

**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

(1)	REPORTABLE: <u>YES</u> /NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED. <u>OK</u>
<u>07/03/2017</u>	
DATE	<u>[Signature]</u> SIGNATURE

7/3/17

Case no. 25587/2012

In the matter between:

SUNSET BAY TRADING 271 PTY LTD

PLAINTIF

and

THE REGIONAL LAND CLAIMS COMMISSIONER,

MPUMALANGA PROVINCE

DEFENDANT

JUDGMENT

RABIE, J

1. The plaintiff instituted an action against defendant for payment of damages. The defendant, inter alia, filed a special plea that this court lacks jurisdiction in the action. The parties requested the court, and it was so ordered, that the issue of jurisdiction be separated from the other issues in terms of Rule 33 (4) of the

Uniform Rules of Court. The matter was argued before this court without any evidence being presented to it.

2. The jurisdiction of the Land Claims Court ("the LCC") is provided for in Section 22 (1) and (2) of the Restitution of Land Rights Act, Act 22 of 1994 ("the Act"). Those subsections provide as follows:

"22 Land Claims Court

(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 section 166 (c), (d) or (e) of the Constitution-

- (a) to determine a right to restitution of any right in land in accordance with this Act;
- (b) to determine or approve compensation payable in respect of land owned by or in the possession of a private person upon expropriation or acquisition of such land in terms of this Act;
- (c) to determine the person entitled to title to land contemplated in section 3;
- (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 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 order;
- (cB) to determine whether compensation or any other consideration received by any person at the time of any dispossession of a right in land was just and equitable;
- (cC) to determine any matter involving the interpretation or application of this Act or the Land Reform (Labour Tenants) Act, 1996 (Act 3 of 1996), with the exception of matters relating to the definition of 'occupier' in section 1 (1) of the Extension of Security of Tenure Act, 1997 (Act 62 of 1997);
- (cD) to decide any constitutional matter in relation to this Act or the Land Reform (Labour Tenants) Act, 1996 (Act 3 of 1996);
- (cE) to determine any matter involving the validity, enforceability, interpretation or implementation of an agreement contemplated in section 14 (3), unless the agreement provides otherwise;
- (d) to determine all other matters which require to be determined in terms of this Act.

(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 interests of justice to do so." (My emphasis)

3. The courts contemplated in section 166 (c), (d) or (e) of the Constitution, Act 108 of 1996, and which do not have jurisdiction over matters falling within the jurisdiction of the LCC in terms of the Act, are:

"(c) the High Court of South Africa, and any high court of appeal that may be established by an Act of Parliament to hear appeals from any court of a status similar to the High Court of South Africa;

(d) the Magistrates' Courts; and

(e) any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Court of South Africa or the Magistrates' Courts."

4. This court consequently has no jurisdiction over matters which, inter alia, relate to the determination of any matter involving the interpretation or application of the Act or to determine any other matter which requires to be determined in terms of the Act.

5. In order to decide whether this court has jurisdiction to adjudicate the present matter, the nature of such matter has to be established. It is settled law that the nature of matter, and thus the court's jurisdiction, is determined on the basis of the pleadings. Cf Chirwa v Transnet Ltd 2010 (1) SA 238 (CC) at 263 C; Gcaba v Minister for Safety and Security 2010 (1) SA 238 (CC) at 263 C; My Vote Counts NPC v Speaker of the National Assembly 2016 (1) SA 132 (CC) at 184 A-F.

6. In My Vote Counts, at paragraph [132] the following was stated:

[132] A court's jurisdiction is determined on the basis of the claim in the pleadings. In *Chirwa Langa CJ* held that —

'a court must assess its jurisdiction in the light of the pleadings. To hold otherwise would mean that the correctness of an assertion determines jurisdiction, a proposition that this court has rejected. It would also have the absurd practical result that whether or not the High Court has jurisdiction will depend on the answer to a question that the court could only consider if it had that jurisdiction in the first place. Such a result is obviously untenable.' 198

[133] In a unanimous judgment this court confirmed *Chirwa* and held that —

'Jurisdiction is determined on the basis of the pleadings, as *Langa CJ* held in *Chirwa*, and not the substantive merits of the case. . . . In the event of the court's jurisdiction being challenged at the outset (in limine), the applicant's pleadings are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the court's competence. While the pleadings — including in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits — must be interpreted to establish what the legal basis of the applicant's claim is, it is not for the court to say that the facts asserted by the applicant would also sustain another claim, cognisable only in another court.' 199 [Footnote omitted.]"

7. The issues in a case are identified by the pleadings, disclosing the points on which a decision from the court is required. Cf *Van der Walt and Others v Lang and Others* 1999 (1) SA 189 (LCC) at paragraph [11]. It is accordingly necessary to analyse the plaintiff's claim as set out in the pleadings in order to establish whether the court would be required "to determine any matter involving the interpretation or application" of the Act. If so, the LCC would have exclusive jurisdiction and this court cannot continue to adjudicate the plaintiff's claim.
8. As mentioned, the plaintiff claimed damages from the defendant. A summary of the salient allegations in the particulars of claim upon which the claim is based, is the following:
 - 8.1. On 24 August 2007 the Commission on Restitution of Land Rights caused a notice to be published in the Government Gazette that a claim for the restitution of land rights had been lodged against the plaintiff's properties in terms of section 10 of the Act.
 - 8.2. On 8 April 2008 the plaintiff informed the defendant that it was suffering economic losses and prejudice as a result of the notice which had been

published and which prevented the plaintiff to proceed with its plans to re-establish the old sawmill on its property.

- 8.3. On 5 May 2008 the plaintiff requested the defendant to issue a notice degazetting the land claim in accordance with the provisions of section 11 A of the Act.
- 8.4. On 2 June 2008 the plaintiff advised the defendant of its intention to take legal action *"as a result of the defendant's failure to comply with its obligations and duties in terms of the Act"*.
- 8.5. The defendant failed and/or neglected to reply to the plaintiff's requests and submissions regarding the validity of the claims which were published in the Government Gazette.
- 8.6. The plaintiff obtained an order from the LCC on 21 June 2011 setting aside the land claim for the restitution of the plaintiff's property and directing the defendant to withdraw the publication of the land claim as published in the Government Gazette. The defendant has failed to comply with this court order.
- 8.7. The publication in the Government Gazette of the land claim against the plaintiff's properties *"was erroneous, as no valid claim for the restoration of land rights in respect of the plaintiff's properties and/or land existed"*.
- 8.8. The plaintiff, through its attorney of record, made representations to the defendant that the publication of the land claim against the properties *"was incorrect, without any factual and/or legal substance, spurious, unfounded and ill-conceived, but notwithstanding the defendant failed and/or neglected to, as he was obliged to do, rectify the issue by withdrawing the notice in accordance with the provisions of section 11 A of the Act"*.
- 8.9. The defendant's conduct or omission was not a bona fide mistake, but a wilful and mala fide refusal to comply with his duties and obligations bestowed upon him in accordance with the provisions of the Act. The defendant's conduct or omission *"therefore falls outside the scope and/or ambit of section 18 of the Act"*.

8.10. The defendant had a legal duty towards the plaintiff *"to act and comply with the provisions of the Act"*, but notwithstanding sufficient information in respect of the claims which were published in the Government Gazette, *"the defendant refused and/or neglected and/or omitted to withdraw the notice in accordance with the provisions of section 11 A of the Act"*.

8.11. The plaintiff accordingly suffered damages *"as a direct result of the defendant's conduct or omission to comply with his duties and/or obligations in accordance with the provisions of the Act"*.

9. The defendant denied liability towards the plaintiff. A summary of the salient features of the defendant's plea is the following:

9.1. The land claim against the plaintiff's properties had been lodged in the prescribed manner.

9.2. The land claim was not precluded by the provisions of section 2 of the Act.

9.3. The land claim was not frivolous or vexatious.

9.4. Notice of the land claim was accordingly published in the Government Gazette in terms of section 11 (1) of the Act.

9.5. The publication of the land claim was not erroneous.

9.6. After publication of the land claim, an investigation of the land claim was conducted in terms of section 12 (1) (a) of the Act.

9.7. The defendant was not obliged to withdraw the publication of the land claim in terms of section 11 A of the Act on the strength of the representations made by the plaintiff, through its attorney, in the face of the investigation of the land claim in terms of section 12 (1) (a) of the Act.

9.8. The defendant acted in good faith while performing his functions in terms of the Act.

9.9. Liability on the part of the defendant in having not withdrawn the notice of the land claim in terms of section 11 A is excluded in terms of section 18 of the Act which provides that, inter alia, the defendant shall not be liable in respect of any act or omission in good faith while performing a function in terms of any provision of the Act.

10. Having regard to the substantive averments supporting the plaintiff's claim and the defendant's defence thereto, it was submitted on behalf of the defendant that the plaintiff invoked the provisions of the Act to establish its cause of action against the defendant, and the defendant, similarly, relied on the provisions of the Act for his defence to the action. Consequently, so it was submitted on behalf of the defendant, the issues for determination in the action are issues that arise from the provisions of the Act and, similarly, the issues for determination involve the interpretation or application of the Act. Consequently, so it was submitted, LCC has exclusive jurisdiction to adjudicate the plaintiff's claim.

11. On behalf of the plaintiff it was, firstly, submitted that the High Court has jurisdiction in respect of a claim based on a delict committed within its jurisdiction. Reliance was placed on section 21 of the Superior Courts Act, act 10 of 2013 which provides as follows:

"21 Persons over whom and matters in relation to which Divisions have jurisdiction.

(1) A Division has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction and all other matters of which it may according to law take cognizance, and has the power -

..."

12. The plaintiff submitted that no statute, including the Act, expressly takes away the competence and/or jurisdiction of the High Court to adjudicate an action based on delict and award damages in respect thereof.
13. Secondly, it was submitted on behalf of the plaintiff that to the extent that the provisions of the Act are relevant for purposes of determining a claim based on delict, this court in any event has, in terms of the common law doctrine of cohesion of a cause of action, also known as the *causae continentia* principle, the necessary jurisdiction to adjudicate the plaintiff's claim based on delict, regardless of the fact that the provisions of the Act are involved.
14. The plaintiff submitted that as the High Court has jurisdiction to adjudicate the intellectual claim for damages, it would, on the basis of the *causae continentia* principle, be just and sensible for the High Court to also exercise jurisdiction over the cause of action to the extent that it relates to the provisions of the Act it was submitted that this court should not thwart the pursuit of the claim for the enforcement of a common law right, i.e., a claim for delict shall damages, by denying access to the High Court, of a claim which clearly falls within the ordinary power of the High Court.
15. Thirdly, it was submitted on behalf of the plaintiff that it would not be proper or correct to interpret section 22 (1) (cC) of the Act in isolation and literally devoid of its constitutional, general and specific context. Firstly, it was submitted that to the extent that it purports to interfere with the jurisdiction of the High Court, the provision should be strictly interpreted. Secondly, it was submitted that the section cannot be relied upon as an absolute and categorical prohibition or bar against this court interpreting the provisions thereof, as demonstrated by the need

to interpret the section in order to determine whether this court has jurisdiction over a delictual claim or whether that jurisdiction has been limited or removed by the section. Thirdly, it was submitted that the LCC is a specialised court created by the Legislator to adjudicate land claims instituted in terms of the Act and that on a proper contextual interpretation a "matter" in respect of which the LCC has exclusive jurisdiction would be one pertaining to a land claim and the restoration of land, and not a claim based on delict. Lastly, it was submitted that there is no express empowerment or authorisation for the LCC to make an award of delictual damages in favour of the person on the basis of a delict.

16. I agree with the submissions on behalf of the defendant. Section 22 grants exclusive jurisdiction to the LCC to determine "any matter involving the interpretation or application of this Act". And in relation to such matters falling within its jurisdiction, the LCC shall have all the powers which are possessed by a High Court having jurisdiction in civil proceedings. The section refers to "any matter" and made no distinction in respect of the types of causes of action which may arise, i.e., for example, claims based on delict or on contract or on any other cause of action. The only question is whether a matter which the LCC has to determine involves "the interpretation or application" of the Act. There is consequently no merit in the submission on behalf of the plaintiff that the High Court retained its jurisdiction to determine delictual claims for the reason that delictual claims had not been mentioned by name in section 22 of the Act.
17. In considering the pleadings it is clear that the plaintiff's claim as well as the defendant's defence involve the interpretation and application of the Act.

18. According to his particulars of claim the plaintiff based his claim on allegations which clearly require the interpretation and application of the Act. The plaintiff's allegation that the defendant's failure to comply with his obligations and duties in terms of the Act entitles the plaintiff to take legal action against him, clearly requires an analysis of the provisions of the Act to establish the obligations and duties of the defendant in the circumstances of the case. The allegation by the plaintiff that the publication of the land claim was erroneous as no valid claim for the restoration of land rights existed, similarly entails an interpretation and application of the Act, more particularly as it would require a finding in respect of the validity of the publication as well as a finding in respect of the validity of the land claim. In order to make such findings the court would have to interpret and apply the provisions of the Act.
19. The plaintiff further relied in support of his claim on the allegation that despite representations that the land claim was incorrect, without any factual and/or legal substance, spurious, unfounded and ill-conceived, the defendant failed and/or neglected, as he was obliged to do, to rectify the issue by withdrawing the notice in accordance with the provisions of section 11 A of the Act.
20. In order to adjudicate these allegations the court will, first of all, have to interpret and apply the provisions of the Act in order to make a finding as to whether the publication was valid or not. More in particular, the court will have to consider the provisions of section 11A. This section provides, inter alia, that any person affected by the publication of the notice of a claim in terms of section 11 (1) may make representations to the regional land claims commissioner having jurisdiction for the withdrawal or amendment of that notice. The section then provides that where during the investigation of a claim by the Commission the regional land claims commissioner having jurisdiction "has reason to believe" that any of the

criteria set out in paragraphs (a), (b) and (c) of section 11 (1) have not been met, he or she shall publish and notify the relevant parties that the notice of the claim published will be withdrawn unless cause to the contrary has been shown to his or her satisfaction. The Commissioner's decision has to be adjudicated with reference to paragraphs (a), (b) and (c) of section 11 (1). Section 11 (1) provides as follows:

11 Procedure after lodgement of claim

(1) If the regional land claims commissioner having jurisdiction is satisfied that-

- (a) the claim has been lodged in the prescribed manner;
- (b) the claim is not precluded by the provisions of section 2; and
- (c) the claim is not frivolous or vexatious,

he or she shall cause notice of the claim to be published in the Gazette and in the media circulating nationally and in the relevant province, and shall take steps to make it known in the district in which the land in question is situated."

21. Consequently, in order to establish the validity of the aforesaid allegation by the plaintiff regarding the failure to withdraw the notice, the court will have to consider the exercise of the discretion by the defendant with reference to the prescribed manner in which a claim has to be lodged; whether the claim was or was not precluded by the provisions of section 2 of the Act; and also whether the claim was not frivolous or vexatious. This whole exercise would clearly entail the interpretation and application of the Act.
22. The plaintiff also relies on a legal duty towards him by the defendant to act in accordance with and to comply with the provisions of the Act. The adjudication of this allegation would also clearly entail the interpretation and application of the Act.

23. In his plea the defendant also relies on the provisions of the Act. The allegation is made that the claim had been lodged in the prescribed manner. Section 10 will have to be considered in this regard. Furthermore that the claim was not precluded by the provisions of section 2 of the Act. To decide this issue the court will have to apply section 2 of the Act. The defendant furthermore pleaded that the land claim was not frivolous or vexatious. This issue would have to be decided with reference to section 11 (1) of the Act. The defendant also pleaded that the land claim was correctly published, which allegation would be decided on an interpretation of the relevant sections of the Act.
24. The defendant also pleaded that he was not obliged to withdraw the publication of the land claim in terms of section 11 A of the Act on the strength of the representations made by the plaintiff in the face of the investigation of the land claim in terms of section 12 (1) (a) of the Act. This issue can only be decided with reference to the relevant provisions of the Act.
25. The defendant also pleaded that he acted in good faith while performing his functions in terms of the Act. Section 18 of the Act provides as follows:
- "18 Limitation of liability
- The Commission, members of the Commission, any person or organisation appointed under section 9 or any officer contemplated in section 8, shall not be liable in respect of any act or omission in good faith while performing a function in terms of any provision of this Act."
26. In order to decide the issue of good faith of the defendant the structure and content of the Act will have to be applied.
27. It is clear from the above examples that the plaintiff squarely invoked the provisions of the Act to establish his cause of action against the defendant and

similarly that the defendant relies on the provisions of the Act for his defence. All the issues, and the questions as to who acted correctly or who may be to blame, or whether actions or inactions were made in good faith or not, can only be adjudicated by an interpretation and application of the Act.

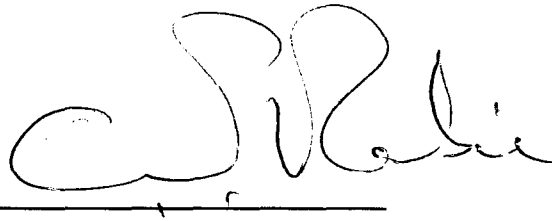
28. No doubt there is a presumption against legislative ouster or interference with the jurisdiction of the High Court. And the High Court has jurisdiction to protect the common law rights of an individual. However, once the plaintiff invoked to the provisions of the Act, which grants exclusive jurisdiction to the LCC to interpret and apply the provisions of the Act, in order to establish a cause of action, the matter changed. As soon as that occurred, the LCC had exclusive jurisdiction because it, and it alone, may apply the provisions of the Act. Cf *Khumalo v Potgieter* 2001 (3) SA 63 (SCA) at [10]; *Crystal Holdings Pty Ltd and Others v The Regional Land Claims Commissioner and Others* [2008] 1 All SA 243 (N) at para [50]; and *Dhlamini v Looock and Another* 2001 (3) SA 56 (SCA) at para [17].
29. In the discussion above it became clear that there is no room for the arguments on behalf of the plaintiff. I deem it necessary, however, to briefly refer to one aspect namely the submissions regarding the *causae continentia* rule. This rule is explained and summarised as follows in Erasmus, *Superior Courts Practice: Volume 1* at pA2-95 as follows:

"This principle entails that where one court has jurisdiction over part of a cause, considerations of convenience, justice and good sense justify its exercising jurisdiction over the whole cause. The jurisdiction of a court may therefore be extended by the principle of *causae continentiae*. The underlying reason for this rule is the avoidance of an unnecessary multiplication of actions and duplication of proceedings concerning the same subject matter, which may cause inconvenience and result in contradictory judgements."

30. I understood the argument on behalf of the plaintiff to be that since the High Court has jurisdiction to determine a delictual claim for damages, it would, on the basis of this rule be convenient, just and sensible for the High Court to also exercise jurisdiction over this cause of action to the extent that it relates to the provisions of the Act. I have already found that the jurisdiction of the High Court to adjudicate a delictual claim cannot survive the provisions of section 22 of the Act merely because it is delictual claim, or for any other reason. For that reason and since the High Court would have no jurisdiction over any part of the cause of action of the plaintiff in the present proceedings, the rule would not apply.
31. It was submitted, however, on behalf of the defendant, that it may possibly be argued that the allegation in the plaintiff's particulars of claim that he suffered damages as a result of the defendant's failure to comply with an order of the LCC, is an issue which does not involve the interpretation or application of the Act and which consequently falls within the jurisdiction of the High Court. If this is so, the *causae continentia* rule might find application.
32. I agree with the defendant that even if this were to be the case, this court would still not be vested with jurisdiction in the present matter by virtue of the *causae continentia* rule. This is so because, firstly, section 22 (1) (cC) provides that the LCC "shall have the power, to the exclusion of any other court contemplated in section 166 (c), (d) or (e) of the Constitution" to determine any matter involving the interpretation or application of the Act. Secondly, section 22 (2) (a) of the Act provides that the LCC shall have "all such powers in relation to matters falling within its jurisdiction as are possessed by a High Court having jurisdiction in civil proceedings". In the light of section 22 (2) (a) the LCC has jurisdiction in the

action, as a consequence of which the rationale for the *causae continentia* rule, i.e., the avoidance of an unnecessary multiplicity of actions and duplication of proceedings concerning the same subject matter which may cause inconvenience and result in contradictory judgements, does not find application. And thirdly, if the High Court were to assume jurisdiction in terms of this rule to determine matters involving the interpretation or application of the Act, the situation may well arise that different courts interpret the same statutory provision differently, which seems to be exactly what the Legislator sought to avoid by giving the LCC, as a specialist court, exclusive jurisdiction to determine any matter involving the interpretation or application of the Act.

33. Particularly in the present matter where, as was seen in the reference above to the pleadings, there is in reality no issue supporting the cause of action and no issue supporting the defences thereto, which does not entail the interpretation and/or application of the Act. Furthermore that most of these issues, if not all of them, fall within the specialist field for which the LCC had been established.
34. For the aforesaid reasons I'm of the view that this court lacks jurisdiction in the action. As far as costs are concerned, there is no reason why costs should not follow the event and why costs of senior counsel should not be included in the costs order.
35. In the result the following order is made:
 1. The action is dismissed with costs which costs shall include the costs of Senior Counsel.

A handwritten signature in black ink, appearing to read 'C.P. Rabie', is written above a horizontal line.

C.P. RABIE

JUDGE OF THE HIGH COURT