




IN THE LAND CLAIMS COURT OF SOUTH AFRICA
HELD AT RANDBURG

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| (1) | REPORTABLE: YES / NO |
| (2) | OF INTEREST TO OTHER JUDGES: YES / NO |
| (3) | REVISED. |
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| 10/11/2020 | |

CASE NO: LCC130/2020

In the case of:

LEFOSE MAKGAHLELA

Applicant

and

MABOI 6 COMMUNITY TRUST
(IT9676/2000)

Respondent

JUDGMENT

COWEN AJ

Introduction

1. The applicant is Lefose Makgahlela, a lecturer at the University of Limpopo. He resides on Portion 39 of the farm Kalkfontein 1001 LS near Polokwane. The applicant conducts various activities on Portion 39 including the cultivation of fields, cash crop farming and the operation of the GAE Holiday Resort and

Conference Centre, situated on a six-hectare portion of the property. Portion 39 is owned by the respondent, the Maboi 6 Community Trust (the Trust). The applicant and the respondent are in a dispute concerning the applicant's rights to use Portion 39 as well as various other properties owned by the Trust, which the applicant, amongst others, uses for purposes of keeping and grazing livestock. These are Portions 1, 5, 36, 42 and 55 of the farm Kalkfontein 1001LS.

2. On 15 September 2020, the applicant approached this court urgently in terms of Rule 34 of the Land Claims Court Rules seeking relief against the Trust to secure his access to and use of the properties. On 16 September 2020, the Court issued directives regulating the further conduct of the matter and securing the applicant's interim access to the properties in question for purposes of providing water and sustenance to his livestock pending the finalization of the application.
3. The application was set down for hearing on 12 October 2020, when it came before me. Mr Grobbelaar appeared for the applicant and Mr Monene appeared for the respondent. The hearing was convened via Zoom in view of the ongoing Covid-19 pandemic.
4. In the notice of motion, the applicant seeks, *inter alia*:
 - 4.1. declaratory relief regarding his entitlement to occupy and use the properties in the way that he does (the declaratory relief) and
 - 4.2. an interdict prohibiting the respondent, its trustees and others acting on their behalf from preventing him access to the properties in question.

5. However, in argument (both written and oral) and while persisting with the declaratory relief, Mr Grobbelaar contended that the application primarily contemplates relief based on the *mandament van spolie* to restore his possession of the properties in circumstances where the respondent has denied him access thereto. He submitted that notwithstanding the terms of the notice of motion, this is apparent from the founding affidavit which explains that the essential purpose of the declaratory relief sought is to restore the *status quo ante* regarding the applicant's use of the properties. In these circumstances, he submitted, the Court can grant a *mandament* relying on the prayer for further and alternative relief. Notably, the founding affidavit expressly explains that the Court is being asked to give effect to the common law prohibition against resorting to self-help. Moreover, Mr Grobbelaar further informed the Court that the applicant had not been denied access to or precluded from using Portion 39, only to the remaining properties used for livestock with the result that the need for urgent relief, if any, related to access to the remaining properties.

6. During the course of argument, I raised a concern regarding the Court's jurisdiction to entertain the application. The Land Claims Court is a specialist court.¹ It is a court which derives its jurisdiction from statute, centrally, the Restitution of Land Rights Act 22 of 1994 (the Restitution Act), the Extension of Security of Tenure Act 62 of 1997 (ESTA) and the Land Reform (Labour Tenants) Act 3 of 1996 (the Labour Tenants Act). While this Court has generous and wide

¹ *Goedgelegen Tropical Fruits (Pty) Ltd* 2007(6) SA 199 (CC); 2007(10) BCLR 1027; [2007] ZACC 12 (*Goedgelegen*) at para 84. *Florence v Government of the RSA* [2014] ZACC 22; 2014 (6) SA 456 (CC); 2014 (10) BCLR 1137 (CC) at paras 24 and 121.

remedial powers in terms of the Restitution Act,² the Court can only exercise its jurisdiction over subject matter contemplated by the provisions of the statutes that empower it.³

7. There is no suggestion in the papers and no argument was advanced that the applicant is entitled to the protections of either the Labour Tenants Act or ESTA.⁴ Rather, the applicants rely squarely on the Restitution Act. Mr Grobbelaar contended that this Court has jurisdiction relying specifically on sections 22(1)(cA) and (cE),⁵ section 22(2),⁶ section 35(2)(fA)⁷ and section 38E⁸ of the

² *Goedgelegen* at paras 30, 84 and 116.

³ *Zulu and others v Van Rensburg and others* [1996] 2 All SA 615 (LCC) (Zulu); *Sibanyoni v Holtzhausen and Others* (LCC143/2015) [2019] ZALCC 11 (9 May 2019).

⁴ See *Mathimbane and another v Normandien Farms (Pty) Limited* [2014] JOL 32048 (LCC) and compare *Zulu*. See too *Venter NO v Claasen en andere* 2001(1) SA 720 (LCC).

⁵ Section 22 is titled Land Claims Court. The relevant parts of section 22 provide as follows:

22(1) *There shall be a court of law to be 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 –*
(a) to determine a right to restitution of any right in land in accordance with this Act;

...
(cA) at the instance of any interested party and in its discretion, to grant a declaratory order on a question of law relating to section 25(7) of the Constitution or to this Act or to any other law or matter in respect of which the Court has jurisdiction, notwithstanding that such person might not be able to claim any relief consequential upon the granting of such order.

...
(dE) to determine any matter involving the validity, enforceability, interpretation of implementation of an agreement contemplated in section 14(3), unless the agreement provides otherwise; ...

⁶ Section 22(2) confers jurisdiction on the Court throughout the Republic of South Africa and provides that the Court shall have

(a) all such powers in relation to matters falling within its jurisdiction as are possessed by a High Court having jurisdiction in civil proceedings at the place where the land in question is situated, including the powers of a High Court in relation to any contempt of the Court.

(b) All the ancillary powers necessary or reasonably incidental to the performance of its functions, including the power to grant interlocutory orders and interdicts;

Restitution Act. Moreover, Mr Grobbelaar submitted that the Court has jurisdiction because there is pending restitution claim by the Mamahule Community in respect of the property (the Mamahule land claim) in respect of which this Court, on 28 August 2007, granted an order in proceedings concerning the Trusts' and the applicant's use of the property pending the finalization of the land claim (the Mamahule order). The Mamahule order was made in proceedings instituted by the land claimant, the Mamahule Community, against the applicant, the respondent (citing the Trustees of the Trust) and the Regional Land Claims Commissioner under case number LCC100B/06.⁹ That order thus binds both parties to this application. And it regulates the applicant's use of Portion 39, (which is in issue both in these proceedings and is one of the properties subject to the Mamahule land claim). However, the order operates as between the Mamahule Community and the applicant.

8. Subject to the implications of the Mamahule land claim and the Mamahule order, I am not satisfied that this Court has jurisdiction over this dispute. Notably, the parties confirmed during the hearing that the Trust did not become the owner of the properties as a result of any restitution claim or specifically by virtue of a

(c) *The power to decide any issue either in terms of this Act or in terms of any other law, which is not ordinarily within its jurisdiction but is incidental to an issue within its jurisdiction if the Court consider it to be in the interests of justice to do so.*

⁷ Section 35 is entitled Court Orders. Section 35(1) sets out the orders a court may make in a land claim and section 35(2) confers the power to make additional orders including, in (fA) "appropriate orders to give effect to any agreement between the parties regarding the finalisation of the claim".

⁸ Section 38E is entitled Additional Powers of Court and confers a range of powers on the Court which it may exercise 'during proceedings under [Chapter III]'.

⁹ Following the hearing I obtained access to the notice of motion and founding affidavit in the proceedings to verify the identity of the parties to the litigation, the relief sought and the resultant impact of the order granted.

section 14(3) agreement. In these circumstances and without more, it is difficult to see how any of the provisions relied upon and cited above might apply.

9. However, the pending land claim and the order granted in LCCB/106 may cast a different light on the matter. Specifically, the question arises whether this Court has jurisdiction under section 22(2)(c) of the Restitution Act,¹⁰ and whether the issues arising, while not ordinarily within its jurisdiction are "*incidental to an issue within its jurisdiction*". If so, the Court may exercise jurisdiction if it considers it to be in the interests of justice to do so. This is because section 22(2)(c) allows the Land Claims Court, when adjudicating a case which concerns an issue in its jurisdiction, also to decide other incidental issues not ordinarily within its jurisdiction.¹¹

10. But can section 22(2)(c) confer jurisdiction in a case when the issues arising are said to be '*incidental*' to issues arising in different proceedings or in respect of a dispute between different parties, in this case the Mamahule land claim or the Mamahule order? In my view it is not necessary for me to decide this question because even to the extent that it may, I have concluded that this is not a case where the issues that arise can properly be regarded as "*incidental*" to the issues in either the Mamahule land claim or the dispute that resulted in the grant of the Mamahule order. In any event, I am of the view that it would not be in the interests of justice to assert jurisdiction in this case.

11. The scope of the Court's jurisdiction arising from section 22(2)(c) depends in some measure on the meaning of the term '*incidental*'. Ascertaining its meaning,

¹⁰ See above at n3.

¹¹ The Court did so in *Venter NO v Claasen en andere* 2001(1) SA 720 (LCC) by dealing with an eviction application in circumstances where it concluded that affected respondents were not ESTA occupiers.

is not, however, without its difficulties.¹² Moreover, the section is capable of restrictive or more generous interpretation focusing on the nature of the relationship between the issues. The Afrikaans text of the Restitution Act refers to '*enige aangeleentheid ... wat ... verband hou met*' the issue in the Court's jurisdiction.¹³ In my view, an unduly restrictive approach would not serve the interests of justice or give adequate effect to the right of access to court protected in section 34 of the Constitution. This is not least because it would create circumstances where a litigant may need to approach both a specialist court and the High Court in separate proceedings for relief on related issues and prevent courts from allowing parties to ventilate their disputes and resolving them holistically before a single court.

12. However, even if I were to interpret the section generously, I am unable to conclude that the issues arising in these proceedings are incidental either to the Mamahule land claim or the Mamahule order. None of the relief sought has any impact on the Mamahule land claim nor does it have any implications for the Mamahule order. Indeed, presumably for this reason it was not considered necessary to join the Mamahule Community to the application.

¹² See Garner, *BA A Dictionary of Modern Legal Usage* (2ed) OUP 1995 at p 430: Garner explains the common misuse (including by legislatures) of incidently (so as to depend on or appertain to something else) for incidentally (loosely, casually or 'by the way').

¹³ The Afrikaans text of section 22 provides that the Court is empowered '*om enige aangeleentheid, hetsy ingevolge hierdie Wet of ingevolge enige ander wet, wat nie gewoonlik binne sy jurisdiksie is nie maar verband hou met 'n aangeleentheid binne sy jurisdiksie, te beslis indien die Hof dit in die belang van geregtigheid ag om dit te doen.*'

13. In any event, I am of the view that the interests of justice would not be served if I were to assert jurisdiction. There are at least three reasons for this. First, the dispute between the applicant and the Trust that is of real urgency is the spoliation and interdictory relief. Provided the applicant's possession is not disturbed, the declaratory relief can be considered in the ordinary course. Second, during the course of the hearing, the Trust confirmed that its attorneys would confirm in writing that the applicant's access to the properties would not be interfered with while the parties sought to resolve their dispute if need be via legal proceedings. Thus, while the parties remain in a position where they need to resolve their dispute about Trust beneficiaries' access to and use of Trust property, the crux of the urgent dispute – the spoliation – has been resolved. Third, the Court could only assert jurisdiction in circumstances where the Mamahule Community has been joined, which would result in the Community being brought into potentially protracted proceedings in which the relief sought does not adversely affect it.

14. In the result, I decline to exercise jurisdiction in respect of the application.

15. The following order is made:

15.1 The matter is struck from the roll.

15.2 There is no order as to costs.



S J COWEN
Acting Judge
Land Claims Court

For the Applicant

Mr P Grobbelaar

Instructed by

Peet Grobbelaar Attorneys

For the Respondent

Ms M S Monene

Instructed by

M T Ramabala Attorneys