

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: 379/24

In the matter between:

SOUTH AFRICAN RIDING FOR THE DISABLED ASSOCIATION Applicant

and

THE REGIONAL LAND CLAIMS COMMISSION: WESTERN CAPE First Respondent

MAGHERDIEN SADIEN N.O. Second Respondent

(on behalf of the Imam Dout Sadien Family Trust
(IT 746/2014)

THE ABDURAGHMAAN SADIEN FAMILY TRUST Third Respondent

(IT 20909/2014)

MOHAMED ALLIE EBRAHIM N.O. Fourth Respondent

(on behalf of the Bapa Sadien Family Trust
(IT 202039/2014)

MAGHERDIEN SADIEN N.O. Fifth Respondent

(on behalf of the Boeta Toyer Sadien Family
Trust (IT 020531/2014)

THE BOETA OMAR FAMILY TRUST Sixth Respondent

(IT 201155/2014)

SEDIEK SADIEN Seventh Respondent

FILING SHEET

FILED HEREWITH:

1. Notice of Motion – Application for Condonation;
2. Applicant's replying affidavit dated 18 February 2025;
3. Applicant's Notice in terms of Rule 9.

DATED AT CAPE TOWN THIS 18th DAY OF FEBRUARY 2025



MICHAEL WAGENER

APPLICANT'S ATTORNEY
PEPPER ST CHAMBERS
10 PEPPER ST
CAPE TOWN
michael@charterpartycases.com
Tel 083 998 0091
c/o Primerio
135 Daisy St
Sandton
Att: N Araujo
Cell: 079 491 1615

TO:

REGISTRAR
CONSTITUTIONAL HILL
BRAAMFONTEIN
JOHANNESBURG
TEL: 011 359 7400
EMAIL: generaloffice@concourt.co.za

STATE ATTORNEY
FIRST RESPONDENT'S ATTORNEY
22 LONG ST
CAPE TOWN
ATT: T LOMBARD
TEL: 021 441 9200
EMAIL: tlombard@justice.gov.za

IGHSAAN SADIEN ATTORNEYS
THIRD TO SIXTH RESPONDENTS' ATTORNEY
76 SOUTH RD
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ATT: I SADIEN
TEL: 021 797 5827
EMAIL: ighsaan@isadienlaw.co.za

MSK ATTORNEYS
SEVENTH RESPONDENT'S ATTORNEYS
10TH FLOOR
THIBAUT SQUARE
LONG ST
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ATT: D MACGREGOR
TEL: 021 421 3838
EMAIL: david@macgregs.co.za

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NOTICE OF MOTION

BE PLEASED TO TAKE NOTICE that SOUTH AFRICAN RIDING FOR THE DISABLED ASSOCIATION (hereinafter referred to as “the Applicant”) hereby applies for an order in the following terms:

1. Condonation for and leave to file a replying affidavit;
2. Directing that the costs of this application, including the costs of two counsel where employed, be costs in the appeal.

TAKE NOTICE FURTHER that the accompanying affidavit of MICHAEL WAGENER annexed hereto will be used in support of this application.

If you intend opposing this application you are required to lodge your affidavit in support of your opposition, after prior service on the Applicant, with the Registrar of this court within 10 days after service of this application on you.

DATED AT **CAPE TOWN** THIS 18th of FEBRUARY 2025



MICHAEL WAGENER

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REPLYING AFFIDAVIT

I, the undersigned, MICHAEL WAGENER, state under oath:

1. I am an attorney, duly admitted, practising under the style of Michael Wagener at Pepper St Chambers, 10 Pepper St, Cape Town. I am the attorney of record of the Applicant, the South African Riding for the Disabled Association.
2. Because of the protracted nature of this matter and its procedural complexity, it is respectfully submitted that it is in the interests of justice to give the Applicant an opportunity to point out features of the answering affidavits which are incorrect or misleading.
3. The First Respondent filed its answering affidavit out time on 4 February 2025. In its application for condonation it appears to suggest that service of the Application for Leave to Appeal by email on 20 December 2024 on Ms Candice Newman who was standing in as secretary for the Head of the Cape Town Office, Mr Felix Mbeki, could simply be ignored. There is no acceptable explanation why the application was only brought to the attention of the



attorney dealing with the matter, Ms Lombard, on 20 January 2025, one month after service on 20 December 2024.

4. Nevertheless, it is important to have regard to the State's submissions and the Applicant does not oppose the application for condonation.
5. The Applicant's replying submissions are set out below.

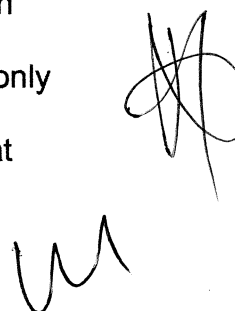
THE AFFIDAVIT OF TANYA LOUISE LOMBARD

AD PARAGRAPHS 37 – 44

6. None the three cases cited are authority for the legal viability of "family" claims under the Restitution of Land Rights Act 22 of 1994 ("the Restitution Act"). Because the Land Court's order has created a new genus of beneficiaries beyond the scope of the Restitution Act, it is in violation of the rule of law and is therefore a nullity.

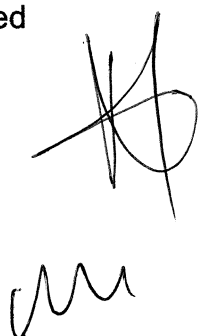
- 6.1 In S v Mabena 2007 (1) SACR 482 (SCA) an order granting bail beyond the provisions of the Criminal Procedure Act 51 of 1977 was set aside as a nullity. At paragraph 2, Nugent JA held as follows:

"The Constitution proclaims the existence of a State that is founded on the rule of law. Under such a regime legitimate State authority exists only within the confines of the law, as it is embodied in the Constitution that

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created it, and the purported exercise of such authority other than in accordance with law is a nullity. That is the cardinal tenet of the rule of law. It admits of no exception in relation to the judicial authority of the State. Far from conferring authority to disregard the law the Constitution is the imperative for justice to be done in accordance with law. As in the case of other State authority, the exercise of judicial authority otherwise than according to law is simply invalid.”

- 6.2 It is respectfully submitted that the reasoning of the SCA in Mabena applies equally to the Land Court’s order in this case. Section 2(1)(c) limits the class of beneficiaries to direct descendants of persons who died without lodging a claim. On any definition of “family”, it includes persons who are not direct descendants of any particular member of that family. An obvious example is persons related by marriage.
- 6.3 The illegality of the Land Court’s order is exacerbated by the fact that the original order of 2013 recognized only one valid claim on behalf of a single individual and only one direct descendant, the Seventh Respondent.
- 6.4 In the first case cited by the State in support of a “family” claim, Jacobs v Department of Land Affairs 2016 (5) SA 382 (LCC), Ngcucaitobi AJ made it clear in paragraph 120 that only direct descendants were entitled to claim. Although the order may be criticized for vagueness, the decision is by no means authority for the type of order granted in this

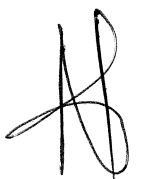
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matter.

- 6.5 In the other two unreported decisions, Pillay NO v The Government of the Republic of South Africa and others LCC 2019/42 dated 8 August 2022 and Izaacs v The Government of the Republic of South Africa and others LCC 2018/206 dated 4 October 2023, Spilg J's orders contained detailed directions for establishing the identity of the direct descendants entitled to claim pursuant to section 2 of the Restitution Act. Again, these decisions are by no means authority for the Land Court's order in this case.

AD PARAGRAPH 60

7. Although dissatisfied with this Court's decision of 23 February 2017 on the basis that it was clearly wrong, the Applicant had no choice but to go along with paragraph 5 of this Court's order which read as follows: "The matter is remitted to the Land Claims Court for determination of compensation payable to the South African Riding for the Disabled Association."
8. Although the clear meaning of paragraph 5 was that this Court assumed the Applicant's right to compensation as a given, the then Land Claims Court imposed on the Applicant the duty of proving its right to compensation by way of an application. This is apparent from an email sent by the Registrar at the direction of the then Acting President, Justice Meer, dated 17 April 2018. (The email and my letter of 10 April 2018 requesting directions are attached as



“RA1” and “RA2”.) In the event, the Applicant was compelled to file a statement of claim to recover the compensation. Both the State and the Seventh Respondent, then the only successful land claimant, pleaded to the statement of claim. Mediation was ordered, followed by a fresh application by five family trusts to be substituted for the Seventh Respondent in the proceedings in the Land Court under case number LCC 26/2010. The result has been the creation a procedural monster.

9. In all the confusion, one fact stands out: the Applicant was given leave by this Court to intervene in the original Land Claims Court proceedings. It was accordingly party to those proceedings on 5 February 2024, when the five family trusts sought leave to intervene in order to substantially vary the Land Claims Court orders of 2012 and 2013. It was this new application which provided the opportunity to re-assess the Applicant’s interest in the order of 8 February 2013. This had to be so because the “inquisitorial proceedings” depriving the Applicant’s of its right to possess erf 142 without being heard, were the foundation on which that order was built.

AD PARAGRAPHS 66 – 77

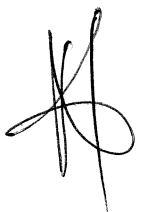
10. The deponent to the State’s answering affidavit fails to mention that a series of one-year leases was entered into between the Applicant and Western Cape Provincial Government over the period between the expiry of the original 20 year lease and the one year lease of 2007. The fact that the leases were renewed year-on-year until 2007 provides the context for the



undertaking of a 50 year lease given by the MEC Transport and Public Works, Robin Carlisle, in April 2011. There can be no doubt that Mpshe AJ was unaware of this undertaking when he identified erf 142 as vacant alternative state land.

11. Also, the fact that all four erven occupied by the Applicant belonged to National Government in 2011 when Carlisle gave the undertaking of a 50 year lease does not detract from the efficacy of the undertaking. National Government also owned all four erven when the series of one year leases referred to in paragraph 10 above were entered into (despite the fact that the leases recorded the properties as owned by Provincial Government).

12. A study of the title deeds of erf 141 (1.29 hectares) and erf 142 (8.9 hectares) demonstrates the ease with which ownership of state land can move between National and Provincial Government simply by endorsement. Erf 141 was expropriated for educational purposes in 1966 and vested in the Educational Trustees (ie Provincial Government). It was then transferred to National Government in 1990. It was transferred back to Provincial Government on 25 February 2019. Erf 142 was also expropriated by Provincial Government in 1966 for educational purposes and transferred to National Government in 1990. Aside from the impugned order of the Land Claims Court of 2013, there is no apparent reason why it could also not be transferred back to Provincial Government as erf 141 was. This would be in keeping with the objectives of the City of Cape Town's District Plan of 2023 referred to in paragraph 43.1 (paginated p 24) of the Founding Affidavit and



Carlisle's undertaking.

13. The assertion in paragraph 76 that the Applicant is "holding over" ie occupying erf 142 (and the other three erven) without consent, has no factual basis. On 27 July 2012, the National Department of Public Works, statutory custodian of state land in terms of the State Land Disposal Act 48 of 1961, emailed the Applicant to set up a meeting to discuss a new lease over the four erven. A copy of this email was annexed to the Applicant's first application to intervene and its veracity has never been questioned. A copy is annexed here as "RA3". Officials from the Department did in fact visit the site in August 2012. The email and the fact of the visit are incontrovertible evidence that the state was contemplating the renewal to the Applicant's lease at the time when Mpshe AJ exercised his inquisitorial powers which led to the order of 8 February 2013.

AD PARAGRAPH 79

14. No attempt is made to justify the gross irregularities adverted to in these paragraphs ie the secret deliberations of Mpshe AJ termed by him as the exercise of his "inquisitorial powers" and the grossly irregular, extra-curial interchange with counsel. The bald assertion is made that they have already been considered by this Court. The charges levelled by the Applicant are so grave that it is unthinkable that this Court would not have mentioned them in its judgment of 23 February 2017, if they had indeed been considered.



AD PARAGRAPH 83



15. It cannot be contended that this is not a constitutional matter. The essence of Applicant's case is that the Land Court has breached the Rule of Law, a founding value of the Constitution. The Land Court has done so by disregarding or misinterpreting the provisions of the Restitution of Land Rights Act, legislation passed in fulfilment of the constitutional imperative in section 25(7) of the Constitution.

AD PARAGRAPH 84

16. The Applicant does not seek a rehearing of the "judgment in case number CCT 172/16". It seeks to participate in a new, far-reaching, application to vary the Land Claims Court's order of 8 February 2013, and in so doing has asked the Land Court (and is asking this Court) to re-assess its interest in that order. As this may involve a finding that this Court's order under case number CCT 172/16 of 23 February 2017 was given per incuriam, it is both appropriate and in the interests of justice that the Applicant be given leave to appeal directly to this Court. The underlying assumption is that only this Court is not bound by its previous decisions.

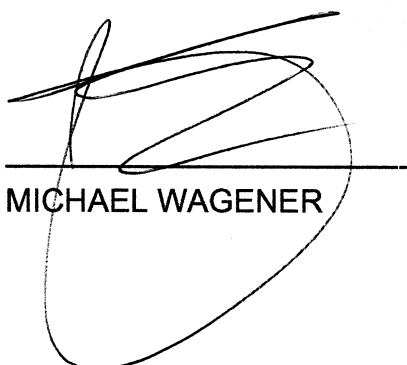
THE AFFIDAVIT OF IGHSAAN SADIEN

17. The Applicant has dealt with the important issues raised in Ighsaan Sadien's affidavit in its reply to the state's answering affidavit above. What

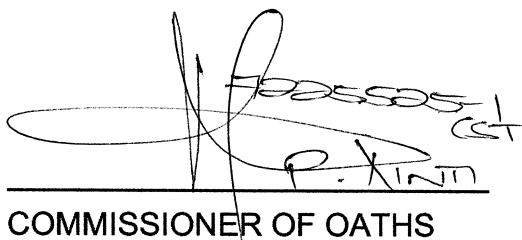
characterizes the Second to Seventh Respondents' response is a dogged refusal to accept that this Court is not bound by its own decisions. In adopting this stance, it has failed to deal with the substance of the Applicant's case which is the illegality of the proceedings in the Land Claims Court.

18. Lastly, it serves to be mentioned that the Seventh Respondent, Sediek Sadien, was represented in the Land Court by MSK Attorneys. This application was served on MSK who accepted service and have given no indication that they no longer act for the Seventh Respondent. In the premises it is appropriate that Ighsaan Sadien demonstrates his authority to act and a notice in terms of Rule 9 will be served simultaneously with this affidavit.

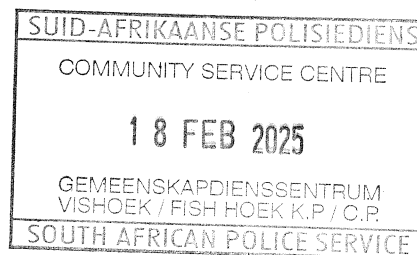


MICHAEL WAGENER

Signed in my presence at CAPE TOWN on 18 FEBRUARY 2025 by the deponent, MICHAEL WAGENER, who confirmed the correctness of the contents of this affidavit and who uttered the words, "the contents of this affidavit are true and correct, so help me God"



COMMISSIONER OF OATHS



RAI

MICHAEL WAGENER

ROSE ST CHAMBERS

BO-KAAP

EMAIL: attorneymwagener@mweb.co.za

Date: 10 April 2018

The President of the Land Claims Court

Kent Avenue

Randburg

Per email: mmatome@judiciary.org

Dear Judge Meer

SARDA v RLCC and others LCC 26/2010, CCT 172/16

I act for the applicant/intervening party in the above proceedings.

A brief background to the case is set out below.

On 8 March 2013, the Land Claims Court (Mpshe AJ), sitting in Cape Town, awarded erf 142 Constantia to the second respondent, Mr Sedick Sadien.

At that stage my client was not party to the proceedings.

My client's application to intervene was dismissed by Mpshe AJ at 1st instance but allowed by the Constitutional Court in the judgment and order accompanying this letter.

I refer in particular to paragraph 5 of the Constitutional Court's order which remits the case back to the Land Claims Court to determine the amount of compensation payable to my client.

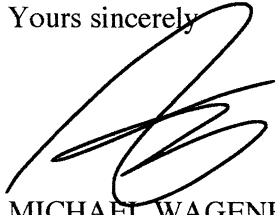
Directions are accordingly sought with regard to the following:

1. The appointment of a judge to hear the matter;
2. The time and venue for the hearing; and
3. Dates for the exchange of pleadings.

Thanking you in advance.

A blacked-out redacted area, likely covering a signature or name.

Yours sincerely

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke, positioned above the printed name.

MICHAEL WAGENER

cc: info@isadienlaw.co.za; shchetty@justice.gov.za

Subject: RE: SARDA v RLCC
Date: Tuesday, 17 April 2018 at 13:15:56 South Africa Standard Time
From: Malebo Matome
To: Michael Wagener
CC: info@isadienlaw.co.za, Chetty Sharma (DoJ&CD Contact)
Attachments: image001.jpg

Good Day,

Your letter dated 10 April 2018 refers.

This court can only determine compensation payable to your client in the event of an application being brought before it.

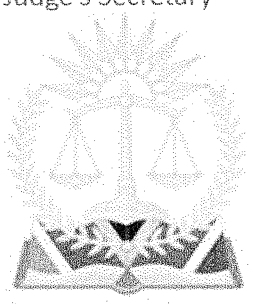
Kindly refer to the Act, the Rules and the Practice Directions of this court in this regard.

Kindly acknowledge receipt of this email and contents thereof.

We trust that you will find the above in order and feel free to contact me with any query.

Kind Regards,

Malebo Matome
Judge's Secretary



OFFICE OF THE CHIEF JUSTICE
REPUBLIC OF SOUTH AFRICA

Land Claims Court

Physical Address: Randburg Mall, Corner Hill Street and Kent Avenue
Postal Address: Private Bag X10060, Randburg, 2125
Tel: (011) 781 2291
Cell: 078 370 6879
Fax: (011) 781 2217/8

Website: www.justice.gov.za/lcc

~~From: Mike Wagener [mailto:wagenerm@mlweb.co.za]
Sent: 10 April 2018 02:54 PM
To: Malebo Matome
Cc: info@isadienlaw.co.za; Chetty Sharma (DoJ&CD Contact)
Subject: SARDA v RLCC~~

~~Dear Ms Matome~~

From: Ivy Murundwa [mailto:Ivy.Murundwa@dpw.gov.za]
Sent: 27 July 2012 08:38 AM
To: capetown@sarda.co.za
Cc: Adele Groenewald
Subject: Constatia: Erven 141,142,560&684: Lease Agreement

RA3

[REDACTED]

Dear Ms Anna Harkiss

I would like to arrange a site meeting for next week Tuesday the 31st of July 2012 regarding the above Lease Agreement.

Please confirm your availability.

Regards
Ivy Murundwa
021 402 2056

[REDACTED]

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NOTICE IN TERMS OF RULE 9

BE PLEASED TO TAKE NOTICE that the Applicant disputes the authority of Ighsaan Sadien Attorneys to represent the Seventh Respondent, Sediek Sadien.

BE PLEASED TO TAKE NOTICE FURTHER that upon receipt of this notice, Ighsaan Sadien Attorneys may no longer act for the Seventh Respondent, unless a duly executed Power of Attorney is lodged with the Registrar within 21 days of this notice.

DATED AT **CAPE TOWN** THIS 17th DAY OF FEBRUARY 2025



MICHAEL WAGENER

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