IN THE LAND CLAIMS COURT OF SOUTH AFRICA
HELD AT CAPE TOWN

Case No.LCC37/03

In the matter between:

MACCSAND CC First Applicant

And

MACASSAR LAND CLAIMS COMMITTEE First Respondent

THE GOVERNMENT OF THE RSA & OTHERS Second Respondent

Application for leave to Appeal

JUDGMENT

MPSHE AJ

INTRODUCTION:

[1] This is an application for leave to appeal some of the orders handed down by this Court on 14 November 2013. The applicant is the first respondent in the court *aquo* whilst the respondent herein is the applicant in the court *aquo.* The applicant seeks leave to appeal paragraphs (b) (c) and (e) of the order.

The salient paragraphs read as follows:

> "(a) The contempt of Court application is dismissed regarding the First and Fourth Respondents.
>
> (b) It is declared that the mining operation conducted by the first respondent on Erf, 1197, Macassar ('the land") is unlawful by reason of non-compliance with the provisions of ("LUPO") regarding departure on rezoning.
>
> (c) The first respondent is interdicted from continuing with the mining operations on Erf, 1197, Macassar, until and unless the land use restriction is obtained in terms of section 15(1) (a) of ("LUPO") to permit lawful mining operations on Erf 1197, Macassar.
>
> (d) Order 3(b) of MOLOTO, J dated 28 August 2003 ("MOLOTO judgment") is varied and substituted with the following:
>
> "Pending the finalization of the finalization of the action instituted under case 37/2003 in the Land Claims Court that the Applicant as an interested and affected person be offered notice of any land application regarding ERF 1197 and be offered a fair and reasonable opportunity to make representations regarding such an application before consideration thereof by the relevant authorities in terms of ("LUPO")".
>
> (e) No order as to costs"

On the other hand the respondent has filed an application for leave to appeal paragraph (d) of the order which reads:

(d) Order 3(b) of MOLOTO, J dated 28 August 2003 ("MOLOTO judgment") is varied and substituted with the following:

"Pending the finalisation of the action instituted under case 37/2003 in the Land Claims Court that the Applicant as an interested and affected person be offered notice of any land application regarding ERF 1197 and be offered a fair and reasonable opportunity to make representations regarding such an application before consideration thereof by the relevant authorities in terms of LUPO".

In addition thereto the respondent has filed an application in terms of Rule 49(11) of the Uniform Rules of Court to uplift the suspension of the implementation of orders [91](b) and [91](c) of the judgment handed down on 14th November 2014.

BACKGROUND:

[2] The applicant has been mining Erf 1197, Macassar since 2001 to date. In the court aquo respondent launched an application in terms of section 6(3) of the Restitution of Land Rights Act 22 of 1994 ("the Act) seeking a declaratory order stopping the applicant from continuing with its mining operations as the same are not in compliance with the provisions of LAND USE PLANNING ORDINANCE 15 of 1985 ("LUPO"). This then culminated in the order *supra*.

APPLICATION FOR LEAVE TO APPEAL

Applicant bases its application on the following grounds:

a) Lack of this court's jurisdiction to decide on the illegality or otherwise of the applicant's mining operation in relation to LUPO.

b) Failure to suspend the implementation of the interdict.

c) That the order of the Supreme Court of Appeal was still operative and this court had no authority to grant another order before setting aside the SCA order.

Counsel for the applicant Mr Jamie argues that this court has no jurisdiction to decide on provisions of LUPO. Further that the provisions of section 22 have to do only with the institution and that section 22(2) does not provide the court with ancillary to grant an interdict.

Section 22 (2) (c) of ("the Act") reads:

> "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 considers it to be in the interests of justice to do so."

[3] The section introduces the words "incidental" and "in the interest of justice".

INCIDENTAL:

This court derives its jurisdiction from section 22 of ('the Act"). Section 22(2) (b) reads:

> "all the ancillary powers necessary or reasonably incidental to the performance of its functions, including the power to grant interlocutory orders and interdicts"
>
> And
>
> "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 considers it to be in the interests of justice to do so."

In order to determine the application of "incidental" to an issue within its jurisdiction an enquiry has to be conducted to determine first the issue over which

the court has jurisdiction. In other words, what is it that the court is busy with or is before it to which incidentality may be applied?

[4] The court's primary function is inter alia, to determine a right to restitution of right in land in accordance with ("the Act")[1]. There is presently before this court a land claim instituted by the respondent, the Macassar Land Claims Committee over ERF 1197 in the Western Cape Province ('the Property"). This court is to determine the right in land over the property.

The applicant has acquired rights to conduct mining operations on the land under claim. The mining operations can safely be linked to the land claim and be referred to as incidental to the issues before this court. The incidentality thereof to the main issue, in my opinion, clothes this court with jurisdiction over the legality or otherwise of the mining operations which jurisdiction ordinarily would be found lacking in the absence of the pending land claim.

"The correct approach in determining what are ancillary or incidental powers is set out in the decision of this Court and was determined by Dodson J in *Zulu and others v Van Rensburg and others* 1996 (4) SA 1236 (LCC):@ 1245 B – C.

"It was suggested on behalf of the respondents that the wording in the first part of section 29 requires that the functions expressly conferred on the Court must first be identified and it is only in relation to those functions that one can then apply the broad provisions conferring ancillary and incidental powers on the Court. This approach would seem to be correct and finds support in the second part of that section which confers on the Court the powers of a provincial division of the Supreme Court in civil proceedings 'in relation to matters falling within its jurisdiction'"

The approach above was adopted in *Hlatswayo v Hein* by Meer J at para 12

[1] Section 22 (1) (a)

> "In oral argument, the Appellants' legal representative suggested that section 29 confers jurisdiction on this Court because the power to hear appeals is an ancillary power. I do not agree. As Dodson J found in *Zulu v Van Rensburg*, "s 29 requires that the functions expressly conferred on the Court must first be identified and it is only in relation to those functions that one can then apply the broad provisions conferring ancillary and incidental powers on the Court." The Appellants have identified no clear function to which appellant jurisdiction could be incidental. It is my view that appellate jurisdiction is primary in nature and cannot be considered incidental."

The section 29 referred is that in the Land Reform (Labour Tenants) Act, however the principle is clear when in order to make a determination of whether an incidental power has been conferred upon the Court one must first outline the clear functions of the Court in terms of the relevant statute.

IF THE COURT CONSIDERS IT TO BE IN THE INTEREST OF JUSTICE:

Mr Jamie for the applicant submits that it was not in the interest of justice for this court to issue an interdict. He submits that[2] the Supreme Court of Appeal put in place an interim protection scheme and that specified strips had been identified for mining.

This submission misses the mark. The interdict is not intended to nullify or amend the Supreme Court of Appeal judgment. The strips identified for mining are still valid and mining will be conducted on the very same property. This court in its judgment was not dealing with or challenging the applicant's acquired mining operation rights but whether the permitted right to mine is being conducted within

[2] First Respondents Heads of Argument page 5 paragraphs 16 to 18

the ambit of the relevant mining laws. This does not have the effect of setting aside the order of the Supreme Court of Appeal.

The fact that the other mining operations that operated without compliance with ("LUPO") are not affected but the applicant is neither here nor there. The alleged other unlawful mining operations have not been brought before a competent court to pronounce on the illegality or otherwise. Applicant's submissions are without substance.

[5] The court found "interest of Justice" in the fact that it would be prejudicial to respondent to litigate in a different forum for their rights over the same subject matter.

"A consideration that can be utilised when deciding if a matter may incidentally fall within the jurisdiction of the Court was one utilised in *Skhosana and Others vs Roos t/a SE Oor and Others*[3] Gildenhuys J in trying to give content to the phrase "in terms of "when considering if this court has jurisdiction to entertain a matter relied on dicta by Nicholson J in Khumalo v Potgeiter[4] where it was held:

> "There are dangers inherent in requiring an applicant to seek certain relief from the Land Claim Court and other relief from the High Court. In the first instance such would be prohibitively expensive and beyond the pocket of most litigants who are not on Legal Aid. Secondly it would lead to a multiplicity of actions where the same facts are canvassed in different tribunals investigating basically the same issues."

It is of course a weighty consideration, by any court. One should not require litigants to expend unnecessary resources that they may not have, approaching

[3] 2000 (4) 561 (LCC)
[4] [1999] 1 All SA 10(N) @ 18

different forums for relief, but in the same instance one cannot confer jurisdiction upon themselves simply to aid litigants. What is incidental to the jurisdiction of the Land Claims Court is given content by what jurisdiction the Court already has in terms of section 22 as a whole. The Court should be wary to inconvenience litigants in matters whereby, the main case is essentially encompassed by the Restitution Act by requiring them to approach the High Court. Similarly, the Court should be wary to confer upon itself jurisdiction where non exists.

Counsel for the respondent Mr Rosenberg in oral argument[5] suggests that this court also derives jurisdiction under section 6 (3) of the ("the Act"). I do not agree with this argument. The respondent (MACASSAR LAND CLAIMS COMMITTEE) in their application wanted a relief in the form of determining legality or otherwise of the mining operations by the applicant (MACASSAR CC.)

In other words the court was called upon to enquire as to whether the mining operations complied with mining laws in terms of LUPO and not that the mining should be interdicted due to what is said to be happening physically to the land. The phrase "Will defeat the achievement of the objects of the Act." does not come into play.

REGARDING SCA DECISION

[6] It is contended by the applicant that this court erred by granting an interdict contrary to the SCA interdict.[6] It is indeed so that an interdict was granted by the SCA. In my judgment the issue was whether applicant may be allowed to

[5] TRANSCRIPT p. 48 lines 14-25 and p. 49 lines 1-7.
[6] Transcript page 7 lines 18-25 and page 11 lines 8-13.

continue with the mining operations without compliance with mining laws in accordance with LUPO. The first order granted by the SCA is pending finalisation of the land claim whereas, this court's order is granted pending compliance with LUPO by obtaining a departure to the zoning in terms of 15 (1) (a) of LUPO. This court's order did not intend setting aside nor does it set aside the interdict granted in favour of the applicant (MACASSAR CC) regarding continued mining.

[7] This Court's order is based on the doctrine of legality. The SCA noted as follows in its judgment:

> "Nor do I propose to consider whether the mining operations conducted by Maccsand, in the face of the grant to it of a mining licence, are illegal for non compliance of other statutes. In any event the learned judge in the court *a qou* granted the interdict without considering the legality or not of Maccsands's mining operations.

Clearly from the above quotation that the issue of illegality or otherwise of the mining operations was not before the SCA in 2004.

The respondent herein (MACASSAR LAND CLIAMS COMMITTEE) armed with the Constitutional Court decision[7] approached this court to enforce compliance with the CC decision. In 2013 before me was the issue of illegality or otherwise of the mining operations and had to be decided upon. The notice of motion at prayer 2.1 reads as follows:

> "Declaring that the first respondent is not entitled to mine erf 1197 Macassar, without having a temporary departure of the zoning of agriculture to permit mining and declaring that first and fourth respondents are not permitted to change the zoning of erf 1197 Macassar."

[7] Maccsand (Pty) Ltd cs City of Cape Town 2012 (4) SA 181 (CC)

[8] It is not disputed that applicant continued mining sine compliance with LUPO was illegal. In the *Lester vs Ndlambe Municipality* case[8] Majiedt, JA States:

> "Section 21 authorizes a magistrate, on the application of a local authority or the Minister, to order demolition of a building erected without any approval under the Act. This is undoubtedly a public law remedy. Alkema J questioned how a statutory breach which gives rise to the same claim under private law or public law can afford court discretion under private law, but not under public law. The answer is simply that the law cannot and does not countenance an on-going illegality and to undermine the rule of law."
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> "Courts have a duty to ensure that the doctrine of legality is upheld and to grant recourse at the instance of public bodies charged with the duty of upholding the law. In *Standard Bank of South Africa Ltd vs Swartland Municipality* Moosa J had to deal with an application that a demolition order, issued in the Malmesbury Magistrates Court, be set aside and for Standard Bank, as mortgagee, to be joined. In stressing the courts duty in enforcing demolition orders the learned judge stated that:
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> > "The unauthorised and illegal conduct of the third respondent (in unlawfully erecting a structure without approved plans) is contra *boni mores* and contrary to public policy, and cannot be condoned by the court. It militates against the doctrine of legality, which forms an important part of our legal system, and more especially since the Constitution became the supreme law of the country.'
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> Moosa J referred to the oft quoted dictum of Chaskalson CJ in Pharmaceutical Manufacturers of SA: In re Ex parte President of the Republic of South Africa and others, which bears repetition:
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> 'The exercise of all public power must comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. '"

[9] In my judgment I made a finding that applicant was mining illegally and I granted the interdict. It was orally argued that I should have suspended the operation of

[8] [2013] ZASCA 95 (22 August 2013) para 23.

the interdict to allow applicant to regularize its position regarding compliance with LUPO. In the *Berg River Municipality vs Zelpy 2065 (Pty) Ltd*[9] *Rogers*, J states:

> "Since the Municipality has established the prerequisites for an interdict, the remaining question is whether I can and should suspend the interdict. Given my view that s 14(1a) of the Act is inapplicable to the new structures and that Zelpy's request for permission under that section was rightly refused by the Municipality, a suspension pending a (further) decision under that section falls away. Zelpy argues, however, that I should in any event suspend the interdict pending a decision on the new rezoning application. I am prepared to accept that a court has the jurisdiction to suspend an interdict even though the interdicted conduct is a continuing criminal offence (as is the case here by virtue of s 39(2) of LUPO). Nevertheless discretion in these circumstances will be sparingly exercised, for obvious reasons. "

MAJIEDT, JA at paragraph 27[10] states:

> "The respondent has not only a statutory duty but also a moral duty to uphold the law and to see to due compliance with its town planning scheme. It would in general be wrong to whittle away the obligation of the respondent as a public authority to uphold the law. A lenient approach could be an open invitation to members of the public to follow the course adopted by the appellant, namely to use land illegally with a hope that the use will be legalise in due course and that pending finalisation the illegal use will be protected indirectly by the suspension of an interdict."

Mr Jamie for the applicant referred to the decision of BINNS – WARD, J[11] in support of the submission that the interdict should have been suspended. That decision is distinguishable from my judgement and was treated as an exception to the rule that conduct of illegality may be construed to be perpetrated by

[9] 2013 (4) SA 154 (WCC) @ Para 53
[10] Footnote 8 *supra*

[11] 410 VOORTREKKER ROAD PROPERTY HOLDINGS CC v MINISTER OF HOME AFFAIRS & OTHERS 2010 (8)

suspending the interdict prohibiting an unlawful conduct. BINNS-WARD J said the following:[12]

> "Both sides in the current case accepted that in the context of any finding by this Court adverse to the respondents, the exigencies of the operation of a refugee reception office in Cape Town – a facility demonstrably essential for the proper discharge of the country's obligations in terms of the Refugees act – enjoined the granting of a period of time for the Department to regularise the situation, either by finding alternative premises, or by bringing the operation of its current premises within the law. The repercussions that would ensue upon an immediate closure of the reception office upon the granting of an interdict would, apart from putting South Africa in breach of international obligations (with which it is obliged by section 231 of the Constitution to comply), also include the exposure of an indeterminate number of asylum seekers to arrest and possible deportation before their application for asylum could be submitted. In this case the immediate operation of the interdict to address the unlawfulness of a given land use would give rise to the potential for a different type of unlawfulness, one bearing centrally on basic human rights."

[10] I did not find exceptional circumstances in favour of applicant justifying the suspension of the interdict. Applicant knew back in 2012 as a result of the CC judgment that it had to regularise its operations by obtaining the said departure. In fact, applicant even took steps and submitted the departure application. The fact that applicant will suffer irreparable harm was long within the knowledge of applicant and was foreseeable. I find no merit in this ground of appeal.

CONCLUSION

[11] The partiers had agreed that in the event I find in favour of applicant only then am I to consider the counter application of the respondent regarding application for

[12] BCCR 785 (WCC). Page 805 paragraph [46] ibid.

leave to appeal against order D [91] of my judgment as well as Rule 65 of the Land Claims Court Rules. The test to be applied in application for leave to appeal is trite. I do not in the circumstances find the test to have been satisfied.

I accordingly make the following order.

(a) Application for leave to appeal the judgement delivered on the 14 November 2013 is dismissed.

(b) Applicant (MACCSAND CC) to pay costs of this application.

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M J MPSHE

ACTING JUDGE: LAND CLAIM COURT