



**CONSTITUTIONAL COURT OF SOUTH AFRICA**

Case CCT 179/16

In the matter between:

**MAMAHULE COMMUNAL PROPERTY  
ASSOCIATION**

First Applicant

**MAMAHULE COMMUNITY**

Second Applicant

**MAMAHULE TRADITIONAL AUTHORITY**

Third Applicant

**OCCUPIERS OF THE FARM KALKFONTEIN**

Fourth Applicant

and

**MINISTER OF RURAL DEVELOPMENT  
AND LAND REFORM**

Respondent

**Neutral citation:** *Mamahule Communal Property Association and Others v  
Minister of Rural Development and Land Reform* [2017] ZACC  
12

**Coram:** Mogoeng CJ, Nkabinde ADCJ, Cameron J, Froneman J, Jafta J,  
Khampepe J, Madlanga J, Mbha AJ, Mhlantla J, Musi AJ and  
Zondo J

**Judgments:** The Court

**Decided on:** 5 May 2017

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## ORDER

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On appeal from the Land Claims Court:

1. Leave to appeal is granted.
2. The appeal is dismissed subject to paragraph 3.
3. The order by the Land Claims Court declaring that the Mamahule Communal Property Association, the Mamahule Community, the Mamahule Traditional Authority and Occupiers of the farm Kalkfontein 1001 LS are unlawful occupiers as defined in the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 is set aside and, in its stead, the following is substituted:

“It is declared that the Mamahule Communal Property Association, the Mamahule Community, the Mamahule Traditional Authority and Occupiers of the farm Kalkfontein 1001 LS are unlawful occupiers of the farm.”

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## JUDGMENT

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THE COURT (Mogoeng CJ; Nkabinde ACJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mbha AJ, Mhlantla J, Musi AJ and Zondo J)

[1] This matter concerns the power of the Land Claims Court, if any, to adjudicate matters under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act<sup>1</sup> (PIE). The pertinent question is whether, if it does not have that power, it

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<sup>1</sup> 19 of 1998.

may nonetheless declare persons unlawful occupiers and order their eviction; and, if it may, the legal basis on which it may do so.

[2] During May 1996 the second applicant, the Mamahule Community,<sup>2</sup> together with the Mothiba, Tholongwe, Mothapo and Mojabelo communities, lodged claims in terms of the Restitution of Land Rights Act<sup>3</sup> (Restitution Act) for the restitution of five farms in Limpopo Province. The farms included Kalkfontein 1001 LS (farm). A settlement agreement was drafted in accordance with the provisions of section 42D of the Restitution Act. The agreement was never signed as the second applicant approached the Land Claims Court to contest the beneficiaries in the claimants' verification list. That dispute remains unresolved before the Land Claims Court. Whilst resolution was pending, the community started demarcating and allocating plots on the farm.

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<sup>2</sup> The first applicant, the Mamahule Communal Property Association, was established by the community to own land restored to it. The "Mamahule Traditional Authority" is cited as the third applicant. According to the applicants' founding affidavit no such authority currently exists, but this was the name used by the community when it initially lodged the claim for restitution. The fourth applicants are the occupiers of the farm subject to the disputed land claim, and are members of the community. For convenience we shall refer to the applicants jointly as the "community".

<sup>3</sup> 22 of 1994. Section 42D provides:

"If the Minister is satisfied that a claimant is entitled to restitution of a right in land in terms of section 2, and that the claim for such restitution was lodged not later than 30 June 2019, he or she may enter into an agreement with the parties who are interested in the claim providing for one or more of the following:

- (a) The award to the claimant of land, a portion of land or any other right in land: Provided that the claimant shall not be awarded land, a portion of land or a right in land dispossessed from another claimant or the latter's ascendant, unless—
  - (i) such other claimant is or has been granted restitution of a right in land or has waived his or her right to restoration of the right in land in question; or
  - (ii) the Minister is satisfied that satisfactory arrangements have been or will be made to grant such other claimant restitution of a right in land;
- (b) the payment of compensation to such claimant;
- (c) both an award and payment of compensation to such claimant;
- ...
- (e) the manner in which the rights awarded are to be held or the compensation is to be paid or held; or
- (f) such other terms and conditions as the Minister considers appropriate."

[3] This precipitated an application in the High Court of South Africa, Gauteng Division, Pretoria by the Minister of Rural Development and Land Reform<sup>4</sup> (Minister) against the community. The Minister sought orders interdicting the demarcation and allocation of plots; declaring that the members of the community were unlawful occupiers as defined in PIE; and evicting the community from the farm. That application was settled, with the community making an undertaking to desist from their conduct. Notwithstanding this, the demarcation and allocation of plots continued.

[4] The Minister brought another application against the community – this time before the Land Claims Court – for substantially similar relief. That application had the support of the owner of the farm.

[5] The community opposed the application on the grounds that the Land Claims Court had jurisdiction to adjudicate evictions only under the Extension of Security of Tenure Act<sup>5</sup> (ESTA) and Land Reform (Labour Tenants) Act<sup>6</sup> (Land Reform Act). It thus had no jurisdiction under PIE on which the application was based. In support, they argued that the definition of “court” in PIE excludes the Land Claims Court. That definition is that “court” means the High Court or the Magistrate’s Court. Therefore – so the argument went – the Land Claims Court, as a creature of statute, lacks jurisdiction to adjudicate matters under PIE. The Minister submitted that the Land Claims Court derives jurisdiction to order an eviction from section 22(1)(c)<sup>7</sup> and (2)(c)<sup>8</sup> and section 6(3)<sup>9</sup> of the Restitution Act.

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<sup>4</sup> The respondent in these proceedings.

<sup>5</sup> 62 of 1997.

<sup>6</sup> 3 of 1996.

<sup>7</sup> This section provides:

“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—

...

(c) to determine the person entitled to title to land contemplated in section 3;

[6] The Court held that “[c]ounsel for the applicants argued that this Court may evict in accordance with the provisions of PIE. I disagree, this Court is ousted in respect of . . . applications under the PIE Act”. The Court then held that it had jurisdiction in terms of section 22(1)(cA) of the Restitution Act to declare that, pending the final determination of the claim in respect of the farm, the community has no legal right or title to take occupation of the farm or portions of it; declare that the community is an “unlawful occupier . . . of [the farm] *as defined in the PIE Act*” (Emphasis added.);<sup>10</sup> and to order the eviction of the community from the farm. It then made an order in those terms. The Court also interdicted the community from engaging in any activity involving the demarcation and allocation of sites on the farm and any other related activity pending the final determination of the claim in respect of the farm.

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(cA) at the instance of any interested person 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 . . . .”

<sup>8</sup> Section 22(2)(c) reads:

“Subject to Chapter 8 of the Constitution, the Court shall have jurisdiction throughout the Republic and shall have—

(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 interests of justice to do so.”

<sup>9</sup> This section provides:

“Where the regional land claims commissioner having jurisdiction or and interested party has reason to believe that the sale, exchange, donation, lease, subdivision, rezoning or development of land which may be the subject of any order of the Court, or in respect of which a person or community is entitled to claim restitution of a right in land, will defeat the achievement of the objects of this Act, he or she may—

(a) after a claim has been lodged in respect of such land; and  
 (b) after the owner of the land has been notified of such claim and referred to the provisions of this subsection;

on reasonable notice to interested parties, apply to the Court for an interdict prohibiting the sale, exchange, donation, lease, subdivision, rezoning or development of the land, and the Court may, subject to such terms and conditions and for such period as it may determine, grant such an interdict or make any other order it deems fit.”

<sup>10</sup> The Court made this holding despite an earlier one to the effect that it had no jurisdiction under PIE.

[7] Applications for leave to appeal brought before the Land Claims Court and Supreme Court of Appeal were unsuccessful. The community now seeks leave from us. We are deciding the matter based on the parties' affidavits and written submissions filed pursuant to directions issued by this Court.

[8] The community persists in its contention that the Land Claims Court had no jurisdiction to make the declarator that it was an unlawful occupier in terms of PIE. The Land Claims Court, drawing its jurisdiction from the Restitution Act, as extended by ESTA and the Land Reform Act, has no authority under PIE, argues the community. The community further submits that, based on the definition of "court" in section 1 of PIE, declarations of rights under PIE are within the exclusive realm of the Magistrates' Courts and the High Court.

[9] The community also argues that the application brought before the Land Claims Court is an abuse of court process. This is because the Minister had since approached the High Court for an eviction order on the basis of the declaration issued by the Land Claims Court that the community was an unlawful occupier. A related argument is that, if the Land Claims Court does have jurisdiction to declare that a person is an unlawful occupier, that declaration may not form the basis of an eviction order by a High Court or Magistrate's Court under PIE. The community also raises the defence of *res judicata* (literally, a matter already judged)<sup>11</sup> on the basis that the issues between the parties had been determined when the parties reached settlement before the High Court. Another contention is that the Minister is not the registered owner of the farm and, therefore, lacks *locus standi* (standing).

[10] The Minister concedes that PIE does not empower the Land Claims Court to make a declaration of unlawful occupation under PIE. However, he submits that here the Land Claims Court's declaration was made in terms of the Restitution Act. He argues that sections 6(3), 11(7), 22(1)(cA) and 22(2) of the Restitution Act do

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<sup>11</sup> The principle is that generally parties may not again litigate on the same matter once it has been determined on the merits.

empower the Land Claims Court to make the declaratory order on the lawfulness of the community's occupation. He also contends that the declarator by the Land Claims Court was made in terms of section 22. Further, as the land in question was subject to a pending land claim under the Restitution Act and the case before the Land Claims Court concerned the community's conduct on that land, the Land Claims Court had authority to "make sure that there [were] no unauthorized activities that [would] undermine the whole process of [the] land claim". The Minister submits that – in accordance with its ancillary jurisdiction under section 22 – the Land Claims Court does possess the power to make the contested declaratory order.

[11] This application concerns the interface between PIE and the Restitution Act insofar as the jurisdiction of the Land Claims Court is concerned. At issue is the interpretation of certain provisions of the two Acts. As this Court observed in *Blue Moonlight*,<sup>12</sup> in its preamble PIE quotes sections 25(1) and 26(3) of the Constitution.<sup>13</sup> PIE "acknowledges people's quest for homes, while recognising that no one may be deprived arbitrarily of property".<sup>14</sup> On the other hand, the Restitution Act was passed pursuant to the provisions of section 25(7) of the Constitution.<sup>15</sup> The interpretation of the Restitution Act and PIE is a constitutional issue.<sup>16</sup> So, we do have jurisdiction. Must leave to appeal be granted?

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<sup>12</sup> *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* [2011] ZACC 33; 2012 (2) SA 104 (CC); 2012 (2) BCLR 150 (CC) (*Blue Moonlight*) at para 36.

<sup>13</sup> Here is what the preamble says in this regard:

"WHEREAS no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property;

AND WHEREAS no one may be evicted from their home, or have their home demolished without an order of court made after considering all the relevant circumstances . . . ."

<sup>14</sup> *Blue Moonlight*, above n 12, at para 36.

<sup>15</sup> This section provides:

"A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress."

<sup>16</sup> *Florence v Government of the Republic of South Africa* [2014] ZACC 22; 2014 (6) SA 456 (CC); 2014 (10) BCLR 1137 (CC) at para 24 and *Occupiers of Portion R25 of the Farm Mooiplaats 355 JR v Golden Thread Ltd* [2011] ZACC 35; 2012 (2) SA 337 (CC); 2012 (4) BCLR 372 (CC) at para 3.

[12] The Land Claims Court was established by section 22 of the Restitution Act to adjudicate matters relating to land claims. It derives much of its jurisdiction from this Act.<sup>17</sup> Section 22(1) of the Restitution Act grants the Land Claims Court, among other things, the power:

- “(c) to determine the person entitled to title to land contemplated in section 3;
- (cA) at the instance of any interested person 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 . . . .”

[13] Under section 22(2)(a) and (b), the Land Claims Court also has “all such powers in relation to matters falling within its jurisdiction as are possessed by a High Court” and “all the ancillary powers necessary or reasonably incidental to the performance of its functions, including the power to grant interlocutory orders and interdicts”. Section 22(2)(c) grants the Court “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”.

[14] Section 35 of the Restitution Act deals with the types of orders the Land Claims Court may grant. It states that the Court may order the restoration of land as well as grant the claimant any alternative relief.<sup>18</sup> Section 38E(e) empowers the Land Claims Court to “make such other order as in the circumstances appears to be just”. Section 38E decrees that during proceedings under Chapter IIIA of the Restitution Act, the Land Claims Court may make an order:

- “(i) prohibiting or setting aside the sale, exchange, donation, lease, subdivision, rezoning or development of land to which an application relates, if it is

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<sup>17</sup> The Land Claims Court is granted additional jurisdiction by ESTA and the Land Reform Act.

<sup>18</sup> Section 35(1)(a) and (e).

satisfied that such sale, exchange, donation, lease, subdivision, rezoning or development—

(aa) defeats or will defeat the achievement of the objects of this Act;

(bb) was not or will not be done in good faith;

...

(iv) prohibiting the entering upon and occupation of the land in question without the permission of the owner or lawful occupier.”

[15] The Land Claims Court has no authority under PIE to declare that a person is an unlawful occupier. PIE does not grant jurisdiction to the Land Claims Court. Section 1 of PIE makes this plain. It defines “court” as the High Court and Magistrate’s Court. Therefore, references to “court” in PIE, with which this Act is replete, are references to these courts. Does the Land Claims Court have power under any other law to determine that a person is an unlawful occupier of land? If it does, is it open to us to place reliance on that other law to support the declaration that the community was an unlawful occupier?

[16] Section 22(2)(b) of the Restitution Act provides that “the Court shall . . . have . . . all the ancillary powers necessary or reasonably incidental to the performance of its functions, including the power to grant interlocutory orders and interdicts”. Without doubt, the litigation that is pending before the Land Claims Court falls within the jurisdiction of that Court.<sup>19</sup> That litigation is central to how the pending land claim will finally be determined. If the Land Claims Court eventually orders restitution of the farm in favour of a claimant group other than the community, the presence of the community on the farm will make the implementation of the order unduly burdensome. It may even necessitate litigation to evict the community. Surely then, granting relief aimed at addressing the problem of the occupying community, including their eviction, before the determination of the claim falls within the section 22(2)(b) power. It ensures that the ultimate resolution of the claim by the Land Claims Court is not hamstrung.

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<sup>19</sup> In terms of section 22 the Land Claims Court has the power to determine a right to restitution of any right in land in accordance with the Restitution Act. The case pending before the Land Claims Court concerns the right to restitution asserted by the various claimant groups.

[17] The case was about evicting the community from the farm and interdicting their return and any activity on it by them pending the final determination of the land claim. The Minister's case sets out enough to entitle him to relief in terms of section 22(2)(b). Thus despite the reference in that case to, and the Land Claims Court's reliance on, PIE, we are entitled to uphold the Land Claims Court's conclusion; that, of course, shorn of the reliance on PIE.<sup>20</sup> Effectively, this is confirming the holding that the community's occupation was unlawful, but not under PIE.

[18] Regarding the community's concern that the Minister is using this holding as a basis for its eviction in fresh proceedings instituted under PIE before the High Court, we are disinclined to pronounce on what the High Court may or may not do with the holding.

[19] There is no substance in the contention that the Minister lacked *locus standi* to bring the application. By reason of the fact that under the Restitution Act the Minister plays a central, multi-faceted role, he did have a direct and substantial interest in the relief he was asking for.

[20] The *res judicata* argument is misconceived. After the earlier High Court proceedings had been settled, the community continued to engage in the conduct of demarcating and allocating sites. Surely, that later conduct could not have been covered by an already concluded settlement.

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<sup>20</sup>See *SAPS v Solidarity obo Barnard* [2014] ZACC 23; 2014 (6) SA 123 (CC); 2014 (10) BCLR 1195 (CC) and other cases collected in footnote 253 of *My Vote Counts v Speaker of the National Assembly* [2015] ZACC 3; 2016 (1) SA 132 (CC).

*Conclusion*

[21] Because the community has achieved some success, albeit limited, that warrants the grant of leave to appeal. But substantially the appeal fails. On costs, we see no reason why the *Biowatch*<sup>21</sup> principle should not apply.

*Order*

The following order is made:

1. Leave to appeal is granted.
2. The appeal is dismissed subject to paragraph 3.
3. The order by the Land Claims Court declaring that the Mamahule Communal Property Association, the Mamahule Community, the Mamahule Traditional Authority and Occupiers of the farm Kalkfontein 1001 LS are unlawful occupiers as defined in the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 is set aside and, in its stead, the following is substituted:

“It is declared that the Mamahule Communal Property Association, the Mamahule Community, the Mamahule Traditional Authority and Occupiers of the farm Kalkfontein 1001 LS are unlawful occupiers of the farm.”

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<sup>21</sup> *Biowatch Trust v Registrar Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) (*Biowatch*) at para 43

For the Applicants:

C R Jansen SC and S M Van Vuuren  
instructed by Gilfillan du Plessis.

For the First Respondent:

W Mokhari SC and P Managa  
instructed by the State Attorney.