



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 172/16

In the matter between:

**SOUTH AFRICAN RIDING FOR THE
DISABLED ASSOCIATION**

Applicant

and

REGIONAL LAND CLAIMS COMMISSIONER

First Respondent

SEDICK SADIEN

Second Respondent

EBRAHIM SADIEN

Third Respondent

Neutral citation: *South African Riding for the Disabled Association v Regional Land Claims Commissioner and Others* [2017] ZACC 4

Coram: Nkabinde ACJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mbha AJ, Mhlantla J, Musi AJ and Zondo J

Judgments: Jafta J (unanimous)

Decided on: 23 February 2017

Summary: Section 35(9) of the Restitution of Land Rights Act— just and equitable compensation — direct and substantial interest — right to intervene

ORDER

On appeal from the Land Claims Court:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order of the Land Claims Court is set aside.
4. The South African Riding for the Disabled Association is allowed to intervene for the purpose of determining compensation payable to the Association.
5. The matter is remitted to the Land Claims Court for determination of compensation payable to the South African Riding for the Disabled Association.
6. The Regional Land Claims Commissioner is ordered to pay costs in the Land Claims Court and this Court.

JUDGMENT

JAFTA J (Nkabinde ACJ, Cameron J, Froneman J, Khampepe J, Madlanga J, Mbha AJ, Mhlantla J, Musi AJ and Zondo J concurring):

Introduction

[1] This is an application for leave to appeal against an order of the Land Claims Court in terms of which a request to intervene in proceedings that served before that Court was dismissed with costs. The Land Claims Court refused leave to appeal and a petition to the Supreme Court of Appeal was also not successful. The application concerns the interpretation and application of the Restitution of Land

Rights Act¹ (Act) which was enacted to give effect to section 25(7) of the Constitution.² As a result a constitutional issue is raised.³

[2] The Chief Justice directed the parties to file written submissions on the question whether the applicant had a direct and substantial interest in an amended order of the Land Claims Court that ordered transfer of a certain immovable property to the second respondent. In compliance with the directions, the parties have lodged written argument and the matter was decided without oral hearing.

Factual background

[3] The applicant is the South African Riding for the Disabled Association (Association). The Association has cited as respondents the Regional Land Claims Commissioner (Commissioner), Mr Sedick Sadien and Mr Ebrahim Sadien (Sadiens).

[4] The Association has occupied Erf 142 Constantia, Cape Town under a lease for 34 years. This property belonged to the State. In terms of the amended order, the Land Claims Court directed that the property be transferred to the Sadiens as compensation for the land they had lost. The Sadiens had claimed restoration of land they had lost as a result of discriminatory practices of the previous apartheid order.

[5] The claim for restoration was determined by the Land Claims Court in December 2012. That Court ordered the transfer of Erf 1783 Constantia to Mr Sedick Sadien, a descendant of Mr Omar Sadien who was the owner of the dispossessed land. But this erf proved to be considerably smaller than the dispossessed land. As a result the Land Claims Court awarded the Sadiens a different

¹ 22 of 1994.

² Section 25(7) 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.”

³ *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* [2007] ZACC 12; 2007 (6) SA 199 (CC); 2007 (10) BCLR 1027 (CC).

piece of land to make up for the shortfall. On 8 February 2013, the Court varied its order to replace the smaller land with Erf 142 Constantia.

[6] This variation was effected without the knowledge of the Association which had allegedly made improvements valued at R7.5 million on the property in question during its tenancy. No offer was made by any party to compensate the Association and the Land Claims Court ordered none. This was at variance with the provisions of section 35(9) of the Act. This section confers upon a lawful occupier of state land compensation determined by agreement or the Land Claims Court, if that Court orders restitution of state land occupied by a lawful occupier.

[7] Aggrieved by the turn of events, the Association instituted in the Land Claims Court an application for leave to intervene. The Association also applied for rescission of the amended order in terms of section 35(11) of the Act.⁴ It sought to have the varied order set aside, including the order of 7 December 2012 in terms of which the smaller land was awarded to the Sadiens.

[8] The Land Claims Court held that the Association had no direct and substantial interest in the remedy sought by the Sadiens. That Court concluded that on the facts the Association had no interest in the subject-matter of the case which was the restoration of land to the Sadiens.

⁴ Section 35(11) provides:

“The Court may, upon application by any person affected thereby and subject to the rules made under section 32, rescind or vary any order or judgment granted by it—

- (a) in the absence of the person against whom that order or judgment was granted;
- (b) which was void from its inception or was obtained by fraud or mistake common to the parties;
- (c) in respect of which no appeal lies; or
- (d) in the circumstances contemplated in section 11(5):

Provided that where an appeal is pending in respect of such order, or where such order was made on appeal, the application shall be made to the Constitutional Court or the Appellate Division of the Supreme Court, as the case may be.”

Intervention

[9] It is now settled that an applicant for intervention must meet the direct and substantial interest test in order to succeed. What constitutes a direct and substantial interest is the legal interest in the subject-matter of the case which could be prejudicially affected by the order of the Court. This means that the applicant must show that it has a right adversely affected or likely to be affected by the order sought.⁵ But the applicant does not have to satisfy the court at the stage of intervention that it will succeed. It is sufficient for such applicant to make allegations which, if proved, would entitle it to relief.⁶

[10] If the applicant shows that it has some right which is affected by the order issued, permission to intervene must be granted. For it is a basic principle of our law that no order should be granted against a party without affording such party a pre-decision hearing. This is so fundamental that an order is generally taken to be binding only on parties to the litigation.

[11] Once the applicant for intervention shows a direct and substantial interest in the subject-matter of the case, the court ought to grant leave to intervene. In *Greyvenouw CC* this principle was formulated in these terms:

“In addition, when, as in this matter, the applicants base their claim to intervene on a direct and substantial interest in the subject-matter of the dispute, the Court has no discretion: it must allow them to intervene because it should not proceed in the absence of parties having such legally recognised interests.”⁷

[12] While it is true that the Association had no interest in the subject-matter of the claim by the Sadiens and that the order issued by the Land Claims Court on 7 December 2012 affected none of its interests, the same cannot be said about the

⁵ *Snyders v De Jager (Joinder)* [2016] ZACC 54; *Minister of Local Government and Land Tenure v Sizwe Development: In re Sizwe Development v Flagstaff Municipality* 1991 (1) SA 677 (Tk) (*Sizwe Development*).

⁶ *Id* at 679A.

⁷ *Nelson Mandela Metropolitan Municipality v Greyvenouw CC* 2004 (2) SA 81 (SE) at para 9.

variation of 8 February 2013. The varied order had the effect of transferring Erf 142 to Mr Sedick Sadien without determination of compensation to the Association.

[13] Section 35(9) affords lawful occupiers of state land like the Association the right to claim compensation when the land they occupy is awarded to a claimant for restitution of land rights. Section 35(9) provides:

“Any state-owned land which is held under a lease or similar arrangement shall be deemed to be in the possession of the State for the purposes of subsection (1)(a): Provided that, if the Court orders the restoration of a right in such land, the lawful occupier thereof shall be entitled to just and equitable compensation determined either by agreement or by the Court.”

[14] What this provision seeks to achieve is to mandate the Land Claims Court to order restoration of rights even where the state land is occupied by a third party. It accomplishes this objective by deeming that such land is in the possession of the State for purposes of restoration in terms of section 35(1).⁸ Compensation under section 35(9) is payable to lawful occupiers only. It must be just and equitable

⁸ Section 35(1) of the Act provides:

“The Court may order—

- (a) the restoration of land, a portion of land or any right in land in respect of which the claim or any other claim is made to the claimant or award any land, a portion of or a right in land to the claimant in full or in partial settlement of the claim and, where necessary, the prior acquisition or expropriation of the land, portion of land or 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 concerned; or
 - (ii) the Court is satisfied that satisfactory arrangements have been or will be made to grant such other claimant restitution of a right in land;
- (b) the State to grant the claimant an appropriate right in alternative state owned land and, where necessary, order the State to designate it;
- (c) the State to pay the claimant compensation;
- (d) the State to include the claimant as a beneficiary of a State support programme for housing or the allocation and development of rural land;
- (e) the grant to the claimant of any alternative relief.”

compensation determined by the parties themselves by means of an agreement, failing which by the Land Claims Court.

[15] In the written submissions the Commissioner contended that the Association was not an interested person envisaged in section 29(1) of the Act because it merely had a financial interest in the litigation concerning restoration of land to the Sadiens.⁹ This is not true. Section 35(9) confers an entitlement upon lawful occupiers to have just and equitable compensation determined if transfer of the land they occupy is ordered. It is the determination of the right to compensation that gives rise to a direct and substantial interest.

[16] Here it is common cause that the Association was a lawful occupier of Erf 142 at the time the variation order was made. Also it cannot be disputed that section 35(9) afforded it a right to compensation and that restoration of rights in state land lawfully occupied was subject to determination of compensation to the Association. The Association alleged that it had made improvements valued at R7.5 million. It is also common cause that no compensation to the Association was agreed upon and that none was determined by the Land Claims Court before ordering that Erf 142 be transferred to Mr Sedick Sadien.

[17] It cannot be gainsaid that the varied order adversely affected the Association's right to compensation. Section 35(9) authorises transfer of the state land to a claimant without the involvement of the lawful occupier of the land in question. But the

⁹ Section 29 of the Act provides:

- “(1) Any interested person, including an organisation, may apply to the Court for leave to intervene as a party to any proceedings before the Court.
- (2) The State shall have the right to intervene as a party to all proceedings before the Court.
- (3) Any party appearing before the Court may do so in person or may be represented by an advocate or attorney.
- (4) Where a party can not afford to pay for legal representation itself, the Chief Land Claims Commissioner may take steps to arrange legal representation for such party, either through the State legal aid system or, if necessary, at the expense of the Commission.”

section safeguards the occupier's interests by conferring on it an entitlement to just and equitable compensation. In these circumstances entitlement to compensation is the pre-condition for authorising transfer. In the absence of an agreement, the lawful occupier is entitled to be heard on what would constitute just and equitable compensation.

[18] Whilst the Court was empowered by section 35(1) to order the transfer, its order was subject to the provision in section 35(9) which required that the Association be paid just and equitable compensation. Absent the Association's compensation, it cannot be said that the Court's variation order was consonant with the proviso. The Association was therefore entitled to intervene and enforce its right to compensation. It is in this limited sense that it had a direct and substantial interest in the proceedings. This interest does not include the question whether Erf 142 must be transferred to the Sadiens. Its interest is restricted to the entitlement to just and equitable compensation which must be determined by agreement or by the Land Claims Court.

[19] It is apparent from the papers that the Association misconceived the extent of its interest and sought the rescission of the varied order. As shown here it had no legal interest in the transfer of the land. Therefore the Land Claims Court was right in holding that the Association had no direct and substantial interest in the property in question. But that Court was in error when it overlooked the statutory right to compensation conferred on a lawful occupier like the Association and that the transfer of the property was subject to the determination of just and equitable compensation. It follows that it was not necessary to rescind the varied order. What was required was to allow the Association to intervene solely for the purpose of determining compensation.

[20] The fact that a final order had already been issued at the time of the application for intervention is immaterial.¹⁰ Once it was shown that the Association was a lawful

¹⁰ *Sizwe Development* above n 5 at 679C. See also *Aquater (Pty) Ltd v Sacks* 1989 (1) SA 56 (A) and *United Watch of Diamond Co v Disa Hotels* 1972 (4) SA 409 (C).

occupier of Erf 142, the Land Claims Court should have granted it leave to intervene for purposes of considering the issue of compensation only. It follows that that Court erred in dismissing the application to intervene.

Costs

[21] The Association has succeeded in its appeal and therefore it is entitled to costs. However, I do not consider it fair to order the Sadiens to pay any of those costs. Their interest in these proceedings was to defend the order that transferred the land in question to Mr Sedick Sadien. They conceded the Association's right to compensation. The same cannot be said about the Commissioner. He advanced the incorrect argument to the effect that section 35(9) afforded the Association a mere financial interest which did not entitle it to intervene. That argument has been rejected.

Order

[22] In the result the following order is made:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order of the Land Claims Court is set aside.
4. The South African Riding for the Disabled Association is allowed to intervene for the purpose of determining compensation payable to the Association.
5. The matter is remitted to the Land Claims Court for determination of compensation payable to the South African Riding for the Disabled Association.
6. The Regional Land Claims Commissioner is ordered to pay costs in the Land Claims Court and this Court.