**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**

**JUDGMENT**

Case no**:537/2011**
**Reportable**

In the matter between:

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| **KING SABATA DALINDYEBO MUNICIPALITY** | **First Appellant** |
| **CAPE GANNET PROPERTIES 118 (PTY) LTD** | **Second Appellant** |
| **WHIRLPROPS 46 (PTY) LTD** | **Third Appellant** |

and

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| **KWALINDILE COMMUNITY** | **First Respondent** |
| **ZIMBANE COMMUNITY** | **Second Respondent** |
| **BATHEMBU COMMUNITY** | **Third Respondent** |
| **MINISTER OF AGRICULTURE AND LAND AFFAIRS** | **Fourth Respondent** |
| **REGIONAL LAND CLAIMS COMMISSIONER: EASTERN CAPE** | **Fifth Respondent** |
| **LANDMARK MTHATHA (PTY) LTD** | **Sixth Respondent** |
| **PROUD HERITAGE PROPERTIES 119 (PTY) LTD** | **Seventh Respondent** |
| **UWP CONSULTING (PTY) LTD** | **Eighth Respondent** |

**Neutral citation:** *King Sabata Dalindyebo Municipality v KwaLindile Community* (537/2011) [2012] ZASCA 96 (1 June 2012)

**Coram:** Mpati P, Cloete, Van Heerden and Mhlantla JJA and Kroon AJA

**Heard:** **3 May 2012**
**Delivered:** **1 June 2012**

**Summary:** Restitution of Land Rights Act 22 of 1994 – order by Land Claims Court in terms of s 34(5) that certain land within a municipality not be restored to any claimant or prospective claimant – order qualified by further directions – revision of orders on appeal – review of publication in terms of s 11 by regional land claims commissioner of claim to municipal land lodged in terms of the Act – costs on appeal.

## ORDER

On appeal from: Land Claims Court (Bam JP, sitting as a court of first instance):

1. The appeals are upheld with costs, including the costs of three counsel, where applicable, the costs to be paid by the fifth respondent.
2. Paragraphs (i) to (v) of the order of the court below are set aside and for them are substituted the following:

   '(i) In terms of section 34(5)(*b*) of the Restitution of Land Rights Act 22 of 1994 it is ordered that when claims in terms of the Act in respect of any land situate in the town of Mthatha, including the Remainder of Erf 912 Mthatha (the land), are finally determined, the rights in the land or any portion thereof shall not be restored to any successful claimant.

   (ii) No order is made in respect of the application for the review of the publication by the fifth respondent of claims lodged in terms of the Act to land situate within the municipality of Mthatha.'

3. The cross-appeals are dismissed.
4. The costs of the respondents in the cross-appeal, including the costs of three counsel, where applicable, will be paid by the fifth respondent.

## JUDGMENT

KROON AJA (MPATI P, CLOETE, VAN HEERDEN and MHLANTLA JJA concurring):

[1] This judgment concerns two appeals and three cross-appeals against orders granted

by Bam JP, sitting in the Land Claims Court (the LCC), in terms of s 34(5) of the Restitution of Land Rights Act 22 of 1994 (the Act). The appeals and cross-appeals are with the leave of Bam JP.

The parties

[2] The first appellant is the King Sabata Dalindyebo Municipality (the municipality), the legal successor to the former Mthatha Municipality, previously Umtata Municipality. The municipal area of the municipality includes the land situate in the town of Mthatha, which in turn includes the land known as the Remainder of Erf 912 Mthatha, and the municipality owns land within the municipal area. The municipality is accordingly a local government body as envisaged in s 34(1) of the Act.[1] It was the applicant in the proceedings before the LCC. Its appeal in the present proceedings is the first appeal against part of the order issued by the LCC.

[3] The second appellant is Cape Gannet Properties 118 (Pty) Ltd (Cape Gannet). It was the seventh respondent cited in the proceedings before the LCC. The third appellant is Whirlprops 46 (Pty) Ltd (Whirlprops). It was not cited as a respondent in the proceedings before the LCC, but intervened in those proceedings as an interested party and, as the tenth respondent, filed papers therein, such intervention being with the leave of the LCC. It is a joint appellant with the second appellant in the second appeal in the present proceedings.

[4] The first respondent is the KwaLindile Community (KwaLindile) a community as defined in the Act, of the KwaLindile Trust Farms, an area in the vicinity of the town of Mthatha. It was the first respondent cited in the proceedings before the LCC. It is the appellant in the first cross-appeal in the proceedings against part of the order issued by the

1 Para 16 below.

LCC.

[5] The second respondent is the Zimbane Community (Zimbane), a community as defined in the Act, of the Zimbane Administrative Area, an area in the vicinity of the town of Mthatha. It was the second respondent cited in the proceedings before the LCC. It is the appellant in the second cross-appeal in the present proceedings against part of the order issued by the LCC.

[6] The third respondent is the Bathembu Community (Bathembu), a community as defined in the Act, of an area in and around Mthatha. It was the third respondent cited in the proceedings before the LCC. Bathembu did not however participate in those proceedings or in the present appeal proceedings.

[7] The fourth respondent is the Minister of Rural Development and Land Reform (formerly the Minister of Agriculture and Land Affairs, and cited as such in the proceedings in the LCC as the fourth respondent) (the Minister). The Minister was joined in the proceedings as the Minister responsible in terms of the Act, as a possible interested party. The fifth respondent is the Regional Land Claims Commissioner, Eastern Cape (the regional commissioner, the fifth respondent in the LCC). The Minister and the regional commissioner are the joint appellants in the third cross-appeal against part of the order issued by the LCC.

[8] The sixth and eighth respondents are Landmark Mthatha (Pty) Ltd and UWP Consulting (Pty) Ltd (respectively, the sixth and ninth respondents in the LCC). They filed papers in the proceedings in the LCC in support of the municipality's prayer for an order in

terms of s 34 of the Act (as to which, see below), but in the result abided the decision of the court. Neither participated in the appeal proceedings.

[9] The seventh respondent is Proud Heritage Properties 119 (Pty) Ltd (eighth respondent in the LCC). It did not participate in the proceedings in the LCC or in the present appeal proceedings.

Legislative Framework

[10] The long heading to the Act records that its core purpose is 'to provide for the restitution of rights in land to persons or communities dispossessed of such rights after 19 June 1913 as a result of past racially discriminatory laws or practices'. The Act has its genesis in s 25(7) of the Constitution (Act 108 of 1996) which provides that -

'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.'

[11] Section 1 of the Act provides inter alia that:

' **"restitution of a right in land"** means –

*a)* the restoration of a right in land; or

*b)* equitable redress;

**"restoration of a right in land**" means the return of a right in land or a portion of land dispossessed after 19 June 1913 as a result of past racially discriminatory laws or practices;

**"equitable redress"** means any equitable redress, other than the restoration of a right in land, arising from the dispossession of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices, including –

*a)* the granting of an appropriate right in alternative state-owned land;

*b)* the payment of compensation.'-

[12] Section 4 of the Act established the Commission on Restitution of Land Rights and provided inter alia for the appointment of a Chief Land Claims Commissioner and various regional land claims commissioners. Section 22 established the LCC, referred to in the Act as 'the Court'.

[13] Section 6(3) provides that where the relevant regional commissioner (or an interested party) has reason to believe that certain dealings (eg the sale, development or rezoning) relating to land which may be the subject of an order of the LCC or in respect of which there is an entitlement to claim restitution of a right in land, he or she may, after lodgement of a claim in respect of such land and on reasonable notice to interested parties, apply to the LCC for an interdict against such dealings. The LCC may grant such interdict, subject to such terms and conditions and for such period as it may determine, or make any other order it deems fit.

[14] Section 11 prescribes the requirements for the acceptance by the relevant regional commissioner of the lodgement of a land claim, and provides, in subsection (1), that on such acceptance the regional commissioner shall cause notice of the claim to be published in the *Gazette* and take steps to make it known in the district in which the land in question is situated. Subsection (6) enjoins the regional commissioner, immediately after publishing the notice, to give notice in writing advising the owner of the land and any other party who, in his or her opinion, might have an interest in the claim, of the publication of the notice and of the provisions of subsection (7). The latter subsection provides that after publication of a notice in respect of any land no dealings, as envisaged, in the land may be undertaken by

any person without his or her having given the regional commissioner one month's written notice of his or her intention to do so. Absent such written notice, and good faith, the LCC may make a variety of orders relating to the dealings undertaken. Further, after publication of the notice in respect of the land, qualified prohibitions will operate against eviction of certain occupiers of the land, certain dealings with improvements on the land and entry upon or occupation of the land without the permission of the owner or lawful occupier of the land.

[15] Section 33 provides that in considering its decision in any particular matter the court must have regard to a number of factors listed in the section.

[16] Section 34 provides as follows:

'(1) Any national, provincial or local government body may, in respect of land which is owned by it or falls within its area of jurisdiction, make application to the Court for an order that the land in question or any rights in it shall not be restored to any claimant or prospective claimant.

. . .

(5) After hearing an application contemplated in subsection (1), the Court may –

(*a*) dismiss the application;

(*b*) order that when any claim in respect of the land in question is finally determined, the rights in the land in question, or in part of the land, or certain rights in the land, shall not be restored to any claimant;

(*c*) make any other order it deems fit.

(6) The Court shall not make an order in terms of subsection (5)(*b*) unless it is satisfied that –

(*a*) it is in the public interest that the rights in question should not be restored to any claimant; and

(*b*) the public or any substantial part thereof will suffer substantial prejudice unless an

order is made in terms of subsection (5)(*b*) before the final determination of any claim.

. . .

(8) Any order made in terms of subsection (5)(*b*) shall be binding on all claimants to the rights in question, whether such claim is lodged before or after the making of the order.

(9) Unless the Court orders otherwise, the applicant shall not be entitled to any order for costs against any other party.'

[17] Section 35 empowers the LCC to make orders in respect of the restoration of land or rights therein or alternative redress (in a variety of forms, including the award of alternative state-owned land or monetary compensation) in favour of a claimant, and further orders ancillary thereto.

Delegations by the Minister to the Eastern Cape Government concerning, and donation by the latter to the municipality of, relevant land

[18] On 1 April 1997 the then Minister (designated the Minister of Land Affairs) signed a delegation in favour of the Member of the Executive Council for Housing and Local Government in the Provincial Government of the Eastern Cape (the MEC), or his successors in office, of the statutory power and authority held by the Minister to dispose of certain state-owned land, subject to certain conditions.

[19] The land, which thereby vested in the Province of the Eastern Cape (and was so registered in the relevant register of deeds), was described as:

'REMAINDER of ERF 912 (formerly known as Umtata Town Commonage West and Umtata Town Commonage East together representing Umtata Town Commonage), Municipality of Umtata, District of Umtata, Province of the Eastern Cape.'

[20] One of the stipulated conditions read as follows:

'. . . where a portion of the properties, formerly known as Municipal Commonages, is to be used for housing/township development or for any other development, the said MEC or Local Authority or any other competent authority, . . . must satisfy themselves beforehand that such development will not result in the dispossession of people's rights (formal or informal) granted on or over such commonage land and in the event people's rights are affected, it is a prerequisite that other arrangements satisfactory to those people have been made, in consultation with the Department of Land Affairs and in accordance with the provisions and/or conditions stated in the Policy and Procedures on Municipal Commonage document by the said Department.'

[21] The delegation referred to was confirmed in a second delegation dated 22 December 1997 in which the wording was substantially the same as in the earlier delegation save that:

a) a clause was inserted providing that when properties were to be transferred by the provincial government to a municipal council, the transfer was to be subject to the conditions set out in the delegation, which were to apply *mutatis mutandis* to such municipal council;

b) in clause 4, headed 'Protection of Existing Land Rights', the relevant wording of the first delegation was altered to read that in the event that people's rights were affected 'it is a prerequisite that a Social Compact Agreement with the affected community be concluded to the satisfaction of those people . . .', and a further proviso was added that the development in question was only to commence after such agreement had been concluded with the affected community.

[22] By letter, apparently dated 14 October 1997, the MEC advised the municipality that a series of erven in Mthatha, being state-owned land, was being donated to it by the Provincial Government of the Eastern Cape, acting in terms of delegated authority from the Minister. The donations were inter alia subject to the specific conditions relating to

alienation of municipal commonage, where applicable, set out in the Ministerial delegation. One of the erven donated was described as follows:

'Remainder of Erf No 912 (formerly known as Umtata Town Commonage West and Umtata Town Commonage East together representing Umtata Town Commonage).'

[23] By deed of transfer dated 29 January 1999, and pursuant to the donation thereof, the Remainder of Erf 912 Mthatha was transferred by the Province of the Eastern Cape to the municipality. However, no conditions relating to the alienation of municipal commonage land were endorsed on the title deed.

Land claims by KwaLindile, Zimbane and Bathembu

[24] During 1998 the office of the regional commissioner received a number of land claims, including claims by KwaLindile, Zimbane and Bathembu. All of the claim forms submitted included claims in respect of land within the town of Mthatha, some of the land falling within the area known as the Remainder of Erf 912 Mthatha.

[25] The answering affidavit of the regional commissioner filed in the proceedings in the LCC, recorded that the various claims received consideration, and whilst this process was still in progress in respect of some of the claims, two of the claims were published by the regional commissioner as provided for in the Act. One of these claims was that made by KwaLindile. (As will be set out later, the publication of this latter claim was the subject of part of the relief sought by the municipality in the LCC).

[26] It was the case of the municipality that history revealed that none of the first three respondents had previously been dispossessed of land which now fell within the boundaries

of the town of Mthatha. Accordingly, to the extent that the land claims lodged by KwaLindile, Zimbane and Bathembu embraced claims in respect of portions of land within that area, the claims were invalid. The contrary allegations contained in the papers filed by KwaLindile and Zimbane had therefore to be rejected. However, as set out below, this court is not seized with the resolution of these issues.

Commercial agreements between the municipality and other parties

[27] During 2004 to 2006 the municipality entered into various agreements with Cape Gannet, Whirlprops and the sixth, seventh and eighth respondents relating to the lease and substantial development of various properties situate in the town of Mthatha, being either erven in Mthatha or proposed sub-divisions of the area known as the Remainder of Erf 912 Mthatha.

The current situation in Mthatha

[28] The evidence tendered on behalf of the municipality, which was not seriously disputed, disclosed inter alia the following. The city of Mthatha is completely urbanised. It comprises many suburbs, consisting of thousands of erven privately owned and developed. In addition to residential erven, it has schools, hostels, hotels, guest houses, conference centres, hospitals, medical clinics, taxi ranks, shopping centres, stores, railway lines, pump stations, a police station, courts of law, private and governmental offices, banks and a variety of public facilities such as a golf course and recreational park. The central business district and the industrial areas are thriving. The N2 national road, linking the Eastern Cape with KwaZulu-Natal, passes through the city. This is a major arterial road making a substantial contribution to the advancement of the welfare of the city and the region as a whole. There are also tracts of undeveloped land, including state-owned land. The

municipality is continually engaged in the development of the city in various directions. It has to ensure that it continues to be in a position to undertake the provision of services to its various communities in a sustainable manner and to play its part in maintaining its vibrant economy, which contributes to the economy of the whole region and reduction of unemployment, both in the city and the surrounding rural areas. The municipality has the necessary infrastructure to sustain the above-mentioned activities, which are in the interests of the whole region and the public at large, and to found further development to meet the ever increasing demand for the contribution it can make. The commercial agreements concluded by the municipality with other parties referred to in paragraph 27 above are integral parts of the continual developments the municipality is undertaking.

Interdict proceedings instituted by the regional commissioner

[29] The regional commissioner alleged that the municipality was made aware of the various land claims lodged with her, which embraced claims in respect of land within the town of Mthatha, including the area known as Remainder of Erf 912 Mthatha. That notwithstanding, the municipality proceeded, in terms of the commercial agreements in question, to make the affected land available for development. This, so it was contended, was in violation of the Act as well as the conditions contained in the delegations by the Minister, to which reference has been made above. In doing so, the municipality had acted in bad faith, and had been guilty of misrepresentation in failing to advise the other contracting parties of the land claims in question.

[30] The municipality recorded that, pursuant to the agreements referred to in paragraph 27 above, development of the sites in question in fact commenced during February 2007, and in some instances construction was also commenced.

[31] The regional commissioner however approached the LCC to seek, and was granted, an interdict against the developments in progress 'pending serious and consultative negotiations,' in case no. 66/2007. The negotiations were undertaken, but proved to be unsuccessful and were aborted in January 2008. Each side placed the blame for the failure of the negotiations at the door of the other side. This, too, is not an issue with which this court need concern itself. The municipality was given leave, in the event of an impasse being reached, to launch an application in terms of s 34 of the Act.

The present litigation

[32] On 8 October 2008 the municipality invoked s 34 of the Act and launched the present litigation.

(a) Para 4 of the municipality's amended notice of motion sought an order in the following terms:

'that when the claims of the first, second and third respondents in respect of any land situate in the town of Mthatha, including the Remainder of Erf 912 Mthatha (the land), are finally determined, the rights in the land or any portions of the land shall not be restored to any successful claimant.'

(b) Para 5 sought, in the alternative, a declarator that, notwithstanding the claims lodged in respect of the land, the municipality was entitled to develop the land.

(c) Para 6 sought a review, and the setting aside as unlawful, of the decision of the regional commissioner to publish a notice that a claim had been lodged in terms of the Act by KwaLindile, insofar as it related to the Remainder of Erf 912 Mthatha and various other erven in Mthatha. Paras 7 and 8 sought orders ancillary to that sought in para 6.

(d) Para 9 sought an order for costs against any respondent who opposed the municipality's application.

[33] In their respective answering affidavits KwaLindile and Zimbane opposed the relief sought by the municipality and prayed for an order dismissing the application with costs. Inter alia, reliance was placed on the papers filed by the regional commissioner. The Minister and the regional commissioner filed a joint answering affidavit, deposed to by the regional commissioner, which dealt at length with the allegations of the municipality, and sought the dismissal of the application with costs.

[34] In substance, the sixth respondent and Cape Gannet supported the main relief sought by the municipality. The ninth respondent also associated itself with the relief sought by the municipality. Whirlprops supported the main relief sought by the municipality, as well as the prayers relating to the review of the regional commissioner's decision to publish the claims lodged by KwaLindile. It also prayed for an order for costs against the regional commissioner.

Order issued in the LCC

[35] The order granted by Bam JP read as follows:

'The following order is made in terms of section 34(5)(*c*) of the Act.

i) The Remainder of Erf 912 Mthatha shall not be restored to any claimant or prospective claimant.

ii) All the prayers seeking the withdrawal, review and the setting aside of publication of notices in the Daily Despatch and the Government Gazette by the 5th respondent are dismissed.

iii) The resumption and the initiation of all development projects upon any portion of the Remainder of Erf 912 Mthatha by the applicant shall only proceed with the full transparent and exhaustive consultation with the 4th, 5th and present and prospective claimant respondents.

iv) Developers and prospective developers must ensure that whatever agreements [are] reached with the applicant in respect of Remainder of Erf 912 Mthatha are in compliance with paragraph (iii) of this order and should revise and re-structure such agreements accordingly. They must also ensure compliance with the spirit and letter of the Delegation, the Constitution and the Act on the part of the applicant and the 4th and 5th Respondents.

v) The applicant and the 4th and 5th Respondents are ordered and are expected to take their responsibilities to the public seriously and take the initiative in reaching consensus. They should jointly research projects and lay down the criteria for the advertising and acceptance of tenders for developments on the Remainder of Erf 912 Mthatha.

vi) There is no order as to costs.'

Attacks on appeal

[36] There was no attack on the order of Bam JP in para (vi) that no party be awarded costs in respect of the proceedings before him. No doubt the learned judge was swayed, correctly, by the fact that at issue in the court a quo were rights contemplated in the Act as well as the Constitution, and considered in the circumstances that, as envisaged in s 34(9) of the Act,[2] it would not be proper for any party to be mulcted in costs. As will be shown below however different considerations apply in respect of the costs on appeal.

[37] The municipality sought to assail the order in para (i) insofar as the LCC restricted the relief granted to an order only in respect of the Remainder of Erf 912 Mthatha, in contradisdinction to the whole of the town of Mthatha. It further attacked the imposition of the riders set out in paras (iii) to (v) to the order in para (i), and the dismissal in para (ii) of the prayers in the review application.

2 Para 16 above.

[38] Cape Gannet and Whirlprops jointly appealed against the order in para (iv) to the extent that the order had a bearing on the existing lease agreements concluded between them and the municipality.

[39] The cross-appeal of KwaLindile was against the grant of the order in para (i), as well as against the orders in paras (iii) to (v). The cross-appeal of Zimbane and the joint cross-appeal of the Minister and the regional commissioner were in similar terms.

The judgment of the LCC

[40] The first issue that arises relates to the restricted reference in para (i) of Bam JP's order (as well as in paras (iv) and (v)) only to the Remainder of Erf 912 Mthatha in contradistinction to a reference to the whole town Mthatha, including the Remainder of Erf 912 Mthatha. It appears that the restriction found its origin in the following statement in the judgment: 'The land in question is described in the Notice of Motion as the "Remainder of Erf 912 Mthatha"'.

[41] The statement reflects a misreading of the notice of motion. As set out in para 32(a) above, the reference in para 4 of the notice of motion was in fact to 'any land situate in the town of Mthatha, including the Remainder of Erf 912 Mthatha (the land)'. (The correct reference was in fact quoted in an earlier passage in the judgment of Bam JP). The judgment does not reflect that, for the purposes of the orders to be made, Bam JP sought to draw any distinction between the Remainder of Erf 912 Mthatha and the rest of the town of Mthatha; no argument along such lines was presented upon behalf of any of the parties; and in fact no such distinction is to be drawn. The learned judge accordingly erred in restricting the operation of the order he granted. I will revert to this aspect later when I

consider the attacks on para (i) of Bam JP's order.

[42] The second issue was also ~~a~~ one of land identification namely of the land that is embraced in the land claims lodged with the regional commissioner. Bam JP correctly commented that it was not clear from the papers which specific areas of Mthatha were encompassed in the Remainder of Erf 912 Mthatha. Nor was there exact clarity on the precise land that was the subject of the various claims. (In fact, during argument in this court counsel for Zimbane at one stage intimated that Zimbane's claim related to the whole of Mthatha and counsel for KwaLindile recorded that it was no longer pursuing certain portions of its claim to land within the town of Mthatha). A related issue was the contention of the municipality that the claims of Kwalindile, Zimbane and Bathembu were invalid claims in that, whatever the allegations of the three claimants, they had in fact not been dispossessed of any land situate in Mthatha, including the Remainder of Erf 912 Mthatha.

[43] It is however not necessary that this court concern itself with these issues, and the conclusion to be reached in the present proceedings is not affected thereby. These issues would properly fall to be resolved by the LCC when it hears and determines the land claims in question.

[44] The learned judge noted that, as provided for in s 34(6) of the Act, the issues for decision were whether it was in the public interest that the rights in question should not be restored to any claimant and whether the public or any substantial part thereof would suffer prejudice unless an order in terms of ss (5)(*b*) were issued before the final determination of any claim.

[45] As to the concept of 'public interest' the learned judge stated –

'. . . the starting point . . . is simply that "public interest" is that which is in *the interest and benefit of the community or communities served by applicant municipality on the land in question.* The claimant respondents are included in this group irrespective of the validity of their claims. Should their claims be successful they will, of course, still be entitled to "just and equitable redress" if the "public interest" supercedes their constitutional right to restitution.' (Original emphasis).

[46] On one ground the learned judge found that the above test of public interest was not satisfied, namely with respect to the commercial agreements concluded by the municipality and certain of the respondents (described by him as 'unilateral agreements' concluded by these parties). In their *present formats,* so it was found, the developments in question 'were designed primarily to promote entrepreneurial pursuits of a few with minimal or peripheral outcomes to the communities served by the applicant particularly those with present and prospective claims to the land such as the First and Second Respondent'. The learned judge therefore did not agree with the contention of the municipality that the setting up of a retail complex, a casino and upper class suburb (one of the developments) was 'significantly' in the public interest, having particular regard to the shareholding in the developments.

[47] On the other hand, it was held that a strong argument in favour of the public interest test was reflected in what was referred to as the 'reality' recognised in *Nkomazi*[3] in the following passage:

'Then there is the reality that restoration of land within the towns could well require, as envisaged by the ninth respondent, towns people to be expropriated of their houses, the expropriation of schools,

3 *Nkomazi Municipality v Ngomane of Lugedlane Community and other*s [2010] 3 All SA 563 (LCC) para 29.

churches, parks and other facilities, as could occur also in respect of the numerous business industries and other economic activities in the town. Major social disruption, the avoiding whereof is advocated in s 33(d) of the Restitution Act, would be inevitable.'

[48] The judgment of the court a quo continued as follows:

'Indeed, it appears to me that the intention of the legislature in enacting section 34 preventing restitution is, among others, precisely to avert the chaos that would follow were established cities and settlements suddenly carved up piecemeal into as many separate and disparate pieces and portions as there were claims.'

[49] The learned judge accepted the submission on the behalf of KwaLindile that a significant facet of public interest, a land claim, provided for in the Constitution and the Act, could not be left out of the equation. However, he held that the curtailment of the claimants' rights to restitution consequent upon the grant of an order in terms of s 34(5)(*b*), would not entail their claims not being dealt with as contemplated in the Act: they would still be entitled to equitable redress, in effect the reverse side of the coin of a finding that the tests of public interest and prejudice have been answered in favour of the municipality.

[50] The learned judge noted that the stance of Zimbane was, firstly, that it was not seeking restoration to itself of what was referred to as 'any land in the city of Mthatha or land in private hands,' but would instead in due course seek an award of what was described as participatory benefits in any developments and projects in respect of portions of the subject land, in compliance, so it was put, with inter alia the tenets provided for in the Act, the Constitution and also the ministerial delegations that sanctioned the donation of the land to the municipality. The second contention of Zimbane was that it was entitled to restoration of those portions of land within the Remainder of Erf 912 Mthatha which were

undeveloped (and unserviced).

[51] It was further recorded that, in the view of the learned judge, it was clear that the opposition of Zimbane to the relief sought by the municipality (in the form of an order in terms of s 34(5)(*b*) of the Act) was born of suspicions about the municipality's propensity 'to go it alone' when it came to reaping the fruits of development. Hence, Zimbane inter alia sought the restoration of undeveloped land to itself so that it could independently be a party to the development thereof. It was intimated by Bam JP that, in the orders to be made, he would attempt to address these particular concerns of Zimbane.

[52] It was however made clear in the judgment that the learned judge remained of the view that an order in terms of s 34(5)(*b*) was justified by reason of the satisfaction of the 'public interest' test. I will revert to this aspect later.

[53] The opposition of the Minister and the regional commissioner to an order in terms of the section was stamped by Bam JP as being 'the most serious and damaging'. It was pointed out that apart from the filing of their joint answering affidavit, the regional commissioner had been statutorily enjoined by s 34(2) to investigate, and submit a report to the court on, the desirability of an order that the land in question not be restored. Instead, so it was put, 'she submitted a report emphatically on the undesirability of making such an order'. The gravamen of her opposing argument was that the claimants were entitled to the restoration of those parts of the Remainder of Erf 912 Mthatha which had not yet been developed. It was further submitted that 'feasibility' was not a bar to the restoration of such portions and, accordingly, in terms of the case law and the Constitution, the primacy of restitution required to be recognised, notwithstanding the other forms of equitable redress

that were available. Reliance had been placed on a dictum in *Khosis*[4].

[54] The counter to these arguments by Mr Mbenenge (who appeared for the municipality in the court a quo), so Bam JP recorded, replicated the submissions that had won the day in *Khosis* and *Nkomazi*:[5]

*'. . .* even the partial restoration of portions of an established metropolitan city such as Mthatha would seriously disrupt and disintegrate the city's stability and development. The converse argument that follows is that the "public interest" would be served by granting the order for non-restoration.'

Bam JP recorded that he was entirely in agreement with 'this logic'.

[55] The learned judge's conclusion on the issue of public interest was couched as follows:-

'Consequently, I find that it would be in the "public interest" not to restore to any claimants any portion of the land within the jurisdiction of the applicant and constituting Remainder of Erf 912 Mthatha. I find that it would, indeed, not be in the "public interest" to restore or even reserve or excise any portion of the city as that could lead to chaos and possible upheaval resulting from competing claims to the city. The overlapping of claims might lead to serious problems causing inter-community tensions and strife.'

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4*Khosis Community, Lohatla, and others v Minister of Defence and others* 2004 (5) SA 494 (SCA) para 30: 'In considering its decision in this regard a court has to take into account the factors listed in s 33. All of them are not necessarily applicable in any given case. However, in a case such as the present the general approach ought to be that the dispossessed community is entitled to restoration of the land unless restoration is trumped by public interest considerations.'
See too *Mphela and Others v Engelbrecht and others* [2005] 2 All SA 135 (LCC) at 184; *Mphela v Haakdoornbult Boerdery CC* 2008 (4) SA 488 (CC) para 32.
5 See n 3 above.

[56] In respect of the second threshold requirement provided for in s 34(5)(*b*), substantial prejudice to the public or a substantial part thereof were an order in terms of s 34(5)(*b*) not to be made before the final determination of any claim, the judgment of the LCC read as follows:

'This requirement is, in this case, the corollary to the "public interest" threshold in that what has been shown to be in the "public interest" will be prejudicial to that public if not granted. I accept the applicant's submissions that failure to grant the order could stifle or slow down development within the subject land due to uncertainty in the outcome of claims to the detriment of its entire communities. Financial institutions will be reluctant to provide any financial assistance, even where claimants consent to such development, to the detriment or substantial prejudice of many including the 1st and 2nd respondents. It is, furthermore, common knowledge that the finalisation of land claims is often a very long process. I am satisfied that the public, or any substantial part thereof, will suffer substantial prejudice unless the order is granted. Accordingly, the section 34 application is to be granted.'

[57] Bam JP then reverted to the reasons why he granted the orders set out in paras (iii) to (v), and he amplified his earlier comments[6] by adding the following paras:

'[27] However, given the poor track record of the applicant in complying with the spirit and letter of the delegations, the Constitution and the Act in the unilateral awarding of tenders to the 6th – 10th Respondents, the application will be granted subject to the conditions to be set out presently.

[28] The conditions to be laid down seek to address particularly the concerns convincingly articulated in the opposing affidavits on behalf of the 1st, 2nd and 5th Respondents. In addition, this court has, *mero motu,* taken judicial notice of the high levels of corruption, factionalism and greed that have assailed our national and local government structures such as might lead to chaos and

6 Paras 46, 50 and 51 above.

social upheaval if not subjected to scrutiny and transparency.'

[58] Bam JP finally recorded that it was unnecessary to deal with the review application, save to point out that disputes concerning the validity of land claims as published fell to be adjudicated by the LCC in due course once it became seized of such proceedings.

Assessment

[59] On the premise that the issue of an order in terms of s 34(5)(*b*) would be proper in this matter (as to which, see below) I propose first to consider the propriety of the orders contained in paras (iii) to (v) of the order issued by Bam JP. Mr Mbenenge (who with Messrs Havenga and Da Silva, appeared for the municipality in this court), subjected the issue of the orders in question to trenchant criticism. Mr Pammenter, for Cape Gannet and Whirlprops, associated himself with the argument.

[60] I agree with the submission that the comments by Bam JP, firstly, that the developments envisaged in the commercial agreements concluded between the municipality and the other relevant parties had as primary purpose the promotion of entrepreneurial pursuits, and, secondly, that the agreements evinced that the municipality had a poor track record in the matter of compliance with the spirit and letter of the delegation, the Constitution and the Act, did not enjoy persuasive foundation in the evidence. Moreover, the learned judge incorrectly sought to stress the position of present and prospective land claimants (an approach which opposing counsel sought to support during argument).

[61] In the first place, it needs no argument that developments of the nature of those that are in issue advance the weal of the broader public, both of Mthatha and of the surrounding region. As intimated in para 28 above such developments are integral facets of the growth of the city, with its concomitant benefits to the community as a whole. Second, the suggestion that to meet the requirement of public interest, 'shareholding' in the developments should now be made available to persons who at this stage are no more than claimants, or would-be claimants, has only to be stated to be rejected. For development of a city to stand still and await the determination of which persons have valid land claims, would of necessity bring in its train manifest disadvantages to the community as a whole.

[62] In seeking to advance a contrary approach, Mr Benningfield (for Zimbane) laid stress on the terms of the delegation by the Minister to the MEC, in respect of which he supported the apparent approach of Bam JP that same were binding on the municipality. Thus, he contended that the municipality was not entitled to proceed with any development until the Social Compact Agreement referred to in clause 4 of the delegation,[7] had been concluded. To complete his argument he contended that by reason of the land claim lodged by it Zimbane qualified as 'people whose rights were affected'.

[63] Even on the premise that the terms of the delegation are binding on the municipality (which this court is not required to find), the argument cannot be upheld. The relevant section in the delegation refers, in terms, to *existing land rights,* in contradistinction to *claimed rights*. This issue engaged the attention of Petse J in *No-Italy Phindiwe Mtirara v*

7 Para 23(b) above.

*Landmark Mthatha (Pty) Limited* (unreported, case no 607/2007 ZAECM, 1 June 2007). Explaining the emphasis he placed on the words 'existing rights' in clause 4 of the delegation the learned judge stated:-

'There can be no doubt that this clause cannot be construed to encompass someone who has lodged a claim with the Land Claims Commissioner for the restitution of land of which the claimant was dispossessed after 1913 as a result of past discriminatory laws or practices as provided for in the Restitution of Land Rights Act because in my view the mere lodgement of a land claim with the Lands Claim Commissioner is by itself an acceptance by the claimant that he/she does not have existing rights in the land in respect of which a claim is made having been dispossessed thereof "*as a result of past discriminatory laws or practices". . .* hence the claim . . . .' (Emphasis in the original. )

I align myself with this approach.

[64] I further cannot endorse the preparedness of the learned judge in the court a quo to take judicial notice of the 'high levels of corruption' etc,[8] as part of the foundation for the making of the orders in question. Whatever the manifestation of corrupt practices etc in other governmental circles, it was not permissible in this case to visit the municipality with same, without any evidential foundation therefor and to craft an order against the municipality on that score.

[65] Two further submissions were made by counsel. First, the content of the orders in question sought to clothe the Minister and the regional commissioner with more powers than those envisaged in the Act; in short, the right in effect to veto the terms of a contract

8[8] Para 57 above.

concluded by the municipality, apparently with a view to securing equitable redress for a claimant. However, so counsel argued, the role of the regional commissioner in respect of claims under the Act is investigative, facilitative and mediatory, not adjudicative,[9] and the orders were *pro tanto* impermissible. The submission was valid.

[66] Second, the orders were void for vagueness and uncertainty, and were accordingly not capable of implementation or enforcement. Suffice it to say that an analysis of the orders demonstrates the validity of this submission.

[67] As to the two threshold requirements posed in s 34(6), the following principles are applicable:

(a) While s 34(5)(*b*) provides for an extraordinary *ante omnia* order (ie prior to the determination of claims),[10] once the court is satisfied that the two jurisdictional requirements have been met, the court does not have a further overriding discretion in terms of the section not to grant an order.[11]

(b) The decision on both requirements involves the exercise of a value judgment, based on the facts found to be proven. On this latter score the court has to take into account the various factors listed in s 33 to the extent that a particular factor is of application in any given case, and is also entitled to have regard to a number of disparate and incommensurable factors, in the result exercising a wide discretion.[12]

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9 See eg *Farjas (Pty) Ltd and another v Regional Land Claims Commissioner, KwaZulu-Natal* 1998 (2) SA 900 (LCC) para 19 (of the judgment of Bam P) and para 41 (of the judgment of Dodson J).
10 *Nkomazi* n 3 above, para 8.
11 *Nkomazi* para 12; *Khosis* n 4 above, para 7.
12 *Nkomazi* para 9; *Khosis* paras 8, 30 and 33.

(c) On appeal, the appellate tribunal is obliged to accord deference to the findings of the lower court, more especially where the latter court is a specialist court called upon to make value judgments.[13]

[68] The reasoning of Bam JP in arriving at the conclusion that it would be in the public interest for an order in terms of s 34(5)(*b*) of the Act to be issued appears from paras 47-55 above. I align myself with this reasoning (subject to my earlier comments bearing on the orders in paras (iii)-(v) of the order of Bam JP). Specifically, the learned judge's references to 'the reality', 'the chaos' and the established nature of the city of Mthatha satisfactorily echo the references in s 33 of the Act to 'feasibility of restoration', 'social upheavel' and 'current use' (said in *Khosis*[14] to bear closely on public interest considerations), to which may be added the element of forward planning adverted to in para 28 above. These considerations are of no less application to land which at the present moment is as yet undeveloped. It may also be mentioned that in this matter there is no suggestion of an ancestral umbilical cord between the land claimed and any of the claimants. I agree therefore that it is in the public interest for an order in terms of s 34(5)(*b*) to issue.

[69] As to the second requirement of 'substantial public prejudice' I again align myself with the approach of Bam JP as reflected in para 56 above. Depending on the evidence, the reverse side of the coin of a finding of public interest in the grant of an order is generally a finding of public prejudice should the order be refused. In addition to the features listed by the court a quo emphasis may be laid on the fact that it is not in the public interest, and would therefore be prejudicial to the public, to have trials (re *restoration* of rights in land)

13 *Khosis* para 11.
14 See n 4 above, para 33.

which have no realistic prospects of success in the light of the finding in respect of the first jurisdictional requirement.[15] Similarly, it may be emphasised that cognisable public prejudice would follow on a refusal of an order in terms of s 34(5)(*b*) having the result, as it would in the present matter, of hampering the municipality in its efforts in striving after a contribution to the welfare of the broader community of Mthatha and the surrounding region. I accordingly agree that the second threshold requirement for the grant of an order was met.

[70] For the reasons detailed in paras 40 and 41 above it is necessary for the order in para (i) made by Bam JP to be amended to include a reference to the whole town of Mthatha, instead of merely the Remainder of Erf 912 Mthatha. Further, in the light of the provision in s 34(8) that an order in terms of s 34(5)(*b*) is binding on all claimants, present and future, it would be appropriate for the references in the notice of motion to the first three respondents, as claimants, not to be included in the order made. These aspects will be reflected in the order set out at the end of this judgment.

[71] The final substantive issue relates to the application of the municipality for the review and setting aside of the regional commissioner's publication of the land claims lodged with her by KwaLindile. It is however unnecessary and undesirable for any order to be made in respect of the prayers in question. It is unnecessary because the relief sought in the prayers does not have a bearing on the main relief which the municipality has secured, ie an order in terms of 34(5)(*b*). The publication itself will also not affect the decision of the LCC in due course when it is seized with a determination of the claims and the relief (excluding *restoration* of any land or rights therein) to be granted in respect of any valid

15 *Khosi* n 4 above, para 42; *Nkomazi* n 3 above, para 9.

claims. At this stage the only effect of publication of the claims is that, as provided for in s 11(7) of the Act,[16] one month's written notice of the intention to engage in dealings in the land must be given to the regional commissioner, and the latter, if so advised, is also entitled in terms of s 6(3) of the Act[17] to approach the LCC for interdictory relief against dealings in any relevant land. And it is undesirable to deal with the review application because this would involve a consideration of the ambit of the claims made by KwaLindile, a question properly to be considered by the LCC.

Costs

[72] The remaining issue relates to the costs of the appeal proceedings. The submission that costs should follow the result can only be upheld to a limited extent. In *Biowatch*[18] a number of principles were enunciated as being applicable to a costs award in constitutional litigation. Applying those principles to the present matter the following conclusions are appropriate:

(a) The municipality and Cape Gannet and Whirlprops, although being the successful parties, are not entitled to, nor did they seek, a costs order against KwaLindile and Zimbane, who were private parties seeking to assert a constitutional right against a government body (the municipality).

(b) The regional commissioner, representing the state, was the prime mover in resisting the relief sought, initially in the LCC by the municipality, and on appeal by the municipality

16 Para 14 above.
17 Para 13 above.
18 *Biowatch Trust v Registrar, Genetic Resources, and others* 2009 (6) SA 232 (CC).

and Cape Gannet and Whirlprops. She launched the interdict proceedings referred to earlier. Her statutory report in terms of s 34(2)[19] unequivocally took up the cudgels on behalf of the claimants insofar as undeveloped land in Mthatha was concerned and propounded the view that the claimants were entitled to the *restoration* of such land, notwithstanding the factor of 'feasibility'. She remained adamant in that stance in the answering affidavit to which she was the deponent. Reliance was placed on her stance by the other unsuccessful respondents. She was in short the driving force behind the litigation. Accordingly, Cape Gannet and Whirlprops, private litigants who achieved success in constitutional litigation against a government agency, the regional commissioner, are entitled to an order that she bear their costs on appeal. Notwithstanding that the municipality is a government body, its budget vote is separate from that of the Department of Rural Development and Land Reform; it is therefore to be equated with a private litigant who achieved success against a government body, and it is accordingly entitled to a costs order against the regional commissioner. KwaLindile and Zimbane did not seek any cost order (and, so we were advised from the Bar, they were in any event being sponsored in the litigation by the Minister and the regional commissioner).

[73] In view of the importance and complexity of the matter, the municipality was justified in engaging the services of three counsel.

Order

[74] The following order is made:

1. The appeals are upheld with costs, including the costs of three counsel, where

19 Para 53 above.

applicable, the costs to be paid by the fifth respondent.

2. Paragraphs (i) to (v) of the order of the court below are set aside and for them are substituted the following:

'(i) In terms of section 34(5)(*b*) of the Restitution of Land Rights Act 22 of 1994 it is ordered that when claims in terms of the Act in respect of any land situate in the town of Mthatha, including the Remainder of Erf 912 Mthatha (the land), are finally determined, the rights in the land or any portion thereof shall not be restored to any successful claimant.

(ii) No order is made in respect of the application for the review of the publication by the fifth respondent of claims lodged in terms of the Act to land situate within the municipality of Mthatha.'

3. The cross-appeals are dismissed.

4. The costs of the respondents in the cross-appeal, including the costs of three counsel, where applicable, will be paid by the fifth respondent.

**F KROON**
**ACTING JUDGE OF APPEAL**

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|---|---|
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