

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CC CASE NO: CCT 179/2016
SCA CASE NO: 410/16
LCC CASE NO: 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 Applicants

and

**MINISTER OF RURAL DEVELOPMENT AND
LAND REFORM**

Respondent

HEADS OF ARGUMENT ON BEHALF OF THE APPLICANTS

OF THE CONSTITUTIONAL COURT

PRIVATE BAG X1

17-10-2016

KALKFONTEIN 2017

DIE KONSTITUSIONELE HOF

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INTRODUCTION

1. The following written submissions are made pursuant to the directions issued by the Chief Justice on 21 September 2016.
2. The constitutional and statutory environment that determines the jurisdiction of the Land Claims Court (LCC) is, with respect, the following:
 - 2.1 The LCC is a court envisaged by section 166(e) of the Constitution, being a court of a status similar to the High Court of South Africa. These provisions envisage that such courts would be established by an Act of Parliament.
 - 2.2 In terms of the Superior Courts Act 10 of 2013, the LCC would similarly fall under the definition of a "superior court".
 - 2.3 The fact that the LCC (or a similar court) was initially envisaged by sections 121 to 123 of the Interim

Constitution, respectfully no longer plays any role in the determination of its jurisdiction. Those provisions have now all been replaced by provisions in the final Constitution read with the relevant provisions of the Restitution of Land Rights Act 22 of 1994 (the Restitution Act).

2.4 The Constitution, read with the Superior Courts Act, foresees and permits the creation of courts with a similar status than that of a High Court, and also grants Parliament the right to assign powers to such a court. Apart from section 166(e) referred to above, section 169(1)(a) of the Constitution provides that a High Court may decide any Constitutional matter, except a matter that -- (ii) is assigned by an Act of Parliament to another court of a status similar to the High Court of South Africa.¹

2.5 The fact that the Land Claims Court is a court with similar status to that of the High Court of South Africa

¹ *Mathe and others v Lanseria Commercial Crossing (Pty) Ltd and others* (LCC196/2010) [2011] ZALCC 15 (15 December 2011) at para 41

is gleaned from such provisions as sections 22(4), 37(1) and (2) of the Restitution of Land Rights Act 22 of 1994.

2.6 For present purposes, the statutorily conferred jurisdiction in terms of the Extension of Security of Tenure Act 62 of 1997 (ESTA) and the Land Reform (Labour Tenants) Act 3 of 1996 (LTA) need not be considered in depth. It would suffice to note that section 20(1) of ESTA also contains an ‘ancillary powers necessary and or reasonably incidental to’ clause, as does section 29 of the LTA. Such clauses are standard in legislation that assigns powers to courts.²

2.7 The Land Claims Court is, however, not a “*Division*” of the High Court as envisaged by section 169(2) of the Constitution and as defined in the Superior Courts Act. As such, it does not have the plenary jurisdiction as provided for in section 169(1)(b) of the Constitution

² See also section 21(5) of the Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000.

read with section 21(1) of the Superior Courts Act. The LCC remains a creature of statute, and its ancillary jurisdiction must be cautiously circumscribed and purposively approached.

2.8 The Land Claims Court is created in terms of the provisions of Chapter 3 of the Restitution of Land Rights Act 22 of 1994 and its jurisdiction over persons and causes of action and the competent orders which it may make are primarily determined by the provisions of section 22(1), section 22(2) and section 35 of the Restitution Act.

2.9 Despite not having plenary jurisdiction over persons or causes of action, it is by design a specialist court and the legislature has given it exclusive powers over most issues to be dealt with in terms of the Restitution Act. This much is clear from the provisions of section 22 of the Restitution Act.³

³ *Florence v Government of the RSA* [2014] ZACC 22 at para 24

2.10 Despite the specialist nature of the LCC and the exclusive jurisdiction granted to it under the Restitution Act, the only instances where it has specific jurisdiction over evictions are those where the legislature has specifically provided for such power, being the relevant provisions of ESTA and the Labour Tenants Act. No eviction jurisdiction has been provided to the court in terms of the Restitution Act.

3. It is in this context that the question arises whether the power to evict, which is a power jealously circumscribed by the Constitution itself (section 26(3), can be conferred by way of such ancillary provisions as contained in section 22(2) of the Restitution Act.

DOES THE LCC HAVE JURISDICTION TO DECLARE A PERSON AN UNLAWFUL OCCUPIER AS DEFINED IN THE PREVENTION OF ILLEGAL EVICTIONS AND UNLAWFUL OCCUPATION OF LAND ACT 19 OF 1998?

4. We submit, no.

5. To quote from the *Mathe* matter (*supra* at fn 1):

"The Land Claims Court is a creature of statute. It is established by and derives its power from the Restitution of Land Rights Act. It is given further jurisdiction by ESTA. The Restitution of Land Rights Act gives it jurisdiction 'to decide any constitutional matter in relation to the Act or the Land Reform (Labour Tenants) Act, 1996 (Act 3 of 1996)'. ESTA gives it jurisdiction 'to decide any constitutional matter in terms of the Act'. These provisions do not assist because the right of the second and sixth applicants are not regulated by any of the Acts mentioned. They are regulated by the PIE Act.⁴

6. The question can be approached from either analysing the provisions of the PIE Act first, alternatively, by first analysing the provisions of the Restitution Act. We start our submissions from the vantage point of the PIE Act.
7. In terms of the definition of "court" in section 1 of PIE, a court is either "any division of the high court" or the magistrates' court in whose area of jurisdiction the land in question is situated (*our underlining*).

⁴ At para 42

8. We therefore submit that it is a simple matter to conclude that the LCC does not have jurisdiction over the PIE Act. The LCC has, in fact, previously decided so much.⁵

9. Also important, is that the PIE Act does not allow its procedural and substantive safeguards to be circumvented under any circumstances. Section 4(1) provides as follows:

“Notwithstanding anything to the contrary contained in any law or the common law, the provisions of this section apply to proceedings by an owner or person in charge of land for the eviction of an unlawful occupier.” (our underlining)

10. The PIE Act empowers an organ of state to bring eviction applications in terms of section 6(1), more specifically under those circumstances described in section 6(a) and (b) of PIE.

11. The same “exclusivity of PIE” would also apply to section 6 evictions, being evictions at the instance of an organ of state. The reason being that all other legislation that previously provided for such eviction (or removal of slums) have been

⁵ See: *Bergboerdery v Makgoro* 2000 (4) SA 5765 (LCC) at 579 D
Mathe v Lanseria Crossings (*supra* at fn 1 and 2)

repealed by either section 11(1) of PIE, or are nullified by section 11(3) of PIE.

12. It is also clear from the provisions of section 9 that the legislature applied its mind in detail to the issue of jurisdiction. In terms of this section, any defective jurisdiction which a Magistrate's court would otherwise have in respect of remedy, is cured by statutory provision.
13. PIE is the primary piece of legislation by which the legislature has given effect to the provisions of section 26(3) of the Constitution. This court has, with respect, jealously guarded any attempts by private owners or organs of state to circumvent the strong procedural and substantive protections created by the PIE Act.⁶
14. The order made by the LCC in this case usurps the functions of the High Court when dealing with an application for

⁶ See: *Pheko and Others v Ekurhuleni Metropolitan Municipality* (CCT 19/11) [2011] ZACC 34; 2012 (2) SA 598 (CC); 2012 (4) BCLR 388 (CC) at paras 38 to 40 and 45
Schubart Park Residents' Association and Others v City of Tshwane Metropolitan Municipality and Another (CCT 23/12) [2012] ZACC 26; 2013 (1) SA 323 (CC); 2013 (1) at paras 49 to 51

eviction in terms of PIE, or in terms of any other law.⁷ The PIE Act requires a twofold enquiry. The court first determines whether the person in respect of whom the eviction is sought, is an unlawful occupier. If that is the case, then, secondly, the court decides if it is just and equitable to grant an eviction order.⁸

15. Based on the aforementioned, the issue of whether an occupant is an unlawful occupier in terms of PIE is the first of the twofold enquiry to obtain an eviction order in terms of PIE. As such, it is something which falls within the exclusive purview of a division of the High Court, alternatively, the Magistrates' Court.

16. And the term "unlawful occupier" is defined in the PIE Act. Part of the definition provides "or without any other right in law to occupy such land". Such "other right in law" would include the right to occupy land once a restitution claim has been upheld. The question of occupation is distinct from the question of the validity of the land claim.

⁷ The eviction was probably sought on the basis of PIE, although that in itself is not clear from either the Notice of Motion, or from the papers.

⁸ See: *City of Johannesburg v Changing Tide 74 (Pty) Ltd* 2012 (6) SA 294 (SCA) at para [12]

17. Once the validity of the land claim has been upheld, as it was in this case, the question about whether any subsequent occupation is lawful, must be dealt with under PIE.
18. When considering the matter from the vantage point of the Restitution Act, the same result is respectfully reached.
19. Eviction can only be obtained against a person whose occupation is unlawful. Acts such as PIE and ESTA sometimes distinguish between occupation that was unlawful from the outset (on the one hand) and occupation that became unlawful after the consent or the right of occupation has been terminated (on the other hand)⁹. Questions around the lawfulness of the occupation are therefore inextricably linked with the question whether an eviction is competent and just and equitable. As such, these closely related questions must be answered during the same proceedings, and at least by the same court.
20. Considering the clear constitutional framework for evictions created by section 26(3) of the Constitution, it is difficult to

⁹ Section 8 of ESTA

see how a power to evict can ever be implied or assumed without express provisions as are found in PIE, ESTA and the LTA. Similarly, the question whether occupation is lawful, should not be answered by a court that does not have the express jurisdiction to do so. LCC judgments that would suggest the contrary are respectfully wrong.¹⁰

21. Once a set of carefully crafted rules and structures has been created for the effective and speedy resolution of disputes and protection of rights in a particular area of law, it is preferable to use that particular system.¹¹
22. The LCC found that it had no jurisdiction to evict.¹² It also found that there was no evidence of any sale, exchange, donation, lease, rezoning or development of the land.¹³
23. As we point out below, the word "occupation", is not contained in either sections 11(7)(aA) or 6(3) of the Restitution Act. It should similarly, without even dealing with

¹⁰ *Halle and another v Downs* [2008] ZALCC 15 at paras 30 to 33; *Normandien Farms (Pty) Ltd v Mathimbane and others* LCC 196/2013 delivered 4 November 2015 at paras 25 to 42 - this matter is not reported on SAFLII and does not have any citation.

¹¹ *Gcaba v Minister for Safety & Security & Others* 2010 (1) SA 238 (CC) at 56

¹² Para 14 of the judgment, annexure "LM1".

¹³ Para 15 of the judgment, annexure "LM1".

the merits of the rest of the claim, not have been included in the Notice of Motion, neither in the subsequent order.

24. In our submission, the absence of a power to evict, means that there should also not be any power to declare on the lawfulness of occupation. The latter is simply not the purpose of the Restitution Act.
25. Issues dealing with eviction, and the concomitant issues of the lawfulness of occupation are therefore issues that fall to be decided by the High Court.
26. For this very reason, the Minister initially brought the proceedings in the High Court. For the same reason, the parties settled the High Court matter on the basis that those persons already on the land would remain on the land, and that no further settlement would occur until the rights of the claimants in terms of the Restitution claim had been determined by the LCC. The finding of the LCC that there had been further settlement after the High Court settlement is simply wrong.

27. Once the jurisdiction over these issues have been decided in favour of the High Court, it becomes difficult to construct jurisdiction for the LCC. The tendency in our law has been to avoid finding concurrent jurisdiction. Regard can be had to the questions of jurisdiction that arose in the fields of labour law¹⁴ and equality law¹⁵.
28. If the LCC is permitted to enter the arena of determining the lawfulness of occupation on land subject to a Restitution claim, or which is the subject of an LCC order, the kind of uncertainty and confusion that the Gcaba matter refers to, will arise.¹⁶ It should be borne in mind that once the Restitution Claim is finalised, the LCC's functions come to an end. The High Court will then have jurisdiction over ordinary disputes concerning land use rights and community membership.
29. Even if we are wrong on the existence of the power to make a declarator, such an order should not be made if its purpose is to form the basis of an eviction order. That is the case in

¹⁴ *Gcaba (supra)* at para 70 to 73

¹⁵ *Manong v Eastern Cape Department of Roads and Transport & Others* (369/08) [2009] ZASCA 50 (25 May 2009)

¹⁶ *Gcaba (supra)* at para 2

this matter. The Minister has since the LCC judgment again instituted eviction proceedings in the High Court.

30. Even further, if there are certain instances where the LCC can and should deal with questions concerning the lawfulness of occupation, then this court should respectfully give the clarity and guidance in respect of the overlap of jurisdiction.

31. We deal with the context, and relevance, of sections 11(7)(a) and (d) below. These provisions were, however, never invoked by the Minister in the LCC.

WHAT IS THE BASIS OF THE LCC'S JURISDICTION (paragraph 1b of the Directive)

32. Due to the submissions made above, we obviously submit that there is no basis for any interdict, nor for any declarator to be made in this matter, if these purport to deal with any issue which falls within the ambit of the PIE Act.

**THE BASIS ON WHICH PARAGRAPH 1 OF THE LCC ORDER
MADE PRAYERS 2, 5 AND 6 OF THE NOTICE OF MOTION AN
ORDER OF COURT**

33. We respectfully submit that paragraph 1 could not include prayers 2, 5 and 6.
34. As pointed out above, the court found that there was no evidence of any of the activities listed in section 6(3) of the Restitution Act. Yet it framed its order as if it was one made under section 6(3). This it could not, with respect, do.
35. The LCC either made this order (prayer 2 of the Notice of Motion) as a result of not properly applying its mind to the content of the prayer, or due to its mistaken understanding of the ambit of section 22(1)(cA) of the Restitution Act. We deal with this latter aspect below.¹⁷ The content of prayer 2 does not involve a question of law, it only involves questions of fact.

¹⁷ See para 25 of the LCC judgment, annexure LM1.

36. An order in terms of section 6(3) is at least notionally within the express powers of the LCC. The declaratory orders (prayers 5 and 6) are not.
37. The basis of implied or ancillary jurisdiction for the LCC can only be found in either section 22(2)(a), (b) or (c) of the Restitution Act.¹⁸
38. The “issue within its jurisdiction” was never properly identified, nor did the Minister (Applicant in the LCC) ever attempt to make out a case for incidental jurisdiction in this sense. He simply proceeded on the basis that the court has jurisdiction to adjudicate on any issue in terms of the PIE Act, including an actual eviction.
39. As pointed out below, the application was brought within the confines of section 6(3) of the Restitution Act. The Respondent incorrectly alleged that it was the owner of the land. It also extended the ambit of the interdict to include “occupation”. Occupation is not included in either section 6(3) or section 11(7)(aA).

¹⁸ Leaving aside the Constitutional power provided for in section 172(1)(b)

40. First, from a general reading of section 6(3) and section 11(7)(aA) of the Restitution Act, it is clear that the provisions are aimed at owners or developers of land who are performing any of the listed activities without having given the requisite notice to the Regional Land Claims Commissioner. The LCC found accordingly that section 6(3) is meant to protect claimants.¹⁹ Development on land has the potential of making restoration of the land unfeasible.
41. As stated, the "occupation" of the land is not included in the list of impugned activities in section 6(3).
42. The State initially alleged that it was the owner of the land when it quite evidently was not.²⁰ At no stage could it even comply with the most basic rule of evidence, namely, to prove its ownership by way of the best evidence rule. In this regard, no title deeds were presented. In addition, the allegations that the previous RLCC had granted express permission for the claimants to occupy the claimed land were

¹⁹ Para 15 of the LCC judgment, LM1.

²⁰ See para 21 of the LCC judgment. The court accepted, as alleged by the Respondents, that the land was still owned by the Estate Late Mabina.

not refuted at all. No attempt was made to refute such evidence.

43. The Act has two very specific provisions which are applicable to Claimants. The first is section 11(7)(a). This section provides that no person may in an improper manner obstruct the passage of the claim.
44. The Respondent did not rely on the provisions of this section and, even if it did, it would never have been able to prove any obstruction. It appears from the record that the land claim of the Applicants had already been upheld and all the formal approvals within the Department had been given.²¹ All that was left to do was for the land to be purchased from the landowner and to be transferred to the claimant community.
45. The only dispute mentioned, related to the entitlement of certain individuals to membership of the claimant community. This aspect does not concern the merits of the claim.²²

²¹ Paragraph 2 of LLC Judgment
²² See para 2 of the LCC judgment.

46. In terms of section 42A(1) of the Restitution Act, such land must be transferred to a claimant community (our underlining).
47. In other words, our submissions are that “unlawful occupation” could not have been found on the basis of section 6(3) of the Restitution Act, as that section is not aimed at occupation at all.
48. The occupation could also not obstruct the passage of the claim. It was in fact the RLCC and the Minister who was delaying the passage of the claim, and who had been doing so since 2005. In any event, no evidence was submitted to prove any obstruction.
49. The purpose of the application was described as follows in the founding affidavit:

“6. As appears from the notice of motion prefixed hereto, this is an application for an interdict restraining development on the farm, eviction of illegal occupants and demolition/removal of corrugated iron housing structures and other structures (‘the structures’) constructed by or through the first to fourth respondents on the farm.”

50. At that stage the matter was still pursued on an urgent basis, in complete violation of the provisions of section 5 of the PIE Act. In addition to this, it must further be borne in mind that the matter had just a few weeks earlier been settled in the High Court and the parties had entered into a written settlement. The fact that the process in the LCC was an abuse cannot be left aside.
51. In addition, the Minister attempted to create the impression that there was some ongoing land invasion. These allegations were all completely false.
52. It should further be remembered that the Applicants (the land claimants) had already obtained an interdict against the RLCC and other developers for development on some of the land being claimed. It does not behove the State to turn a blind eye to unlawful development on claimed land but, at the same time, then to interdict and evict legitimate land claimants who have been entitled to the transfer of the land for at least six to seven years at the time of the proceedings in the LCC.

53. This aspect of the case becomes even more problematic when consideration is given to the fact that the proceedings in the High Court and thereafter in the LCC were brought as a response to an application by the Applicants to have the RLCC be declared to be in contempt of court.
54. We therefore respectfully submit that the justification for any order can only be made by reference to the record. We submit no order of any kind was justified on the basis of the record as it stands. In the absence of a record, this court should respectfully not uphold an order on general concerns of justice and equity.
55. The LCC's own description of its powers and its jurisdiction simply cannot be excluded from this statement. The LCC based the granting of the relief on section 22(1)(cA). This section is wholly inappropriate under the circumstances. This section deals with the answering of questions of law relating to section 25(7) of the Constitution or other issues in respect of which there is legal uncertainty. The present matter deals with facts on the ground.

56. At the very least, with respect, the LCC had to grapple with the content of other more appropriate provisions before it could exercise whatever discretion it may have.
57. The only sections with which the LCC engaged in its judgment were sections 6(3), 22(1)(c) 22(2)(c) of the Act.²³
58. Section 22(1)(c) was with respect not in issue at all. Section 3 of the Restitution Act deals with claims against nominees. This finds no application in this matter.
59. The LCC did not find the section 6(3) and section 22(2)(c) issue in favour of the Minister, despite the wording of the orders.²⁴ In a certain sense, only the last two paragraphs (24 and 25) of the LCC judgment deals with the basis on which the relief is granted.
60. We therefore respectfully submit that the orders were not properly granted at all.

²³ See: para 11 of the judgment of the LCC
²⁴ See paras 15 to 17 of the LCC judgment.

**DOES UNLAWFULNESS OF OCCUPATION FOLLOW IF
PRAYERS 2, 5 AND 6 WERE GRANTED PROPERLY**

61. We submit no. Unlawfulness of occupation must be viewed as terms relevant to the PIE and ESTA acts.
62. In the context of this case, the interdict preventing further occupation, does not determine the lawfulness of the occupation that had already taken place (prayer 2)
63. "To take occupation" is something different from "actually being in occupation" (prayers 5 and 6). The former relates to an intended action, the latter to an existing state.

**IS IT IN THE INTERESTS OF JUSTICE TO UPSET THE
DECLARATOR**

64. It is with respect not in the interests of justice to allow the order to stand as it is.
65. The finding of unlawfulness, whether direct or implied, will seriously prejudice the claimants in the new High Court application for eviction that has already been instituted.

66. Incorrectly granted orders should not be allowed to stand just because they serve some well-intended purpose. That would put the Rule of Law on a very slippery slope.
67. It is also not in the interests of justice to allow a litigant, even less a state litigant, to reach an agreement in one court and then to renege on that agreement and then to institute proceedings elsewhere. That type of conduct brings the judicial system into disrepute.

CONCLUSION

68. For these reasons we respectfully submit that the following order should be made:
 - 68.1 Leave to appeal should be granted,
 - 68.2 The appeal should be upheld with costs, including the costs of two counsel, and
 - 68.3 The order of the LCC should be altered to read

"The application is dismissed with costs"

C R JANSEN SC

SM VAN VUREN

Counsel for the Applicants

Chambers
Pretoria
13 October 2016

LIST OF AUTHORITIES

1. *Bergboerdery v Makgoro* 2000 (4) SA 5765 (LCC)
2. *City of Johannesburg v Changing Tide 74 (Pty) Ltd* 2012 (6) SA 294 (SCA)
3. *Florence v Government of the RSA* [2014] ZACC 22
4. *Gcaba v Minister for Safety & Security & Others* 2010 (1) SA 238 (CC)
5. *Halle and another v Downs* [2008] ZALCC 15
6. *Manong v Eastern Cape Department of Roads and Transport & Others* (369/08) [2009] ZASCA 50 (25 May 2009)
7. *Mathe and others v Lanseria Commercial Crossing (Pty) Ltd and others* (LCC196/2010) [2011] ZALCC 15 (15 December 2011)
8. *Normandien Farms (Pty) Ltd v Mathimbane and others* LCC 196/2013 delivered 4 November 2015
9. *Pheko and Others v Ekurhuleni Metropolitan Municipality* (CCT 19/11) [2011] ZACC 34; 2012 (2) SA 598 (CC); 2012 (4) BCLR 388 (CC)

10. *Schubart Park Residents' Association and Others v City of Tshwane Metropolitan Municipality and Another* (CCT 23/12) [2012] ZACC 26; 2013 (1) SA 323 (CC); 2013 (1)