons residing or being in, and **in relation to all causes arising** and all offences triable within, its area of jurisdiction and all other matters of which it may according to law take cognisance, and has the power-*

- (a) to hear and determine appeals from all Magistrates' Courts within its area of jurisdiction;*
- (b) to review the proceedings of all such courts;*
- (c) in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.*

[12] The plaintiff's argument that the High Court has jurisdiction to enforce agreements, even those emanating from Land restitution is not 100% correct. In ***Majeje Traditional Authority v Mbhungala & Others*** 2007 JOL 19030 T, judgment by Ledwaba J, the point in *limine* regarding jurisdiction was not upheld. In that matter the court was dealing with an interdict and it was held that the relief claimed by the applicants fell within the jurisdiction of the High Court. The land, in respect of which the interdict related, was a subject of the dispute before the Land Claims Court.

[13] The outstanding difference between this case and the case above lies in section 22 (C) e) which reads thus:

‘There shall be a court of law known as the Land Claims Court which shall have the power, to the exclusion of any court contemplated in section 166(c) (d) or (e) of the Constitution;

(C)e) to determine any matter involving the validity, enforceability, interpretation or implementation of an agreement contemplated in section 14(3), unless the agreement provides otherwise’

[14] The matter before court is a matter concerning the enforcement of an agreement between Mdlankomo Moyeni Community and the defendants. In principle not all agreements are to be heard exclusively by the Land Claims Court. It is only agreements contemplated by section 14 (3) of the Act. Section 14(3) of the Act reads thus:

‘If in the course of an investigation by the commission the interested parties enter into a written agreement as how the claim should be finalised and the Regional land claims Commissioner having jurisdiction certifies in writing that he or she is satisfied with the agreement out not be referred to court, the agreement shall be effective only from the date of such certification or such a later date as may be provided for in the agreement’.

[20] This agreement before court was signed by two parties i.e. Mdlankomo-Moyeni Community and the defendants. The cause of action is about the enforcement of an agreement referred to section 22 (C) e) of the Act. The same agreement was made in terms of section 14(3) of the Act. The agreement was mentioned in the pleadings. The agreement was indeed certified by the Regional

Land Claims Commissioner Ms Faleni in terms of section 14(3) of the Act. That appears in page 56 of the agreement.

[22] The certification reads as follows:-

‘The Regional and Claims Commissioner for the Eastern Cape, Ms L. Faleni will certify in writing as provided for in terms of section 14(3) of Restitution of Land Rights Act, Act no.22 of 1994, as amended that she is satisfied with the agreements entered into by various parties for the settlement of the Mdlankomo-Moyeni commonage claim and that such agreements ought not to be referred to Court, and such agreements be effective from the date of signature by the parties (A copy of 14 (3) certificate attached as Annexure E)’

[23] The certificate is not before court. The fact that certificate is mentioned and was alleged to be attached as Annexure E proves on balance of probabilities that the certificates exist. It is not necessary that the certificate must be produced before for this court to prove that the agreement was concluded under the auspices of section 14(3) of the Act. The contract itself has referred to section 14(3) and specifically states that it was certified by the Regional Land Claims Commissioner Ms Faleni.

[24] Therefore this is a matter which exclusively falls under the jurisdiction of the Land Claims Court in terms of section 22(C) e) of the Act, because it was an agreement in terms of section 14 (3) of the Act.

[25] The agreement was properly discovered by the plaintiff and the notice was sent to the defendants. The defendants argued that they never received the agreement. Had the defendants seen this agreement in time they should have noted this discrepancy earlier. It is for that reason this court is of the view that it should not to grant costs against the plaintiff because both parties appear to be at fault.

[26] It is ordered that:

- (a) The action must be instituted before the Land Claims Court.
- (b) The action is dismissed on the ground of lack of jurisdiction but not on the merits.
- (c) There is no order as to costs.

DUNYWA AJ

ACTING JUDGE OF THE HIGH COURT

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Matter heard on:

27 November 2015

Judgment delivered on:

10 December 2015