THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no. 361/2011
Not Reportable

In the matter between

MANGANGENI EMMAUS WESTMEAD RETURNERS COMMUNITY TRUST	**First Appellant**
MUNTOZWAYO SOLOMON PHEWA	**Second Appellant**
BOBO ANTHANASIUS MGOBHOZI	**Third Appellant**
THEMBI ANNACLETTAH MBILI	**Fourth Appellant**
HENRY SANDILE HLENGWA	**Fifth Appellant**
SIZAKELE PAULINA MOLEFE	**Sixth Appellant**

and

MINISTER OF RURAL DEVELOPMENT AND LAND REFORM	**First Respondent**
KWAZULU NATAL REGIONAL LAND CLAIMS COMMISSIONER	**Second Respondent**
ITHALA LIMITED	**Third Respondent**

Neutral citation:	*Mangangeni Emmaus Westmead Returners Community Trust v The Minister of Rural Development and Land Reform* (361/2011) [2012] ZASCA 89 (31 May 2012)
Coram:	**FARLAM, NAVSA et MAJIEDT JJA, SOUTHWOOD et PETSE AJJA**
Heard:	**14 May 2012**
Delivered:	**31 May 2012**

Summary: Settlement of land claim in terms of Restitution of Land Rights Act 22 of 1994 – agreements to regulate holding and control of funds paid pursuant to settlement – claimants' trust's entitlement to payment of funds not unqualified.

ORDER

On appeal from: Kwazulu Natal High Court (Durban) (Cele J sitting as court of first instance):

1. The application to amend the notice of motion is refused;
2. The appeal is upheld only insofar as it relates to the decision to uphold the point in limine on jurisdiction;
3. The orders of the court a quo are set aside and replaced with the following orders:

   'a. The two points in limine are dismissed:

   b. The application is dismissed with costs, such costs to be paid by the second, third, fourth, fifth and sixth applicants in their official capacities.'
4. The second, third, fourth, fifth and sixth appellants in their official capacities are ordered to pay the costs of this appeal.

JUDGMENT

SOUTHWOOD AJA (FARLAM, NAVSA, MAJIEDT JJA and PETSE AJA concurring)

[1] This appeal is concerned with the right to control two amounts (R5 445 468 for the restitution capital award and R732 865.75 for the restitution discretionary award) paid by the first respondent to the third respondent pursuant to a s 42D settlement agreement (the s 42D agreement) entered into in terms of the Restitution of Land Rights Act 22 of 1994 (the Act) and three transfer of funds agreements. The first issue to be decided is whether the court a quo had jurisdiction in respect of the appellants' claims for:

(a) a declarator that two transfer of funds agreements were invalid or had lapsed;

(b) a declarator that it is in the interests of the first appellant and its members that the first appellant takes control and management of the funds held by the third respondent;

(c) an order that the third respondent pay to the first appellant the sums of R5 925 624.91 (the balance of the restitution capital award) and R397 428.39 (the balance of the restitution discretionary award); and

(d) an order that on the date of making payment, the third respondent provide a full account of all funds received by it and interest earned on investments.

The second issue to be decided is whether, if the court a quo had jurisdiction, it should have granted the appellants the relief which they sought. The parties agree that if the court a quo had jurisdiction this court should decide the merits. The appellants' application for leave to amplify the record by placing a second, signed s 42D agreement before this court was not opposed.

[2] Only the first and second respondents (the respondents) opposed the application in the court a quo. Apart from opposing the grant of the relief sought the respondents raised two points in limine: the first was that the second appellant did not have authority to bring the application and the second was that the court a quo did not have jurisdiction to decide the claims. The court a quo dismissed the first point but upheld the second and (wrongly)[1]dismissed the application (it should have removed the matter from the roll).[2] The appellants appeal with the leave of this court. They seek to overturn the court a quo's finding on jurisdiction and the grant of the relief sought in the notice of motion.

[3] The Act provides that a person entitled to claim restitution of a right in land may lodge a claim (s 10 (1)) and that if the regional land claims commissioner is satisfied that the claim has been lodged in the prescribed manner, that it is not precluded by s 2 and that it is not frivolous or vexatious, he or she shall give notice of the claim in the Government Gazette (s 11 (1)). Thereafter the Commission may investigate the claim (s 12) and the claim may be referred to mediation and negotiation (s 13 (1)) or to court (s 14(1)). During the investigation by the Commission the interested parties may enter into a written agreement as to how the claim should be finalized and the regional land

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[1] In this context jurisdiction means 'the power of the court by law to adjudicate upon, determine and dispose of a matter' (*Ewing McDonald & Co Limited v M & M Products Co* 1991 (1) SA 252 (A) at 256G) and the crucial time for determining whether a court has jurisdiction is the time when proceedings are commenced: once established jurisdiction continues to exist until the end of the proceedings even though the ground upon which it was established ceased to exist (*Thermo Radiant Oven Sales (Pty) Ltd v Nelspruit Bakeries (Pty) Ltd* 1969 (2) SA 295 (A) at 310D). Consequently once the court had found that it did not have jurisdiction it had no power to dismiss the application and should have merely recorded that it upheld the special plea on jurisdiction (*Communication Workers Union v Telkom SA Ltd* 1999 (2) SA 586 (T) at 599B-C.)

[2] The judgment/order of a court on the merits of a matter when the court does not have jurisdiction is a nullity (*Lewis & Marks v Middel* 1904 TS 291 at 303; *Suid-AfrikaanseSentrale Ko-operatiewe Graanmaatskappy Bpk v Shifren and others and the Taxing Master* 1964 (1) SA 162 (O) at 164 g-h; *Communications Workers Union v Telkom SA Ltd* 1999 (2) SA 586 (T) at 593 G-H).

claims commissioner may certify in writing that he or she is satisfied with the agreement and that it ought not to be referred to the court (s 14 (3)). The Minister may also enter into an agreement with the parties (s 42D).

The relevant provisions of s 42D provide as follows:

'(1) If the Minister is satisfied that a claimant is entitled to restitution of a right in land in terms of section 2, and that the claim for such restitution was lodged not later than 31 December 1998 he or she may enter into an agreement with the parties who are interested in the claim providing for one of more of the following:

(a) The award to the claimant of land, a portion of land or any other 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 in question; or

(ii) the Minister is satisfied that satisfactory arrangements have been or will be made to grant such other claimant restitution of a right in land;

(b) the payment of compensation to such claimant;

(c) both an award and payment of compensation to such claimant;

(d) … (deleted);

(e) the manner in which the rights awarded are to be held or the compensation is to be paid or held; or

(f) such other terms and conditions as the Minster considers appropriate.

(2) If the claimant contemplated in subsection (1) is a community, the agreement must provide for all the members of the dispossessed community to have access to the land or the compensation in question, on a basis which is fair and non-discriminatory towards any person, including a tenant, and which ensures the accountability of the person who holds the land or compensation on behalf of such community to the members of the community.

(3) The Minister may delegate any power conferred upon him or her by subsection (1) … to the Director-General of Land Affairs or any other officer of the State or to a regional land claims commissioner.'

[4] The court referred to is the Land Claims Court established by s 22, the relevant provisions of which read as follows:

'(1) There shall be a court of law to be known as the Land Claims Court which shall have the power, to the exclusion of any court contemplated in s 166*(c), (d) or (e)* of the Constitution–

(*c*C) to determine any matter involving the interpretation or application of this Act …

(d) to determine all other matters which require to be determined in terms of this Act.'

It is clear from the provisions of s 22 read with s 23, which provides for the qualifications of judges of the court, that the court is a specialized court,[3] and that it has exclusive jurisdiction in respect of the matters referred to: i.e. the jurisdiction of the high court in respect of all the matters referred to is clearly excluded[4].

[5] The first question which arises in this appeal is whether the determination of the disputes between the parties involves the interpretation or application of the Act (s 22(1) (*c*C)) or is a matter which requires to be determined in terms of the Act (s 22(1) *(d)*). These issues necessitate an analysis of the facts which must be taken into account in accordance with the Plascon-Evans principles.[5] There is no suggestion that the respondents' version or any part of it should be rejected on the papers[6] but it is clear that in at least one important respect the respondents did not properly engage with the facts alleged by the appellants and did not create a *bona fide* dispute of fact. Where this happens the court is entitled to accept the correctness of the facts averred by the appellants.[7]

[6] The relevant facts are as follows: the appellants are the Mangangeni Emmaus Westmead Returners Community Trust (the Trust), which was established to act on behalf of the claimants under the Act, and the Trust's five trustees. The first respondent is the Minister of Rural Development and Land Reform who is charged with the administration of the Act. The second respondent is the Kwazulu Natal Regional Lands Claims Commissioner and the third respondent is a Durban-based investment bank.

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[3] *Concerned Land Claimants' Organisation of Port Elizabeth v Port Elizabeth Land and Community Restoration Association and others 2007(2) SA 531 (CC) para 19*

[4] *De Bruin v Director of Education 1934 AD 252 at 256 and 258; Lenz Township Co (Pty) Ltd v Lorentz NO en andere 1961 (2) SA 450 (A) at 455B – C.*

[5] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634D – 635C and National Director of Public Prosecutions v Zuma 2009 (2) SA 277 (SCA) para 26*

[6] *National Director of Public Prosections v Zuma supra para 26*

[7] *Wightman v Headfour (Pty) Ltd 2008 (3) SA 371 (SCA) paras 12 and 13*

[7] On 14 August 1995 about seven hundred people calling themselves the Mangangeni Emmaus Westmead Returners Committee lodged a claim under the Act in respect of portions of the farm Zeekoegat No 973 owned by the Marianhill Mission Institute and the farms Salt River, Stockville and Richmond. On 25 April 1997, acting in terms of s 11(1) of the Act, the second respondent published a notice of the claim in the Government Gazette.

[8] After the claim was published in the Government Gazette, representatives of the claimants and the second respondent met on a number of occasions with a view to reaching agreement on the restitution award and the purchase of the property from the Marianhill Mission Institute. Eventually the second respondent prepared a draft agreement which provided that –

(a) the first respondent would pay a restitution award of R6 770 500 to the claimants;

(d) a portion of the award would be used to pay the Marianhill Mission Institute for the land to be purchased by the claimants;

(c) the claimants would establish a trust (i.e. the first appellant) to represent two hundred and fifty claimants;

(d) the first respondent would pay the balance of the restitution award to the Trust after the purchase price of the property had been paid.

The claimants agreed with these proposals and it was agreed that they would be incorporated in a s 42D agreement.

[9] Thereafter there were numerous meetings between the claimants' representatives and the second respondent's representatives during which the parties attempted to reach agreement as to how the funds should be managed to ensure that all the claimants would benefit equally. This seemed to be an insurmountable problem.

[10] Eventually, in July 2003, the first appellant and the respondents entered into a s 42D agreement in terms of which:

(a) it was agreed that the total value of the 250 claims was R6 770 500;

(b) the State agreed to restore to the claimants, portions of the remainder of portion 79 of the farm Zeekoegat 937 and portion 8 of erf 6388 Pinetown registration division FT, Province of Kwazulu Natal ('the land');

(c) it was agreed that the sum of R1 333 885 would be deducted from the total value of the claims and would be utilised by the State to purchase the land from the registered owners;

(d) the remainder of the total value of the claims after purchase of the land (R5 436 618) would be held by the first appellant in an interest-bearing account;

(e) the land would be transferred from the registered owners to the first appellant for the purpose of developing the land on behalf of the 250 claimants so that each claimant would receive a residential sub-division in the township and a share in the development of the remaining land in accordance with the Emmaus Development Concept dated 29 October 2001;

(f) the first appellant and the Department would enter into an agreement containing the terms and conditions pertaining to the transfer of funds to the first appellant in terms of the concept plan. This agreement would outline the first appellant's and the State's continuing obligations to set up proper controls and risk management systems to ensure that the benefits of the agreement reached the individual claimants;

(g) the first appellant was obliged to allocate to each claimant a single residential site within the development of the land;

(h) the claimants would apply to the State for development assistance or subsidies and the State would assist the claimants in the application by paying a restitution discretionary grant of R3000 per claimant;

(i) prior to or simultaneously with the transfer of the land to the first appellant the State would pay to the first appellant the balance of the total claim together with the restitution discretionary grant of R3000 per claimant and the first appellant would hold these amounts in an interest-bearing account for the benefit of the claimants and such amount would together with the interest thereon be utilized by the first appellant in accordance with the provisions of the agreement.

(The respondents' denial that they signed the agreement and the implication that the agreement was not entered into is, to say the least, disingenuous. One of the second respondent's letters refers to the signed agreement and does not dispute that the agreement was entered into. Two later agreements refer to the fact that the land claim

was settled in terms of an agreement which is annexed to these agreements as an annexure and the respondents paid over to the third respondent, for the benefit of the first appellant and the claimants, the restitution capital award and the restitution discretionary award. The respondents have not produced any other document which would support such payments.)

[11] In about June 2003 the National Department of Land Affairs, the Commission on the Restitution of Land Rights Kwazulu Natal, the Ithala Development Finance Corporation Limited (third respondent) and the first appellant entered into a written agreement for the transfer of the restitution capital award and the restitution discretionary award to the third respondent for the benefit of the Mangangeni Emmaus Westmead Land claimants. After referring in the extensive preamble to (a) the s 42D agreement (attached as an annexure); (b) the parties' wish to transfer, receive and ensure the proper management of the funds to enable the claimants' trust (i.e. first appellant) to implement the various projects; (c) the amounts to be transferred to the first appellant (restitution capital award of R5 511 879 and restitution discretionary award of R750 000); (d) that payment would be effected to the first appellant's trust account with the third respondent; (e) that the funds would remain in the third respondent's account until full expenditure and reconciliation; (f) that the third respondent would be responsible for the management and disbursement of the funds and (g) that the first appellant and the Commission would set up and adhere to a fair, transparent and equitable system for the disbursement of the funds by the first appellant, the parties agreed on the terms and conditions applicable to the funds to be paid over to the first appellant. These terms and conditions provide that the funds would be received, managed and disbursed by the third respondent in accordance with the agreement, which required the approval and consent of the second respondent and compliance with the procedures prescribed by the agreement.

[12] On 2 September 2003 the first appellant and the Marianhill Mission Institute entered into a written agreement in terms of which the first appellant purchased from the Institute for a purchase price of R1 315 032 portion 326 of the farm Zeekoegat and portion 8 of erf 6388 Pinetown. Transfer of the land to the first appellant was delayed because of the second respondent's concerns about the way the Trust was being

managed and neither the restitution capital award nor the restitution discretionary award was paid to the first appellant.

[13] On 8 February 2006 the Director-General of the Department accepted the recommendations of the regional land claims commissioner, inter alia, that the Director-General approve the transfer of the restitution discretionary award (R750 000) and the restitution capital award (R5 455 468) to the third respondent and that the Director-General sign the transfer of funds agreement between the Department and third respondent. On the same day the Director-General signed agreements for the transfer from the Department to the third respondent of the restitution capital award and the restitution discretionary award which had already been signed by the Regional Land Claims Commissioner and the third respondent. The agreements, which are in identical terms, record that the parties wish to ensure the proper management of the funds to enable the first appellant to implement the relevant programme and that the funds would be paid over to the first appellant but would be managed by the third respondent which would invest, manage and make payments strictly for the purposes and in terms of the conditions set out in the agreement. The agreements also stipulate that the Department would remain responsible for the utilization of the funds and that the Department appointed the third respondent to act on its behalf in receiving, managing and administering the funds.

[14] On 28 February 2006 the Department paid the sum of R5 455 468 (the capital award of R6 770 500 less the sum of R1 315 032 for the purchase of the land) into the third respondent's bank account No 7911670 and on 6 March 2006 the Department paid the sum of R732 865.75 (the discretionary grant of R750 000 less rates of R17 134 for 2003/4 and 2004/5) into the third respondent's bank account No 79212157.

[15] On 5 December 2007 the Marianhill Mission Institute transferred the land into the name of the first appellant which since then has paid property rates totalling R524 800. The respondents state that these rates will be refunded as the municipality has exempted land reform beneficiaries from paying rates.

[16] Since receiving the funds the third respondent has continued to hold them in the two accounts and has disbursed funds from time to time to or on behalf of the first appellant, but only with the approval of the respondents. The respondents have raised concerns about the appellants' management of the Trust and there have been allegations, all hearsay and unsubstantiated, that the second to sixth appellants have been removed as Trustees. The affidavits show that none of the Trustees has been removed and that no steps have been taken to remove any of them.

Locus Standi

[17] Although the respondents contended in their heads of argument that the court a quo should have upheld the first point in limine, in oral argument before this court the respondents disavowed any reliance on the point raised. Accordingly it requires no further consideration.

Jurisdiction

[18] The court a quo upheld the respondents' point in limine that the high court has no jurisdiction to decide the matters raised in the affidavits on the simple basis that the respondents had not signed the s 42D agreement and by implication had not entered into such an agreement. This finding was contrary to the respondents' concession in their heads of argument (i.e. that it was common cause that the first appellant and the respondents had entered into the s 42D agreement annexed to the founding affidavit as MSP12) and the other undisputed facts. Briefly, these were that a claim had been lodged under the Act; that the claim had been settled and a discretionary award tendered; that the two amounts were paid by the respondents to the third respondent pursuant to the settlement and tender and no basis for the payment other than the s 42D agreement was canvassed in the affidavits. The special plea on jurisdiction should therefore not have been decided on the basis that no s 42D agreement had been entered into.

[19] It was clear that agreement had been reached that the restitution capital award and the restitution discretionary award would be paid and the court had to decide whether the two transfer of funds agreements entered into on 8 February 2006 (MSP27 and KR3) were invalid or, if valid, had lapsed, and whether in the light of the s 42D agreement and the three transfer of funds agreements the first appellant was

entitled to payment of the balances owing in the two accounts managed and controlled by the third respondent. The answer to these questions depends upon the law of contract and the interpretation of the agreements concerned. They clearly do not involve the application or interpretation of the Act (s 22(1) (cC)) and are not matters which require to be determined in terms of the Act (s 22(1) (d). The point in limine regarding jurisdiction should therefore have been dismissed.

The relief sought

[20] In their founding papers the appellants sought a declarator that the transfer of funds agreement in respect of the restitution discretionary award (MSP27) was invalid or had lapsed but clearly the appellants had to seek the same relief in respect of the transfer of funds agreement pertaining to the restitution capital award (KR3). The appellants did not seek any relief in respect of the agreement for the transfer of the restitution capital award and the restitution discretionary award entered into in June 2003 to which the first appellant was a party (KR4). The appellants alleged in their founding affidavit that the transfer of funds agreement (MSP27) was 'in violation of the settlement agreement' and that it is unconstitutional, invalid and of no force and effect. The appellants further alleged that even if the agreement was valid it had lapsed and the respondents were no longer entitled to control and manage the funds pursuant to the agreement. In their heads of argument the appellants conceded (correctly) that the transfer of funds agreements give the respondents, particularly the third respondent, the power to manage and control the first appellant's funds. The appellants argued simply that because the transfer of funds agreements were concluded without the consent of the appellants they were invalid and of no force and effect. No other grounds of invalidity were referred to. The appellants made no submissions regarding the agreement for the transfer of the restitution capital award and the restitution discretionary award entered into in June 2003 (KR4). Without making submissions regarding the relief sought the appellants asked for the relief claimed in the notice of motion. In oral argument the appellants' counsel (who did not prepare the heads of argument) contended that the transfer of funds agreements (MSP27 and KR4) were no longer in force because they were only intended to operate for a period of 24 months from 8 February 2006. This was alleged in the founding affidavit and was denied by the respondents, who did not pertinently allege that the Department or the parties had agreed that the agreements should continue to operate after that time.

[21] It has not been shown that the two transfer of funds agreements (MSP27 and KR3) are invalid. The mere fact that the agreements were entered into without the appellants' consent would not render them invalid. Neither would the mere fact that the agreements appear to be in conflict with another agreement between different parties render them invalid. But, in any event, the transfer of funds agreements are consistent with the provisions of clause 1.2.5 of the s 42D agreement which require that the funds be safeguarded once they are transferred to the first appellant.

[22] It has also not been shown that the two transfer of funds agreements have lapsed with the effluxion of time. The respondents pertinently deny this and when read in context this denial clearly indicates that (as provided in the agreements) the Department had decided or the Department and the third respondent had agreed that the third respondent would continue to manage and control the funds in accordance with the agreements. There is no other explanation for the third respondent's continued management and control of the funds.

[23] The appellants have not even attempted to explain the status of the transfer of funds agreement entered into in June 2003 (KR4). There is no allegation that it was invalid or that it was terminated and the appellants correctly say this agreement left the first appellant with no powers whatsoever regarding the use and disbursement of the funds. The agreement clearly provides for the third respondent to invest, manage and disburse the funds in accordance with the agreement and instructions from the regional lands claims commissioner.

[24] The appellants have therefore not shown that they are entitled to any of the declarators claimed in the notice of motion.

[25] For the same reasons it cannot be found that the appellants are entitled to an order that the third respondent pay to the first appellant the two amounts in the accounts controlled by the third respondent. Section 42D empowers the Minister (and his delegates) to agree on the manner in which the rights awarded are to be held or the compensation is to be paid or held or any other terms and conditions which he considers appropriate. The s 42D agreement provides in clause 1.2.5 for agreement to

be reached on the transfer and management of the funds awarded. The first transfer of funds agreement, to which the first appellant was a party (KR4) clearly gives effect to this clause. The transfer of funds agreements entered into in 2006 (MSP27 and KR3) have the same object. The three transfer of funds agreements plainly provide for the third respondent to act on behalf of the respondents in managing and controlling the funds and the appellants have not demonstrated any right to payment free from such control.

[26] During oral argument the appellants' counsel applied, informally, for the notice of motion to be amended to include a prayer for 'an order authorising the first appellant to have free and unfettered control of and access to the funds held on its behalf by the third respondent'. The respondents objected to this amendment because it would change the whole complexion of the application. I agree and the application for an amendment will be refused.

[27] The appellants have therefore not shown that they are entitled to any of the other relief sought in the notice of motion.

[28] It remains to mention the failure of both sides' counsel to provide the court with a chronology as required by rule 10(3) (d). One purpose of a chronology is to facilitate the reading and understanding of the record which in this case does not follow a clear and logical sequence. The absence of the chronology has substantially increased the burden of preparing for this appeal. Practitioners should note that such failures to comply with the rules can result in an order disallowing their fees.[8]

[29] The following order is made:

1 The application to amend the notice of motion is refused;
2. The appeal is upheld only insofar as it relates to the finding on jurisdiction;
3. The orders of the court a quo are set aside and replaced with the following orders:

'a. The two points in limine are dismissed;

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[8] *See Caterham Car Sales & Coachworks Ltd v Birkin Cars (Pty) Ltd and Another 1988 (3) SA 938 (SCA) ([1998] 3 All SA 175) para 36; Premier Free State and Others v Firechem Free State (Pty) Ltd 2000 (4) SA 413 (SCA) paras 45 and 48; Van Aardt v Galway 2012 (2) SA 312 (SCA) para 34*

b. The application is dismissed with costs, such costs to be paid by the second, third, fourth, fifth and sixth applicants in their official capacities.'

4. The second, third, fourth, fifth and sixth appellants in the official capacities are ordered to pay the costs of this appeal.

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B R SOUTHWOOD
ACTING JUDGE OF APPEAL

APPEARANCES:

FOR APPELLANTS:	V I Gajoo SC
Instructed by:	M.E. Mbhele & Co, Pinetown;
	Phalatsi & Partners, Bloemfontein.
FOR RESPONDENT:	T V Norman SC (with her C M Nqala)
Instructed by:	State Attorney, Durban;
	State Attorney, Bloemfontein.