

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT179/16

In the matter between:-

MAMAHULE COMMUNAL PROPERTY ASSOCIATION	First Applicant
MAMAHULE COMMUNITY	Second Applicant
MAMAHULE TRADITIONAL AUTHORITY	Third Applicant
OCCUPIERS OF FARM KAALFONTEIN	Fourth Applicant

and

MINISTER OF RURAL DEVELOPMENT AND LAND REFORM	Respondent
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RESPONDENT'S HEADS OF ARGUMENT

Introduction

1. The following written submission are made pursuant to the directions issued by the Chief Justice on 21 September 2016.
2. The Applicants approach this Court for leave to appeal the judgment of the Land Claims Court. In this matter the Land Claims Court remarked *inter alia* that the provision of Section 6(3) of the restitution of land

rights, Act 22 of 1994 does not clothe either the Land Claims Commissioner and/or an interested party with the right to apply to Court (Land Claims Court) for an eviction of the Applicants. It further stated that it is common cause that the Applicants have a direct interest in the property in light of the provision of section 6(3) of the restitution of land Act, 22 of 1994.¹

3. The Land Claims Court dismissed the respondent's argument that the Court has a jurisdiction to evict the applicants in terms of section 6(3) and 22 of the restitution of land right Act, 22 of 1994². Therefore the only issue in dispute is whether the Court is qualified to declare the applicants to be unlawful occupiers.
4. In order to properly make determination of the Court's power to declare the applicants to be unlawful occupiers, one must consider the empowering legislations which underpin the Court's jurisdiction, viz. Restitution of Land Rights Act, 22 of 1994 and Extension of Security of Tenure Act.
5. Our submissions will be structured as follows:-
 - 5.1. Firstly, we will briefly deal with the jurisdiction of the Land Claims Court;
 - 5.2. Secondly, we will deal with the basis of the jurisdiction;

¹ Para 22 of the judgment.

² Para 16 and 17 of the judgment.

- 5.3. Thirdly, the basis on which paragraph 1 of the Land Claims Court's order made prayers 2, 5 and 6 of the notice of motion an order of court; in particular, whether that order, insofar as it relates to those prayers, was granted properly;
- 5.4. Whether, if the order referred to in paragraph (c) above was granted properly, the unlawfulness of the occupation by the first to fourth respondents does not, in any event, flow automatically from that order;
- 5.5. Whether it is in the interests of justice to seek to upset the declarator.

Jurisdiction of the Land Claims Court

6. The Land Claims Court is a Court established in terms of an Act of Parliament. Having a status similar to a High Court, as envisaged in section 166(e) of the constitution. Section 169(a) of the Constitution provides that a High Court may decide any constitutional matter except a matter that only the Constitutional Court may decide or that is assigned by an Act of parliament to another Court of a status similar to a High Court. The Constitution is silent on whether a Court established in terms of an Act of Parliament having a status similar to a High Court has a jurisdiction to declare unlawful a breach of a right guaranteed by Chapter 2 of the Constitution, but provides that it may make any order

that is just and equitable when dealing with a constitutional matter within its powers.³

7. The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998 defines the Court that has jurisdiction to execute its own provision as “any division of the High Court or Magistrates’ Court in whose area of jurisdiction the land in question is situated”. It is for this reason *inter alia* that the Land Claims Court ruled that the LCC does not have jurisdiction in terms of PIE Act to grant eviction order.⁴
8. The Land Claims Court further bolstered the point above and stated that “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”. The Court dismissed argument by the respondent that the court may evict in accordance with the provisions of PIE.⁵
9. The short answer to the question whether the court can declare the applicants to be unlawful occupiers of the farm in question in terms of Prevention of illegal Eviction and Unlawful Occupation of Land Act, 19 of 1998, is no. However it is important to note that the applicants in this matter were not declared to be unlawful occupiers in terms of PIE but in terms of the Restitution of Land Rights Act, 22 of 1994.⁶

³ Mathe and others v Lanseria Commercial Crossing (pty) and others 2011 ZALCC 15

⁴ para 14 of the judgment

⁵ *ibid*

⁶ para 25 of the judgment

10. The Land Claims Court is a creature of statute. It is established by and derives its powers 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 this Act or the Land Reform (Labour Tenant) Act, 1996 (Act 3 of 1996).⁷
11. The central feature of the argument is whether the rights of the applicants are regulated by the said Acts or PIE. Further to the foregoing, whether the fact that PIE Act gives jurisdiction to the High Court, and that there is no statutory provision giving the Land Claims Court jurisdiction in respect of evictions regulated by PIE, precludes the Land Claims Court from declaring applicants to be in unlawful occupation of the farm.⁸
12. We submit that the Land Claims Court has jurisdiction to do so on the following basis;

12.1. Section 6(3) of the Restitution of Land Rights Act, 22 of 1994, provides that:

“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 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 –

⁷ para 42 of mathe case *ibid*

⁸ para 43 of mathe case

- (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.”

12.2. Section 11(7) of the restitution provides as follows;

“(7) Once a notice has been published in respect of any land-

(a) no person may in an improper manner obstruct the passage of the claim;

(Aa) no person may sell, exchange, donate, lease, subdivide, rezone or develop the land in question without having given the intention to do so, and, where such notice was not given in respect of-

(i) any sale, exchange, donation, lease, subdivision or rezoning of land and the Court is satisfied that such sale, exchange, donation, lease, subdivision or rezoning was not done in good faith, the Court may set aside same.

12.3. Section 22(1)(cA) provides that “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 an order.”

12.4. Section 22 provides “(2) subject to Chapter 8 of the Constitution, the Court shall have jurisdiction throughout the Republic and shall have- (a) all such powers in relation to matters falling within its jurisdiction as are possessed by a High Court having jurisdiction in civil proceedings at the place where the land in question is situated, including the powers of a High Court in relation to any contempt of the Court (b) all the ancillary powers necessary or reasonably incidental to the performance of its functions, including the power to grant interlocutory orders and interdicts.(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.”

13. It is not in dispute that the farm in question is a subject of a land claim, which the applicants are claimants. Therefore in terms of the restitution of land rights Act, the land which is under land claim is vested in the office of the commissioner of the land claims and has the power to

make sure that there is no unauthorised activities that will undermine the whole process of land claim.

14. It is the respondent's case that the applicants proceeded to erect shacks on the farm contrary to the agreement between the respondent and the applicants, thereby affecting the smooth process of the land claim. The application was brought to deal with further structures which were erected on the farm post settlement in the High Court.⁹
15. The argument by the applicant that there are dangers inherent in requiring an applicant to seek certain relief from the Land Claims Court and other relief from the High Court is devoid of any factual foundation as applicants and respondent settlement in the High Court had to do with the 50 structures which were identified not the additional structures which were erected post the agreement.
16. Therefore we humbly submit that the application to the LCC had to do with the additional structures erected on the farm contrary to the applicant's stance that it is a forum shopping exercise.
17. The powers of the Land Claims Court to declare the occupiers of the land which is under the land claims are derived from Section 22 of the Act, together with Section 11 of the same Act. The declaration made by the Court in this case was not made in terms of PIE Act as the Court does not enjoy any powers, viz. be it eviction powers or declaratory

⁹ para of the answering affidavit

powers in terms of the Act. Instead it was made in terms of the Restitution Act, which clothes the Court with the discretionary powers to declare any person who is in occupation of the land as an unlawful occupier and also make an appropriate order where it deems fit.

18. It is submitted that the rights of the applicants are regulated by the restitution of land rights Act, 22 of 1994. This matter is different in contrast with the facts in *Mathe* judgment wherein the enquiry was whether the unlawful occupiers were regulated by ESTA, and if not, whether the Court can proceed to declare them to be unlawful even though they are not regulated by ESTA.
19. In the present case, contrary to *Mathe* judgment, the land in question is still under land claim and it is on this basis that the LCC has jurisdiction to declare the applicants to be unlawful occupiers. There is no merit in the argument that the land claim has been finalised as it has not been approved by the Minister due to objection by members of the community who feel that they were left out of the process.
20. With regard to the argument that the Minister is not the owner of the property, it is submitted that the Respondent does not need to be the owner of the property in order for him to approach the Court for appropriate relief. As long as there is a land claim, and which land claim, is still under way, the land remain vested in the Regional Commissioner's office and therefore he exercises the powers to approach Court at any time if there are unauthorised activities.

21. It is also important to note that there is no dispute with regard to the fact that the land is under land claim.
22. It is on this basis that we submit that the land is vested in the office of the Regional Claims Commissioner who has the right to exercise his powers in terms of the Act.

The Basis of the Jurisdiction

23. As indicated above the Court declared the applicants to be unlawful occupiers of the farm in terms of section 22 of the restitution of land Act, 22 of 1994 not in terms of Prevention of Illegal Evictions and Unlawful Occupation of Land Act 19 of 1998.
24. It is incorrect for the applicants to assume that, because the LCC did not grant the prayer for eviction, it is therefore hamstrung to exercise its statutory powers to declare the applicants to be unlawful occupiers.
25. As long as there is a claim on the farm and it is yet to be finalised, the restitution of land rights Act which confers LCC exclusive jurisdiction over such land will apply.

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

26. In our submission, the Court relied on section 22 (cA) which provides that “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”.
27. The question is whether the Court has jurisdiction over the land in question, and if so, whether that means it can declare the persons who are in occupation of the property to be unlawful, it is our respectful submission that the provisions of the Act do grant the Court enough discretion to declare unlawful occupiers, as long as it has jurisdiction over the land.
28. The LCC, contrary to the applicant’s argument, correctly stated that section 6(3) of the Act does give the respondent *locus standi* to approach it for the relief and therefore decided the matter in terms of section 22.
29. The provisions of section 6(3) of the Act are elastic as they provide for discretionary powers to Court to make an order as it deems fit. It is our submission that the discretion provided by the Act includes the discretion to grant a declarator in the circumstances similar to the present case.

30. It is our submission that in light of the fact that the LCC exercises jurisdiction over the land in question, it has inherent powers by virtue of that, to make any order that it deems fit. (section 22(2)(a))
31. It is our submission further that the order declaring the applicants to be unlawful occupiers falls within the ancillary powers necessary or incidental to the performance of its functions, viz to ensure that there is no unauthorised activities on the claimed land.(section 22(2)(b))
32. We have already demonstrated above that the land is under land claim and hence the LCC has jurisdiction over it. The issue regarding occupation and unauthorised activities, we submit, is incidental to the issue within its jurisdiction and therefore it is in the interest of justice that the LCC make a finding on the issue of the unlawful occupiers.
33. It is our submission that the facts fall squarely within the purview of the restitution of land Act.

Does unlawfulness of occupation follow if prayers 2, 5 and 6 were granted properly

34. It is our submission that the unlawfulness follows. This matter was previously dealt with in the High Court and the applicants concede this point.

35. The applicant and respondent entered into an agreement wherein the applicant undertook not to settle any further structures or persons on the farm, pending finalisation of the proceedings instituted by the applicant in the Land Claims Court.
36. The parties further agreed to determine the number of the informal structures presently on the property and to record the status *quo*.
37. The current application was brought against the persons who occupied the property post agreement. Therefore, as there is settlement agreement between the parties, which settlement neither party disputes its validity, further settlement on the farm is automatically rendered unlawfully by virtue of the settlement.

Is it in the interest of justice to upset the declaration

38. It is in the interest of justice to allow the declaratory orders to stand.
39. If the declaratory order is set aside, the applicants and others will continue to erect structure on the land and that will prejudice the ultimate beneficiaries of the land as they will inherit the land with occupants on it.
40. It is apposite to state that there is a dispute regarding the veracity of the list of the beneficiaries of the land submitted to the Minister hence the delay in the prosecution of the claim. If at the end of the day, it is

found that the applicants are not the rightful beneficiaries of the land and they have occupied the land, it will prejudice the whole process of claim and the beneficiaries.

41. We therefore submit that the interest of justice tilts in favour of the declarator being maintained in order to ensure smooth passage of the claim.

Conclusion

42. Wherefore we submit that the application be dismissed with costs.

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19 October 2016