



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

Case No: LCC 117/2022

Before the Honourable Cowen J

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES:
NO
(3) REVISED. NO

SIGNATURE

18 May 2024
DATE:

In the matter between:

MUSLIM JUDICIAL COUNCIL

First Applicant

**THE TRUSTEE OF THE CAMEES
DARRIES HERITAGE LAND TRUST**

Second Applicant

and

THE CHIEF LAND CLAIMS COMMISSIONER

First Respondent

THE REGIONAL LAND CLAIMS COMMISSIONER

Second Respondent

JUDGMENT

COWEN J

- [1] The applicants, the Muslim Judicial Council (MJC) and the Trustees of the Cammies Darries Heritage Land Trust (the CDH Trust) applied to this Court to review decisions of the respondents to refuse them funding for legal representation in terms of section 29(4) of the Restitution of Land Rights Act 22 of 1994 (the Restitution Act). The first and second respondents are the Chief Land Claims Commissioner and the Regional Commissioner, Western Cape, respectively.
- [2] The two decisions that were subject to the review are decisions of 25 February 2022 and 31 March 2022 to refuse, respectively, the MJC's and the CDH Trust's requests to fund their litigation in an action under case number LCC 37/2003. The applicants are parties to those proceedings in which the Macassar Land Claims Committee, as plaintiff, claims restitution under the Restitution Act in respect of land situated in Macassar, Cape Town. The applicants dispute the plaintiff's entitlement to relief and when the impugned decisions were taken had themselves counter-claimed for restitution in respect of what they say is overlapping land.
- [3] The application came before me on 27 November 2023. However, in circumstances where Legal Aid South Africa has now taken over the function of providing legal assistance to restitution litigants, the parties agreed to an order on the merits pursuant to which the funding decisions were set aside and the

applicants would submit a fresh application to the Legal Aid Board to request funding.

[4] The respondents did not concede that the decisions were unlawful, and the question of costs still required determination. I heard preliminary argument on that issue on 27 November 2023, and then stood the matter down to enable the parties to deliver further affidavits germane to costs and deliver further written submissions. Judgment on costs was reserved only on 19 February 2024. This judgment deals with those costs.

[5] Section 29(4) provides:

‘Where a party cannot afford to pay for legal representation itself, the Chief Land Claims Commissioner may take steps to arrange legal representation for such party, either through the State legal aid system or, if necessary, at the expense of the Commission.’

[6] Historically, the steps taken by the Chief Land Claims Commissioner to arrange representation have entailed its provision through a facility known as the Land Rights Management Facility which was housed in the Department of Rural Development, Agriculture and Land Affairs (the Department). Under that system the Commissioner retained for herself a discretion to approve or reject applications. However, in late 2019, a decision was taken for Legal Aid South Africa to provide legal support to all land claimants, occupiers, labour tenants and persons involved in such litigation. That decision was taken in circumstances where the executive was initiating the Land Court Bill, now the Land Court Act 6 of 2023 (the LC Act). The LC Act only came into force on 5 April 2024 after this matter was argued.

[7] Nonetheless, with effect from 1 April 2022, it has been Legal Aid South Africa that made the relevant decisions in respect of legal representation for restitution matters. At least pending the commencement of the LC Act, this ensued pursuant to a memorandum of understanding signed by the Department of Justice, Legal Aid South Africa and the Department (the MOU). The competent authorities for implementing the MOU are the Directors General of Justice, the Department and the Executive Officer of Legal Aid South Africa. In terms of Clause 4.5 of the MOU, Legal Aid was to ensure that it worked in collaboration with the Department to ensure that the constitutional rights of farm occupiers, labour tenants and restitution claimants are realised.

[8] Subject to the principles in *Affordable Medicines Trust*¹ and *Biowatch*² this Court only orders costs in special circumstances dealing as it does with social legislation. In this case, the applicants were asserting a right of access to State funding for legal representation against the State, in context of a restitution matter, and in my view, had they succeeded in the review, they would have been entitled to their costs against the State.³ The issue of costs must be dealt with against that background.

[9] The applicants, however, face two difficulties.

[10] First, the case that the applicants advanced was materially misdirected in that it was in material measure advanced on information that was not before the

¹ *Affordable Medicines Trust and others v Minister of Health and others* 2006(3) SA 247 (CC) at paras 138 and 139

² *Biowatch Trust v the Registrar Genetic Resources* 2009(6) SA 232 (CC)

³ *Cf In re Kusile Land Claims Committee: Land Restitution Claim, Midlands North Research Group and others* 2010(5) SA 57 (LCC), paras 17, 20, 21 and 37.

Commissioner when she made her decisions and indeed on events that had not yet occurred. The applications for funding were submitted on 14 January 2022 and the Commissioner made her decisions on 25 February 2022 and 31 March 2022. It was only thereafter in June 2022 that the applicants delivered notices of intention to amend their counter-claims. In important respects, the case on review is advanced – both on affidavit and in the written submissions – in respect of the issues that arise by virtue of those amendments. But it is the circumstances that prevailed at the time the applications were considered, and the information that was then before the Commissioner that must inform the lawfulness of her decisions. Once the chronology is appreciated, salient points raised in the review application, at least as pleaded, are shorn of substance. Put differently, at the time that the impugned decisions were taken, the applicants' counterclaims did not raise the issues that the applicants now complain were not duly or rationally considered, including in light of the applicants' means.

[11] This does not mean that the applicants may not have raised points of substance or importance, but it is difficult to see how the case could succeed even assuming some of these points have merit, given how the case was advanced and the fact that the applications for assistance were made and the impugned decisions were taken prior to the notices of amendment. Furthermore, given that Legal Aid South Africa must now consider the applicants' predicament post-amendments, and in light of its own processes and requirements, it would be undesirable for this Court to pre-empt its decisions by unnecessarily expressing views on these points.

[12] While much of the review application is affected by this issue, I am mindful that there are some points raised in the founding affidavit, as supplemented, that are not so affected. Most pertinently, the position of the MJC in respect of the portions expressly referred to in their pre 1998 claim form. However, when limited to these narrow issues, I am of the view that the Commission answered the case. In doing so, the Commission considered the MJC's means in light of their means test and the fact that but for the expanded issues arising from the counter-claim, the first applicant was in fact funding itself. I cannot fault the Commissioner for declining to provide assistance in response to the application and counter-claim as framed at that time. I am similarly unpersuaded that the Commissioner's response to the CDH Trust's claim can be faulted in view of the information then before her.

[13] Moreover, even if the applicants had succeeded in persuading the Court that they should achieve limited success, it would not have been possible to grant effective relief at least because Legal Aid South Africa was not a party to the proceedings yet had taken over its functions under the MOU. On consideration of the papers before me, this is not a case where this Court would have granted a substitution order: at best a limited remittal might have been ordered. On the current arrangements the remitted decision would then have had to serve before Legal Aid South Africa which had taken over with effect from 1 April 2022. It was for this reason that when argument commenced, the Commission made an open tender at the hearing of the matter to consent to the decisions being set aside for purposes of progressing the proceedings, and without conceding the merits. The tender was made precisely due to the practical concern that even if the applicants succeeded on review, the Court could not grant any effective relief,

because the current arrangements for legal representation under section 29(4) of the Restitution Act entail its provision by Legal Aid South Africa and subject to its processes and requirements. The tender was accepted but, as appears from the order made, without the applicants conceding either the legality of the new arrangements or that the application had become 'moot', as was suggested.⁴

[14] In my view, even if there may have been scope to grant effective relief, this could only have ensued if Legal Aid was joined in the proceedings and explained their position and the transitional arrangements. The tender the Commission made thus enabled a practical solution that both expedited and simplified the litigation process.

[15] However, the difficulty for the Commission is that although Legal Aid South Africa took over on 1 April 2022, in other words, shortly after the Commissioner took the impugned decisions, the applicants were apparently unaware of the transition until the hearing in November 2023 or shortly before hand and indeed, remained in the dark about its details even after the hearing and until a supplementary affidavit was delivered on 30 January 2024 to enable the issue of costs to be ventilated. In this regard, the respondents only raised the difficulty in heads of argment submitted on 20 November 2023. The respondents, in doing so, asserted that the transition was a matter of public record. But while many engaged in land litigation may have been aware of the transition, the transition was not effected by way of legislative act nor was it gazetted and these parties did not know about it. In my view, the circumstances surrounding the transition

⁴ I do not deal with whether the language of mootness is apposite. The real underlying issue was whether effective relief could have been granted given the transfer of functions.

should have been raised by the Commissioner in her answering affidavit which is dated November 2022. Had she done so, it would have put the applicants in a position where they could have sensibly evaluated their position, made suitable enquiries, and, assuming the parties had each conducted themselves reasonably from that time, the dispute might then have settled or, if not, a joinder might have been effected and the Court then apprised of material information to determine the matter. In my view, the Commission's failure to deal squarely with the transfer of functions in the answering affidavit thus contributed in a limited but material part to a wastage of costs from the date of receipt of the answering affidavit. Thus, while the Commission's tender was ultimately responsibly made, a factor of which I take note, it was made in circumstances where the applicants were unaware of the transition. In all the circumstances, I order that the Commission pay a portion (25%) of the applicants' costs from the date the answering affidavits were delivered.

[16] I make the following order:

16.1 The Commission shall pay 25% of the costs of the applicants in the review application on a party and party scale from the date of their receipt of the answering affidavit, including the costs of two counsel.

16.2 Save as aforesaid, each party shall pay its own costs.



SJ Cowen

Judge, Land Court

Date reserved: 19 February 2024

Date of decision: 18 May 2024.

Appearances:

Applicants: Adv W Duminy SC and Adv G Quixley instructed by Raymond McCreath Inc.

Respondents: Adv M Majozi and Adv P Maluleke instructed by the State Attorney, Johannesburg.