



**IN THE LAND CLAIMS COURT OF SOUTH AFRICA
HELD AT DURBAN**

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|------------|--|
| (1) | REPORTABLE: YES / NO |
| (2) | OF INTEREST TO OTHER JUDGES: YES / NO |
| (3) | REVISED. |
| 27-08-2018 | |
| | |

Before: **Canca AJ**

CASE NO.: LCC 68/2018

In the matter between:

VUSI-OAKFORD COMMUNITY TRUST

Applicant

and

CANELANDS ESTATE CC

1st Respondent

GILLESPIE MURRAY ARMSTRONG

2nd Respondent

MARCO MSOMI

3rd Respondent

KWAZULU SANDS CC

4th Respondent

ROWEN BIRTHARTHEE

5th Respondent

TONGAAT HULETT

6th Respondent

ETHEKWINI METROPOLITAN MUNICIPALITY

7th Respondent

**DIRECTOR-GENERAL: DEPARTMENT OF WATER
& SANITATION**

8th Respondent

MEC: DEPARTMENT OF MINERAL RESOURCES

9th Respondent

**DIRECTOR-GENERAL: DEPARTMENT OF RURAL
DEVELOPMENT & LAND REFORM**

10th Respondent

**MEC: DEPARTMENT OF ECONOMIC DEVELOPMENT,
TOURISM & ENVIRONMENTAL AFFAIRS**

11th Respondent

Delivered on: 22 August 2018

JUDGMENT

CANCA AJ

Introduction

[1] The applicant, in an endeavour to protect and enforce its right of ownership over certain property, approached the Court on an urgent basis on 25 April 2017 seeking, among other things, an interdict preventing the first to fifth respondents from continuing their alleged illegal mining of sand on its property situated in the vicinity of Verulam in KwaZulu-Natal. An *ex parte* interim order was duly granted in terms of which the first to fifth respondents were interdicted and restrained from:

- 1.1. commencing or continuing sand mining operations on the Farm Roode Krans No. 828, Registration Division FU, Province of KwaZulu-Natal (“the farm”) until and/or unless authorization is granted in terms of the KwaZulu-Natal Planning & Development Act, 6 of 2008 (“the KZN Planning & Development Act”), for the land in question to be used for mining;
- 1.2 commencing or continuing with illegal sand mining operations on the farm until and unless an environmental authorization has been granted in terms of the National Environmental Management Act, 107 of (“NEMA”);
- 1.3 entering the farm for the purposes of extracting or mining sand unless and or until they have been granted a licence or authorization to carry out sand mining activities in terms of the Mineral & Petroleum Resources Development Act, 28 of 2002 (“the MPRD”) and or any other statutory instrument or legislation; and
- 1.4 commencing or continuing with sand mining operations on the farm, without a licence and/or the applicant’s authorization.

The Court, in addition to the above, also ordered the first to fifth respondents and/or any illegal sand miners occupying through them to remove all their movable property and or assets and to vacate the farm within 12 hours of the grant of the order.

[2] The first to third respondents oppose the application and have raised two preliminary points. The first being that the Court lacked jurisdiction to determine the dispute. The basis of their opposition was that the dispute falls outside the jurisdiction of the Court as provided for in section 22 of the Restitution Act. The second point is that the applicant was not quorate when it authorized the deponent to the founding affidavit, Jubulani Paul William Gumede ("Gumede"), in his capacity as the chairperson of the applicant, to launch this application.

[3] The fifth respondent deposed to an affidavit confirming the correctness of the contents of the answering affidavit deposed to by the second respondent insofar as it referred to his involvement in the matter. He was not represented at Court. The sixth, seventh and the eleventh respondents have not indicated their stance to the application and were not represented at Court. The eighth, ninth and tenth respondents elected to abide the Court's decision.

Parties

[4] The applicant, an entity administered in accordance with the Trust Property Control Act, 57 of 1988, is the owner of the farm.

[5] The first respondent is a close corporation and the second respondent, Gillespie Murray Armstrong ("Armstrong"), its sole member. The third respondent is a director of a company that provides security services to the first respondent. The fourth respondent is also a close corporation whose member is the fifth respondent. The sixth respondent is a

well-known South African owner of sugarcane farms in KwaZulu-Natal. The seventh respondent is the local authority under whose jurisdiction the farm falls. The eighth, ninth, tenth and eleventh respondents, hereinafter referred to as the State respondents, are individually and/or jointly vested with powers that impact the farm and the mining thereon.

Background

[6] The applicant was constituted by the Vusi-Oakford Claimant Community following a successful claim for the restoration of rights in land in terms of the Restitution of Land Rights Act, 22 of 1994 ("the Restitution Act"). The farm consists of land which was restored to the claimant community under the Restitution Act and that which was obtained from the Dominican Association of South Africa. The applicant, on obtaining ownership of the farm, entered into a lease agreement with the six respondent, Tongaat Hullett, on 3 June 2016, in terms of which of the farm was leased to Tongaat Hullett where it would farm sugar cane.

[7] On 27 March 2017, Tongaat Hullett sub-let the farm to the first respondent ("Canelands") for the purpose of farming sugar cane commercially.

[8] The events which led to the launch of this application are, in brief summary, set out as follows in the founding affidavit. Gumede avers that he discovered that the first to fifth respondents were mining sand in close proximity to the sugar plantation on the farm, during a visit to the farm in August 2017. He further avers that, after reporting this to representatives of Tongaat-Hulett, as lessee of the farm, he, together with those

representatives, conducted an inspection *in loco* on the farm. During the inspection, the persons mining the sand on that day informed them that they had been hired by the third respondent to do so.

[9] Gumede then convened a meeting on 23 January 2018 which was attended, *inter alia*, by trustees of the applicant, the third respondent and a representative of the fourth respondent where he expressed his displeasure at the conduct of those involved in the mining and ordered them to cease their unlawful activities on the farm. According to him, this meeting failed to produce the desired results, as despite various complaints directed at Tongaat-Hulett, the mining continued causing serious soil erosion and rendering portions of the farm unsuitable for farming. He further states that Tongaat-Hulett was in breach of, among other things, sub-clauses 9.2, 9.4 and 9.10(c) of the lease as the miners, in addition to causing environmental degradation of the land, were also not in possession of the requisite mining licences.¹

[10] Armstrong, who deposed to the answering affidavit on behalf of Canelands, denies that he or Canelands are engaged in mining activities on the farm. He avers that there were already a number of people, including the fifth respondent, mining sand on the farm when he acquired possession of it in March 2017. On enquiry, the miners informed him

¹ The provisions of these sub-clauses read as follows:

“9.2 Conduct its farming operations according to sound agricultural practice and shall not cause soil erosion or cause any damage whatever to the Land or render the Land less suitable for farming purposes;

9.4 Take all necessary and reasonable precautions to prevent and abate soil erosion on the Land, including maintenance of internal roads;

9.10(c) Not contravene or permit the contravention of: Any laws or by-laws, regulations or requirement of any competent authority, including the State, relevant to the conduct of the Lessee’s business and its occupation of the Land.”

that their mining activities were conducted with the knowledge and consent of the applicant. A copy of a sand haulage agreement, concluded between the applicant and the fourth and fifth respondents on 15 November 2015, is annexed to the answering affidavit. Armstrong further avers that the third respondent and one Fisher separately concluded verbal agreements to mine sand on the farm. Affidavits confirming these verbal agreements are also attached to the answering affidavit.

[11] The third respondent also filed an answering affidavit in which he, *inter alia*, states that:

- 11.1. he attended a meeting with Gumede and his fellow trustees, namely, Nari, Mthetwa and Dube during March or April 2017 at the applicant's offices where he was verbally granted permission to mine sand on the farm at a monthly rental of R8000.00 per month;
- 11.2. during the period between May 2017, when he commenced the mining operations, and 26 April 2018, he had paid rental totaling R100,000.00; and
- 11.3. some of the rental was paid in cash to Nari, Mthethwa and Dude, who are some of the applicant's trustees.

[12] Although the applicant has not denied the existence of the verbal agreement with Fisher, it denies having entered into any agreement with the third respondent permitting him to conduct mining activities on the farm. However, I do not consider it necessary to

determine whether the applicant did, in fact, permit the third respondent to mine the sand for the reasons that follow.

The first point *in limine*: Does this Court have the jurisdiction to hear this matter?

[13] Mr. De Wet, for the first to third respondents, contends that once the applicant acquired the farm, it became an ordinary civil landowner and that the cause of action sought to be enforced in this application falls outside the jurisdiction of this Court.

[14] Mr. Kadungure, for the applicant, erroneously in my view, relied on sub-section 22(1)(d) of the Restitution Act to rebut the argument advanced by Mr. De Wet. According to this sub-section, the Court has the power "*to determine all other matters which require to be determined in terms of this Act.*"

[15] The "*matters which require to be determined in terms of this Act*" are broadly set out as follows in the first section of the long title of the Restitution Act which reads as follows:

"To provide for the restitution of rights in land to persons or communities dispossessed of such rights after 19 June 1913 as a result of past racially discriminatory laws or practices; to establish a Commission on Restitution of Land Rights and a Land Claims Court; and to provide for matters connected therewith."

In order to achieve the aim of the Restitution Act set out in the first portion of its long title, the Act grants the Court the powers set out in section sections 22 and 38E². The powers conferred on the Court by section 22 include the following, namely, the power to (1) determine a right to restitution, (2) 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 the Restitution Act, (3) determine the person entitled to title to land contemplated in section 3 of the Restitution Act³ as well as those set out in the further sub-sections of section 22.

[16] As can be seen from the above, the applicant's enforcement of its right of ownership has nothing to do with a claim for restitution, compensation relating to restitution or the issues which require determination in terms of the further sub-paragraphs of section 22 of the Restitution Act. Mr. De Wet submitted that the fact that the applicant previously acquired the farm through a restitution claim is of no relevance. I agree. This Court, unlike the High Court, does not possess general or inherent jurisdiction as it derives its judicial authority from a statute and its powers are circumscribed. See *Macassar Land Claims Committee v Maccsand CC 2* [All SA] 17 (SCA) quoted by Van Zyl DJP in *Bangani v Minister of Rural Development and Land Reform* (2017) 2 All SA (ECM), paragraph 7. Moreover, sub-section 22(2)(c)⁴ also does not, in my view, assist

² The Court's powers under section 38E refer to interdicts which may be granted during restitution claim proceedings and are therefore not relevant for purposes of this judgment.

³ Section 3 deals with claims against nominees and is also not relevant in this matter.

⁴ This sub-section reads: Subject to Chapter 8 of the Constitution, the Court shall have jurisdiction throughout the Republic and shall have-

(a)

(b)

the applicant. This is so because, although the applicant acquired the farm through the restitution process, the activities complained of in this matter are not “*incidental to an issue within its jurisdiction*”. Once that process was completed, those activities can no longer be considered to be “*incidental*” to the restitution of a right to the claimed land.

[17] This Court will only have jurisdiction to decide an issue which is ordinarily not within its jurisdiction if that issue is incidental to another issue which is within its jurisdiction. The term “*issue*” has been described in *Hanson, Tomkin and Finkelstein v DBN Investments (Pty) Ltd* 1951 (3) SA 769 (N) at 772 B as “*The result of the pleadings in an action, disclosing the precise points on which the decision of the court is required.*” In this instance, there are no longer any existent or anticipated issues before the Court to which the issues in the present case can be incidental.

[18] It cannot be in the interests of justice for this Court to decide issues which are not ordinarily within its jurisdiction, unless such issues are incidental to other undecided issues in which the Court does have jurisdiction. The purpose of section 22(2)(c) of the Restitution Act is, in my view, to avoid duplication of litigation and to save costs. If the present application had been brought in the High Court instead of this Court, it would not have constituted any duplication of actual or anticipated litigation in this Court, nor would it have resulted in additional costs.

(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 considers it to be in the interest of justice to do so.”

[19] Mr. Kadungare contended during argument that *Minister of Rural Development and Land Reform v Normandien Farms (Pty) Limited and Others* (2017) ZASCA 163, is authority for the contention that this Court has jurisdiction where a landowner seeks to protect an environmental right under the National Environmental Management Act, 107 of 1998 ("NEMA").

[20] One of the issues for determination in *Normandien* was whether labour tenants were exempt from the provisions of the Conservation of Agricultural Resources Act, 43 of 1983 ("CARA"). The Court in that matter found that Normandien had standing to seek the removal of occupants' livestock on land overgrazed in violation of CARA and that labour tenants were not exempt from CARA.

[21] The issue of whether this Court had jurisdiction to deal with the matter was not an issue in dispute and was not decided in *Normandien*. I agree with the argument advanced by Mr. De Wet that *Normandien* is not authority for the proposition that this Court has jurisdiction to deal with a landowner complaint that land was either being eroded or damaged.


[22] In the light of all of the above, I find that the objection to this Court's jurisdiction is well taken and that this Court lacks jurisdiction to determine the applicant's dispute with the first to seventh's respondents.

Costs

[23] The first to third respondents asked for an order that the applicant pays the costs of this application. This Court has in the past not given costs orders where special circumstances are absent. I do not consider that any special circumstances exist in this matter which would justify a costs order and will, accordingly, make no order as to costs.

[24] In the result, I order as follows:

1. The rule *nisi* granted on 25 April 2018 is discharged.
2. The application is dismissed.
3. There is no order as to costs.



MP Canca
Acting Judge, Land Claims Court

Appearances:

For the applicant:

Adv. T Kadungure

Instructed by:

Gumede & Jona Inc. Attorneys, Durban

For the 1st to 3rd respondents:

Adv. A De Wet SC

Instructed by:

McCarthy & Associates Attorneys, Mooi River