

"LMI"

IN THE LAND- CLAIMS COURT OF SOUTH AFRICA

HELD IN RANDBURG

Heard on 17<sup>th</sup> -21<sup>st</sup> March 2014  
Decided: 1<sup>st</sup> August 2014

CASE NUMBER: LCC94/12

Before Mpshe AJ & Carca AJ

In the case between:

MINISTER OF RURAL DEVELOPMENT  
& RURAL DEVELOPMENT

Applicant

And

MAMAHULE COMMUNAL PROPERTY  
ASSOCIATION

1<sup>st</sup> Respondent

MAMAHULE COMMUNITY

2<sup>nd</sup> Respondent

MAMAHULE TRADITIONAL AUTHORITY

3<sup>rd</sup> Respondent

THE UNLAWFUL OCCUPIERS OF THE FARM  
KALKFONTEIN

4<sup>th</sup> Respondent

MOJAPELO COMMUNITY (Maboi)

5<sup>th</sup> Respondent

MOTHIBA COMMUNITY

6<sup>th</sup> Respondent

MOTHAPO COMMUNITY  
THLOLONGWE COMMUNITY

7<sup>th</sup> Respondent  
8<sup>th</sup> Respondent

POLOKWANE MUNICIPALITY

9<sup>th</sup> Respondent

JUDGMENT

MPSHE AJ:

Introduction

[1] The applicant brought this application on an urgent basis for an interdict, restraining the development on the farm Kalkfontein 1001 LS ('the farm'), for eviction of illegal occupants and for the demolishing/removal of corrugated iron housing structures and other structures ('the structures) constructed on the farm by or through the first to the fourth respondents.

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- 1.1 The farm falls within the area of jurisdiction of the Polokwane Municipality, Capricorn District, Limpopo Province. The specific orders sought by the applicant are as follows:
  2. Interdicting and restraining the first, second and third respondents or any person/s or entity acting by or through it/them from selling, donating or in any other manner whatsoever granting title or authorising the development, demarcation subdivisions, or occupation of the farm Kalkfontein 1001 LS ("the farm") pending final determination of the right and title to restoration of the farm to the lawful owners.
  3. Directing the first, second, third and fourth respondents and all person/s claiming rights, title or interest to occupation of the farm Kalkfontein 1001LS ("the farm"), through or under them to remove all corrugated iron structures and other structures ("the structures") constructed on the farm to vacate the aforesaid property within one month from the date on which the order is granted.
  4. Authorising the sheriff and or/his deputy, should the first to fourth respondents not so remove the structures and vacate the property within one month of the grant of this order, to evict, demolish and remove the structures erected on the property by them and any other person/s claiming rights and /or interest through or under them.
  5. Declaring that the first, second, third and fourth respondents or any other person acting through them have no legal right or title to take occupation of the farm Kalkfontein 1001 LS pending the final determination of the rights and title to the restoration of the farm in accordance with the Restitution Act.
  6. Declaring that the first, second, third and fourth respondents or other persons acting for them to have no legal right or title to take occupation of portion 146, 147, and 153 of the farm Kalkfontein 1001 LS, pending the final determination of the rights and title thereto and the restoration of the farm to all lawful beneficiaries in accordance with the Restitution Act.
  7. Declaring that the first, second, third and fourth respondents are unlawful occupiers of the farm Kalkfontein as defined in the PIE Act No 19 of 1998.
  8. Granting an order that the first, second, third, and fourth respondents be evicted from Kalkfontein 1001LS or from portions thereof.
    - 8.1 Directing the first to fourth respondent and/or any such person(s) who oppose this application to pay costs of this application
    - 8.2 Granting the applicant such further and /or alternative relief

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- 1.4.3 The fifth respondent is the Mojapelo Community being a group of persons who submitted a claim to the farm or portion thereof, of care of P Mojapelo , Ga- Mojapelo Tribal Office, Maboi, Polokwane .
- 1.4.4 The sixth respondent is Mothiba Community being a group of persons who submitted a claim in respect of (the farm) or portion, thereof.
- 1.4.5 The seventh respondent is Mothapo Community being a group of persons who submitted a claim in respect of (the farm) or portion thereof.
- 1.4.6 The eighth respondent is the Tholongwe Community being a group of persons who submitted a claim in respect of (the farm) or portion thereof.
- 1.4.7 The ninth respondent is the Polokwane Municipality, Capricorn District, of Civic Centre, Corner Landros Mare and Bodenstein Street, Polokwane. The seventh respondent is cited in these proceedings by virtue of the land referred to in paragraph 1.1 above being within its area of jurisdiction.
- 1.4.8 Only the 1<sup>st</sup> and 4<sup>th</sup> respondents have entered appearance to oppose.

Background

[2] This matter has a long history of litigation starting from 2005.

In 1995, land claims were lodged in terms of the Restitution of Land Rights Act 22 of 1994 (the Act) , in respect of the farm known as Kalkfontein 1001LS (" the farm"), on behalf of Mamahule Community and the Mothiba Community, Tholongwe Community, Mothlapo Community and Mojapelo Community for the purpose of restitution.

The owners of the farm were duly notified of the claims in respect of the farm and were referred to the provisions of section 6(3) of the Act.

The claims were duly published.

After investigation of the claims a settlement was reached which was subject to the Minister's approval. However, pending the approval of the memorandum for the

settlement of the above by the Minister, some of the potential beneficiaries disputed the correctness or veracity of the list of legitimate beneficiaries as contained in the claimants' verification list. Correctness of the list was therefore challenged in Court and the settlement was postponed. The challenge is pending before this Court.

Pending the dispute referred to in the preceding paragraph, the farm was to be purchased by the State during 2005 for the purpose of eventual restitution.

However, the purchase price has not been paid by the state and no transfer has taken place. No settlement agreement in relation to the claims to the farm has been signed to date.

[3] Since 2005 the Mamahule Community have been involved in a number of court proceedings against the Chief Land Claims Commissioner, the Regional Land Claims Commissioner for Limpopo and the present applicant.

Purpose of this application.

[4] It would appear that the North Gauteng High Court under case number 21067/12 dealt with an application for eviction of a number of illegal occupiers of the farm. On the 2<sup>nd</sup> May 2012 the North Gauteng High Court granted the eviction as applied for.

Subsequent to that order, other fifty shacks were erected on the farm. The current application seeks the eviction and demolishing of the shacks. In addition to the eviction the applicant seeks declaratoties as per 1.1.4 – 1.1.6 and an interdict as per 1.1.1 to the notice of motion.

Issues to be determined:

The issues to be decided by the court in this application are the following:

- 4.1 Whether the three points in *limine* raised by the respondents have merit and are fatal to the applicant's application.
- 4.2 With regards to the merits of the applicant's application there are two main issues that are to be decided by the honourable court.

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Those issues are:

- 4.2.1 Firstly whether the applicant is entitled to bring this application in terms of Section 6(3) of (the Act) and
- 4.2.2 Whether the applicant has complied with the provisions of the Prevention of Illegal Eviction from Unlawful Occupation of the Land Act 19 of 1998 ( the PIE Act)
- 4.2.3 The first issue is dependent on the court arriving at the conclusion that this honourable court is competent to entertain the application and further that the PIE Act is applicable.
- 4.2.4 The second issue on the merits is whether the applicant is entitled to be granted the declaratory order that, the respondents have no legal right or title to take occupation of the farm Kalkfontein 1001LS, alternatively to take occupation of portion 146,147 and 153 of the farm Kalkfontein 1001LS, pending final determination of the rights and the title and the interest arising from restitution process still to be finalised by the honourable court.
- 4.2.5 A further declarator sought by the applicant, which is closely associated with the first two declarators, is that the court declares that the respondents are unlawful occupiers as defined in the PIE Act.

I now deal with the point in *limine* raised by the respondents.

Ad Jurisdiction:

- [5] The defence is that this court does not have jurisdiction to decide on an eviction under any legislation save the Extension of Security of Tenure Act 62 of 1997 (ESTA) and the Land Reform (Labour Tenants Act 3 of 1996 (Labour Tenants).
- [6] It is further the contention of the respondents that the eviction relief sought is regulated by the Prevention of Illegal Eviction Act 19 of 1998 (PIE).
- [7] It is the applicant's submission that the court does have jurisdiction to evict deriving the same from the provisions of section 6(3), 22(1) (c) and 22(2) (c) of the Restitution of Land Rights Act 22 of 1994 (the Act).

Section 22(1) (c) reads as follows:

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"To determine the person entitled to title the land contemplated in Section 3;

Section 22 (2) (c) provides as follows:

"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."

[11] Counsel for the applicant submitted that this court has jurisdiction to order eviction on the basis of section 22(2) (c) of (the Act). The section provides for an issue "which is not ordinarily within its jurisdiction but is incidental to an issue within its jurisdiction." (My underlining).

[12] In order to determine the application of "incidental" to an issue within its jurisdiction an enquiry has to be conducted to determine first the issue over which the court has jurisdiction. In other words, what is it that the court is busy with or is before it to which incidentality may be applied.

[13] The court's primary function is *inter alia*, to determine a right to restitution of right in land in accordance with (the Act). There is presently no claim to land before this court. The claims of second, fifth, sixth, seventh and eight respondents have been validated by the Commission and a memorandum in terms of section 42D of (the Act) was drawn, however, it is yet to be signed and has not been effected.

[14] The correct approach in determining what ancillary or incidental powers is, is set out in the decision of this Court and was determined by Dodson J in *Zulu and Others v Van Rensburg and others* 1996 (4) SA 1236 LCC @ 1245 B-C

"It was suggested on behalf of the respondents that the wording of this part of section 29 requires that the functions expressly conferred on the Court must first be identified and it is only in relation to those functions that one can then apply the broad provisions conferring ancillary and incidental powers on the Court. This approach would seem to be correct and finds support in the second part of that section which confers on the Court the powers of a provincial division of the Supreme Court in civil proceedings in relation to matters falling within its jurisdiction."

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The approach above was adopted in *Hlatshwayo v Hein* [1997] 4 ALL SA 630 (LCC) by Meer J at paragraph 12:

'In oral argument, the Appellants' legal representative suggested that section 29 confers jurisdiction on this Court because the power to hear appeals is an ancillary power. I do not agree. As Dodson J found in *Zulu v Van Ransburg* section 29 requires that the functions that one can apply the broad provisions conferring ancillary and incidental powers on the Court.' The Appellants have no clear function to which the appellant jurisdiction could be incidental. It is my view that appellate jurisdiction is primary in nature and cannot be considered incidental. The Section 29 referred to is found in the Land Reform (Labour Tenants) Act, however the principle is clear when in order to make determination of whether an incidental power has been conferred upon the Court one must first outline the clear functions of the Court in terms of relevant statute."

The definition of 'Court' is defined in (PIE Act) as being "Court means any division of the High Court or the Magistrates' court in whose area of jurisdiction the land in question is situated" (my underlining).

It is clear from the definition supra that the Land Claims Court is not included and it is not a division of the High Court. Counsel 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 the applications under the PIE Act.

And section 6(3) provides as follows:

"Where the regional land claims commissioner having jurisdiction or an interested party has reason to believe that the sale, exchange, donation, lease subdivision, rezoning or development of land which may be 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



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development of the land, and the Court may, subject to such terms and conditions and for such a period as it may determine, grant such an interdict or make the order it deems fit."

[15] The provisions of section 6(3) of (the Act) are meant to protect the interest of the claimants. I do not have evidence before me demonstrating any sale, exchange, donation, lease, rezoning or development to be taking place on the property. Submissions by counsel for the applicant are to the effect that development is taking place in the form of erection of shacks with corrugated iron sheets on the property.

[16] I do not have to make a finding as to whether erection of shacks or not constitutes development. Section 6(3) of the Act does not clothe this court with eviction jurisdiction. It is however trite that the applicant does have *locus standi* to bring an application in terms of section 6(3) of (the Act) as an interested party.

[17] Provisions of Section 22(1)(c) refers to matters over which the court has jurisdiction regarding land claims. This section does not and has nothing to do with evictions as suggested by counsel for the applicant. This court is not called upon to make a determination on any claim over land but to order eviction of the respondents.

Non joinder and locus standi:

[18] Having made a finding on lack of jurisdiction by this court to grant an eviction order, I now deal with the two remaining points in *limine*.

[19] Counsel for the respondents submitted that the applicant should have joined to these proceedings the owner of the property being Estate Late Herman Mabina and the office of the Regional Land Claims Commissioner (Limpopo).

[20] It is argued by counsel for the responded that the Regional Land Claims Commissioner should have been joined. Section 4 of the Act provides for the establishment of a Commission on Restitution of Land Rights as well as officers *inter alia* Regional Land Claims Commissioners. The Act provides for the establishment of Commission on Restitution of Land Rights as well as officers *inter alia*, Regional Land Claims Commissioners. The establishment of the Commission by the applicant brought to life a complete new entity separate from the applicant.

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Ideally the Regional Land Claims Commissioner should have been joined but failure to do so is not fatal given the fact that under section 6(3) applicant as an interested party could bring this application.

[21] The estate Late H Mabina is the current owners of portions, 146, 147 and 153 of Kalkfontein 1001LS. The owners consented and are indeed supportive of this application. Moreover, there is absolutely no prejudice to be suffered by the owner Estate Late Mabina. In my mind, the owner will actually benefit should the relief sought be granted. There is also correspondence from the owners' lawyer to the applicant in support of this application.

[22] The provisions of section 6(3) gives either the land claims commissioner and or an interested party authority to apply to this court for an interdict. It is common cause that the applicant has a direct interest in the property. It is the applicant who should award the property to the claimants.

[23] I find that the applicant has *locus standi*.

[24] Counsel for the applicant argued that should the court not find in the applicant's favour regarding the eviction, the court should grant the orders in prayers 5, 6, 7 and 8 to the notice of motion.

[25] There is sufficient evidence before me to grant the said relief sought. This court has power to grant such declaratories in accordance with section 22(1)(cA) which states:

"(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 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."

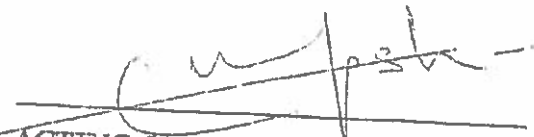
#### Order

Consequently I make the following order:

1. Order is granted in respect of prayers 1, 2, 5, 6 and 7 to the Notice of Motion.

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2. No order as to costs.

  
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ACTING JUDGE M J MPSHE

I agree

  
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ACTING JUDGE P M CANCA

Appearances:

For the applicant

*Adv A T Ngconwane SC & T Lupuwana instructed by State Attorney in Pretoria*

For the respondents

*Adv C R Jansen SC instructed by Lawyers for Human Rights in Pretoria*

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IN THE LAND CLAIMS COURT OF SOUTH AFRICA  
HELD AT RANDSBURG

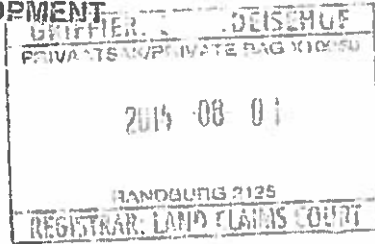
Before: The Honourable AJ Mpshe & AJ Canca

CASE NO: LCC 94/2012

In the matter between:

MINISTER OF RURAL DEVELOPMENT  
AND LAND REFORM

Applicant



and

- MAMAHULE COMMUNAL PROPERTY ASSOCIATION First Respondent
- MAMAHULE COMMUNITY Second Respondent
- MAMAHULE TRADITIONAL AUTHORITY Third Respondent
- THE UNLAWFUL OCCUPIERS OF THE FARM
- KALKFONTEIN Fourth Respondent
- MOJAPELO COMMUNITY (Maboi) Fifth Respondent
- MOTHIBA COMMUNITY Sixth Respondent
- MOTHAPO COMMUNITY Seventh Respondent
- THLOLONGWE COMMUNITY Eighth Respondent
- POLOKWANE MUNICIPALITY Ninth Respondent

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COURT ORDER

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Having read the papers filed of record and having heard Counsel, the following order is made: -

1. That this matter be heard as a matter of urgency and that the applicant's non-compliance with the forms, time periods and methods of service in terms of the Rules of this Court is condoned.
2. That the first, second and third respondents or any other person/s or entity acting by or through it/them are interdicted and restrained from selling, donating or in any other manner whatsoever granting title or authorising the development, demarcation, subdivisions, or occupation of the farm Kalkfontein 1001LS ("the farm") pending the final determination of the right and title to restoration of the farm to the lawful owners.
3. That the first, second, third and fourth respondents or any other person acting through them have no legal right or title to take occupation of the farm Kalkfontein 1001 LS pending the final determination of the rights and title to the restoration of the farm in accordance to the Restitution Act.
4. That the first, second, third and the fourth respondents or other persons acting for them have no legal right or title to take occupation of portion 146, 147 and 153 of the farm Kalkfontein 1001 LS, pending the final determination of the rights and title thereto and the restoration of the farm to all lawful beneficiaries in accordance to the Restitution Act.
5. That the first, second, third and the fourth respondents are unlawful occupiers of the farm Kalkfontein as defined in the PIE Act, Act No: 19 of 1998.
6. No order as to costs.

Given on this Friday the 01<sup>st</sup> August 2014.

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REGISTRAR  
LAND CLAIMS COURT