IN THE LAND CLAIMS COURT OF SOUTH AFRICA

HELD AT RANDBURG

Case No: LCC 23/2007

Before: Meer AJP, Barnes AJ

Heard: 26 June 2018

Judgment Delivered: 3 August 2018

(1) REPORTABLE: YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED.

3/8/2018 .....

DATE SIGNATURE

In the matter between:

MAZIZINI COMMUNITY	First Plaintiff
PRUDHOE COMMUNITY	Second Plaintiff
THARFIELD COMMUNITY	Third Plaintiff
and	
MINISTER FOR RURAL DEVELOPMENT AND LAND REFORM	First Defendant
EMFULENI RESORTS (PTY) LTD	Second Defendant

SUN INTERNATIONAL (CISKEI) LTD	Third Defendant
SHEKINAH OCEAN PARK (PTY) LTD	Fourth Defendant
SUSAN JANE SULTER	Fifth Defendant
MTATI LAGOON (PTY) LTD	Sixth Defendant
MQWALANA HOMEOWNERS	Seventh Defendant
GQUTYWA RIVER LODGE	Eighth Defendant
MPEKWINI (PTY) LTD	Ninth Defendant
THEODORA JUANITA SWART	Tenth Defendant
N NGCEZA	Eleventh Defendant
NOVICE INVESTMENTS CC	Twelfth Defendant
S L HENSBURG	Thirteenth Defendant
BIRA ESTATE CC	Fourteenth Defendant
JANNIE COLTMAN	Fifteenth Defendant
T K FANI	Sixteenth Defendant
N E MANGWANA	Seventeenth Defendant
Z H MASWANA	Eighteenth Defendant
E L & F N TSAKO	Nineteenth Defendant
Z N MANJEZI	Twentieth Defendant
H M & N L MSIWA	Twenty First Defendant
W M MSUTU	Twenty Second Defendant
AMARELEDWANE COMMUNITY	Twenty Third Defendant
S B GUARANTEE (PTY) LTD	Twenty Fourth Defendant
TOURISM INFRASTUCTURE DEVELOPMENT COMPANY	Twenty Fifth Defendant
NOMUNDO EUGINA MABECE	Twenty Sixth Defendant

ROBERT NEVILLE NOAH	Twenty Seventh Defendant
LILIAN LIZIWE PONI	Twenty Eighth Defendant
MAWAKA MALTITUDE MASWANA	Twenty Ninth Defendant
NIMROD WILKINSON MAHLUBI SIPUKA	Thirtieth Defendant
THANDISWA HYDRONA SIPUKA	Thirty First Defendant
POLEKA BEATRICE COKWANA	Thirty Second Defendant
MICHAEL MNCEDISI COKWANA	Thirty Third Defendant
REGIONAL LAND CLAIMS COMMISSIONER, EASTERN CAPE	Participating Party

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JUDGMENT: APPLICATIONS FOR LEAVE TO APPEAL

BARNES AJ

Introduction

1. This is the judgment in respect of the applications for leave to appeal against the judgment in this matter, delivered on 10 April 2018 ("the judgment").

2. The following applications for leave to appeal are before us:

2.1 an application for leave to appeal by the first plaintiff, the Mazinini

Community;

2.2 an application for leave to appeal by the first defendant, the Minister for Rural Development and Land Reform;

2.3 an application for leave to appeal by the sixteenth defendant, Mr T K Fani; and

2.4 an application for leave to appeal by the fourth to eleventh, thirteenth to fifteenth and seventeenth to twenty second defendants in respect of costs only.

3. The second plaintiff opposes the applications for leave to appeal by the first plaintiff, first defendant and sixteenth defendant. It does not oppose the application for leave to appeal by the fourth to eleventh, thirteenth to fifteenth and seventeenth to twenty second defendants in respect of costs.

4. The second plaintiff has brought a conditional application for leave to cross appeal against part of the judgment. The application is conditional upon leave to appeal being granted to the first plaintiff, first defendant or sixteenth defendant.

5. I deal with each of the applications for leave to appeal in turn below.

The First Plaintiff's Application for Leave to Appeal

6. The first plaintiff's application for leave to appeal is extremely wide-ranging. Effectively, it contends that the Court erred in respect of virtually every factual finding made in the judgment. Each factual finding is reasoned in the judgment and it would serve little purpose to repeat that reasoning in respect of each of the findings challenged by the first plaintiff in its application for leave to appeal. It suffices to state that I am not persuaded that there is any prospect that another Court would find differently on the facts.

7. Notably, many of the points on which the first plaintiff challenges the judgment in the application for leave to appeal are in direct conflict with the points of agreement in the joint minute prepared by Mr Tuswa, the first plaintiff's expert and Professor Peires, the second plaintiff's expert. For that reason alone, those challenges could not succeed.

8. The first plaintiff contends that the Court ignored *"the undisputed evidence of the timeline"* which it presented. The timeline was, however, not evidence. It was a summary prepared by the first plaintiff's legal representatives. In any event, it did not demonstrate that the first plaintiff

satisfied the threshold requirements for entitlement to restitution stipulated in section 2 of the Restitution of Land Rights Act 22 of 1994 ("the Act") in respect of the land it claimed.

9. The first plaintiff contends that the Court erred in failing to uphold its claim to restitution in respect of 55 farms, which claim was admitted by the first defendant and competed with no other claimant. This contention is without merit. Firstly, the admission by the first defendant is of no moment as the first defendant does not have adjudicative powers in terms of the Act. Secondly, and fundamentally, no evidence was led by the first plaintiff or produced through Mr Tuswa of any post 19 June 2013 rights held by the first plaintiff in respect of those 55 farms or of any dispossession of the first plaintiff in relation thereto.

10. The fact is that, as with the Prudhoe claimed land, the first plaintiff failed to produce evidence to meet the Act's threshold requirements for entitlement to restitution in respect of the 55 farms.

11. In his oral argument on behalf of the first plaintiff at the hearing of the applications for leave to appeal, Mr Notshe relied on the judgment of *Salem Party Club and Others v Salem Community and Others* 2018 (3) SA 1 (CC), and in particular paragraph 72 thereof, where the Constitutional Court approved an earlier dictum by the Supreme Court of

Appeal to the effect that the Act *"implores the courts to lean towards granting rights in land where it would be just and equitable to do so within [its terms]."*

12. Mr Notshe sought to rely on this passage to argue that the Court had adopted an unduly restrictive approach to the first plaintiff's claim. Key in the above passage however is the phrase *"within the Act's terms"* which was inserted by the Constitutional Court in its reference to the SCA dictum. The *Salem* judgment is not authority for the proposition that courts may grant rights in land where the Act's threshold requirements for entitlement to restitution are not met, and Mr Notshe did not go so far as to suggest that the Court would be empowered to do so.

13. For the above reasons, I am of the view that there is no reasonable prospect that another court would come to a different conclusion on any of the grounds raised by the first plaintiff. The first plaintiff's application for leave to appeal is accordingly dismissed.

The First Defendant's Application for Leave to Appeal

14. Three grounds of appeal are raised on behalf of the first defendant.

14.1 First, it is contended that the Court erred in failing to take account of

the Minister's evidence pertaining to his proposed model for land allocation. This was to the effect that land be restored on a one household, one hectare basis.

14.2 Second, it is contended that the Court erred in granting default judgment against those defendants who failed to defend the action. There are two complaints under this heading. The first is that while the Court accepted the first defendant's undertaking not to displace families from their homes in respect of the tenth and twenty first defendants, it erred in failing to do the same in respect of those defendants who did not defend the action, and the sixteenth defendant in particular. The second complaint is that the Court wrongly granted default judgment against those defendants when no notice of bar notice in terms of Rule 58(4) and (5) had been issued. This, it is contended on behalf of the first defendant, was inconsistent with section 25(1) of the Constitution.

14.3 Third, it is contended that the Court acted irregularly in that while purporting to correct a patent error, it in fact effected a substantive amendment to the judgment.

15. I will deal with each of these grounds of appeal in turn below.

<u>The First Ground</u>

16. It is in the first place, not correct to contend that the Court failed to take account of the Minister's evidence pertaining to his proposed model for land allocation. The Court clearly did so at paragraphs 56 to 61 of the judgment.

17. The first defendant's complaint under this heading appears to go further and include a contention that the Court ought, in its final order, to have restored land in accordance with the Minister's proposed model. This contention is untenable for a number of reasons.

18. Firstly, the first defendant nowhere claimed relief on the basis of his model. If he wished to claim relief as a defendant that was different from that claimed by the plaintiffs, then it was necessary for him to have filed a counterclaim.

19. Secondly, the first defendant nowhere pleaded a case based on his model as a basis and justification for the Court to grant relief.

20. Thirdly, the model was a settlement proposal that was not even finally worked out. As the judgment states in paragraph 59, *"the question of how the first plaintiff would fit into the model was still the subject of discussion and for this reason the proposed model remained a work in progress."*

21. Fourthly, the first defendant's model was not compatible with who the parties were before the Court. The model envisaged awards of land to groups made up of families defined by the boundaries of the farms they lived on, with individuals holding title to one hectare plots within those farms. However, no such groupings were parties before the Court. No individuals from the first or third plaintiffs were before the Court. The individual members of the second plaintiff were before the Court only in the alternative and on the express basis that they wished to pool everything.

22. For all these reasons, there is no merit in this ground of appeal.

The Second Ground

23. As the judgment records in paragraph 62, the first defendant took the position, at a late stage in the proceedings, that he was not prepared to purchase certain of the claimed farms because he did not wish to displace people from their homes.

24. The first defendant's "undertaking" in this regard does not however have the force of law and it was not by virtue of this undertaking that the Court declined to restore the properties of the tenth and twenty first defendants. It was by virtue of their defence of the action and the Court's assessment

of what would constitute just and equitable relief in the light of their defences.

25. The position in respect of the other defendants was different. They either failed to file notices of intention to defend at all, or, like the sixteenth defendant, filed a notice of intention to defend but failed to file a plea or to appear at Court to testify in support of any defence. They therefore effectively failed to defend the action.

26. Where a *prima facie* case had been made out as against those defendants, the Court was entitled, as a matter of general principle and in terms of Rule 58 of its Rules to grant default judgment, which it did.

27. There is accordingly no merit in this ground of appeal.

The Third Ground

28. There is also no merit in this ground.

29. The correction in issue is that relating to Farm 243, which was inadvertently omitted from the order restoring the Fish River Sun Farms to the second plaintiff.

30. In the first place, Farm 243 has always been part of the second plaintiff's claim. This is clear from the pleadings. The first defendant filed no plea disputing that Farm 243 was part of the second plaintiff's claim. It was at all times common cause between the first and second plaintiffs that both were competing for all the Fish River Sun Farms, including Farm 243, as well as all the other farms claimed by the second plaintiff.

31. In the second place, the judgment, at its outset, defines "the Fish River Sun Farms" to include Farm 243. It does so at paragraph 16 in the following terms:

> "The first plaintiff's land claim competes with all of the 26 farms claimed by the second plaintiff. The first and second plaintiff's claims also compete in respect of Farms 242, 243 and 235.These are the farms on which the much sought after Fish River Sun is situated. They will be referred to in this judgment as 'the Fish River Sun Farms.'"

32. In paragraph 272, the judgment finds that the second plaintiff proved its claim to the Prudhoe claimed land, including the Fish River Sun Farms as defined:

> "For all of the above reasons, I am satisfied that the second plaintiff has established that it has a valid claim, as a community, to the Prudhoe claimed land, including the Fish River Sun Farms."

33. It is therefore clear that the omission of Farm 243 from the Order, which itemised the farms to be restored to the second plaintiff, was a patent

error.

34. The first defendant suggested in both its application for leave to appeal and its heads of argument that the Court's "amendment" of the judgment was precipitated by an amended draft order, which included reference to Farm 243, e-mailed to the Court by the second plaintiff's legal representatives several days before judgment was handed down. This suggestion carried with it an innuendo of impropriety on the part of both the Court and the legal representatives of the second plaintiff. However, in response to questioning by the Court, Ms Norman who appeared for the first defendant at the hearing of the applications for leave to appeal, gave the assurance that such innuendo was unintentional and that no allegation of impropriety was made.

35. Paragraph 310 of the judgment reads as follows:

> "At the conclusion of the trial, the second plaintiff submitted a draft order which included Annexure "A" purporting to set out the land that it was dispossessed of and Annexure "B" purporting to set out the land to be restored to it. These Annexures appear to be inaccurate and incomplete. They do not include all the Prudhoe claimed land and there are a number of discrepancies between them. For this reason, they will not form part of the Order. In the absence of

comprehensive and clear cadastral descriptions from the second plaintiff, I am constrained to describe the land to be restored to the second plaintiff as the Prudhoe claimed land as identified on Annexure "B" to this judgment subject to certain qualifications. I do so in the Order that follows."

36. It is apparent from this paragraph that the Court disregarded the amended draft order sent to it by the second plaintiff and chose to employ as the predominant descriptor of the land to be restored to the second plaintiff Annexure "B" to the judgment, which, in turn, was Exhibit 4 at the trial. There the Prudhoe claimed area is bordered in black and clearly includes all the Fish River Sun Farms, including Farm 243.

37. This ground of appeal is accordingly without merit.

38. There is no reasonable prospect that another Court would come to a different decision on the above aspects. The first defendant's application for leave to appeal accordingly stands to be dismissed.

The Sixteenth Defendant's Application for Leave to Appeal

39. The sixteenth defendant raises five grounds of appeal. They are the following:

39.1 First, it is contended that the Court failed to have due regard to the fact that the first defendant had excluded the sixteenth defendant's land from the land that the State was able and willing to restore.

39.2 Second, it is contended that the Court failed to have due regard to the difficulties confronted by the sixteenth defendant in effectively opposing the claim given the late notification received and the fact that the land claimed by the second plaintiff was never clearly defined.

39.3 Third, it is contended that the Court erred in finding that the second plaintiff had made out a *prima facie* case in respect of the sixteenth defendant's land.

39.4 Fourth, it is contended that the Court erred in finding that the sixteenth defendant had effectively failed to defend the action.

39.5 Fifth, it is contended that the Court erred in failing to order the participating party to pay the sixteenth defendant's costs.

40. I will deal with each ground of appeal in turn below.

The First Ground

41. The first defendant does not have adjudicatory powers in relation to the restoration of land. It follows, as the second plaintiff correctly submitted in its heads of argument, that the first defendant's willingness or otherwise to restore portion 19 (the land in which the sixteenth defendant had an interest) was not relevant. It was not a factor which could have justified the Court in refusing restoration. Nor was it a factor that rendered a defence of the action by the sixteenth defendant superfluous.

42. There is accordingly no merit in this ground of appeal.

The Second Ground

43. It is acknowledged in the heads of argument filed on the sixteenth defendant's behalf that portion 19 of Farm 261 (the portion in which the sixteenth defendant had an interest) derives from Farm 249. Farm 249 clearly formed part of the second plaintiff's claim.

44. As for the difficulties allegedly faced by the sixteenth defendant, these are not articulated now, and were not articulated during the trial. As the second plaintiff points out in its heads of argument *"the twenty first defendant was in a similar position to the sixteenth defendant, yet was perfectly capable of filing a plea and testifying in opposition to the claims."*

45. There is accordingly no merit in this ground of appeal.

The Third Ground

46. The second plaintiff called Ms Dyantjie who gave detailed and uncontested evidence on the occupation of Farm 249. Moreover, the second plaintiff relied on the verification work of Mr Tuswa in respect of Farm 249. In his oral evidence Mr Tuswa confirmed that he was able to verify that members of the second plaintiff had rights in land on Farm 249 and had been dispossessed of those rights.

47. Farm 249 was also referred to by Mr Tom in his evidence. It was the birthplace of his mother and the place where his maternal grandmother grew up. Mr Tom also testified that one of the headman, Siyolo, lived on Farm 249. His evidence is corroborated by the verification by Mr Tuswa in annexure 19 to the Prudhoe report, which refers to three Siyolo families as having lived on Farm 249. Mr Tom also referred to a Mr Nyathelo Jaji having moved to Farm 249 from Dunston Farm.

48. Having regard to the above, the second plaintiff clearly made out a strong *prima facie* case for restitution of the land in which the sixteenth defendant had an interest.

49. This ground of appeal is therefore without merit.

The Fourth Ground

50. This ground of appeal is not developed in the heads of argument filed on behalf of the sixteenth defendant.

51. For the reasons set out above, the second plaintiff made out a strong *prima facie* case for restitution of the land in which the sixteenth defendant had an interest. This called for an answer. Yet the sixteenth defendant filed no plea and gave no oral evidence in support of any defence.

52. As set out above, the Court was entitled to adopt the approach it did, both in terms of general principle and in terms of Rule 58 of its Rules.

53. There is no merit in this ground of appeal.

The Fifth Ground

54. The sixteenth defendant's final ground of appeal pertains to costs. It is effectively dealt with in the section below.

55. There is no reasonable prospect of success on appeal in respect of the above aspects. In the circumstances, the sixteenth defendant's application for leave to appeal stands to be dismissed.

The Applications of the Fourth to Eleventh, Thirteenth to Fifteenth and Seventeenth to Twenty Second Defendants

56. These defendants seek leave to appeal on the following basis:

> "In holding in paragraph 323 of its judgment that 'had there been a request for costs order to be made against the Commission, such request would have been considered favourably', the Court failed to have regard to the fact that, in the heads of argument filed on behalf of the cited defendants/applicants, and at the hearing of the matter, the applicants' legal representatives sought a costs order against the participating party, being the Regional Land Claims Commissioner, Eastern Cape, who represented the Commission."

57. I am satisfied that these defendants did seek costs against the Commission, as an alternative, in their heads of argument and that this request was also ventilated during argument at the conclusion of the trial. I am further satisfied that the judgment's failure to reflect this constitutes a patent error which stands to be corrected in terms of section 35(12)(b) of

the Act.

58. The order I make will apply to the sixteenth defendant also.

59. I accordingly make the following order:

Order

1. The applications for leave to appeal by the first plaintiff, first defendant and sixteenth defendant are dismissed.

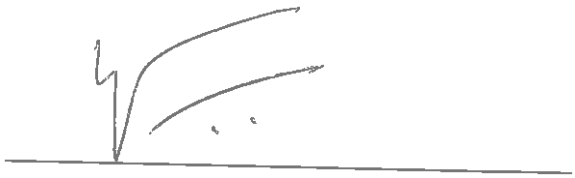
2. The patent error in paragraph 10 of the Order is cured by deleting the said paragraph and replacing it with the following:

"The participating party is ordered to pay the costs of fourth to eleventh and thirteenth to twenty second defendants."

H BARNES

Acting Judge of the Land Claims Court

I agree



Y S MEER

Acting Judge President of the Land Claims Court