THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case No: 704/2013
Not Reportable

In the matter between

JAZZ SPIRIT 12 (PTY) LIMITED	**FIRST APPELLANT**
YAMIV (PTY) LIMITED	**SECOND APPELLANT**
HEIN J BADENHORST	**THIRD APPELLANT**
and	
THE REGIONAL LAND CLAIMS COMMISSIONER: WESTERN CAPE	**FIRST RESPONDENT**
SEDICK SADIEN	**SECOND RESPONDENT**
EBRAHIM SADIEN	**THIRD RESPONDENT**

Neutral citation: *Jazz Spirit 12 (Pty) Ltd & others v The Regional Land Claims Commissioner: Western Cape & others* (704/2013) [2014] ZASCA 127 (22 September 2014)

Coram: Bosielo, Saldulker and Swain JJA, Mocumie and Gorven AJJA

Heard: **27 August 2014**

Delivered: **22 September 2014**

Summary: Civil appeal against costs – Section 21A(1) of the Supreme Court Act 59 of 1959 – whether the matter is appealable – will the judgment or order sought have practical effect or result – exceptional circumstances – Section 21A(3) – application to intervene – direct and substantial interest – application for rescission – Section 35(11) of the Restitution of Land Rights Act 22 of 1994 – is the pending appeal in respect of the order appealed against.

ORDER

On appeal from: Land Claims Court, Cape Town (Mpshe AJ sitting as court of first instance):

It is ordered that:
The appeal is dismissed.

JUDGMENT

Bosielo JA (Saldulker and Swain JJA, Mocumie and Gorven AJJA concurring):

[1] At the end of a protracted and bitterly fought legal battle, and on 7 December 2012, the Land Claims Court, Cape Town (Mpshe AJ) gave judgment and held as follows:

'The claimants have achieved success in this matter not against the respondents but against the State. Generally, I would have to make an order of costs against the State in favour of the claimants. This I cannot do. The claimants are funded by the State. I am inclined to make no order as to costs.'

[2] The appellants appeal against this portion of the order with the leave of the court below. This appeal is therefore confined to the costs order.

[3] In granting leave to appeal, the trial judge held as follows: 'The Land Claims Court is also subject to the basic rule that awarding of costs is in the

discretion of the court. Due to the social justice legislation the Land Claims Court is seized with, it is not bound by the general principle that costs follow the event. In effect the tendency and trend in the Land Claims Court is not to order costs against a party save under exceptional circumstances.'

[4] What gave rise to this case is a disputed land claim lodged by the second and third respondents in respect of a farm, Erf 2274 Constantia (the property) also called Sillery Farm. The appellants opposed this claim. As the dispute regarding the properties could not be resolved either by mediation or negotiation, the matter was referred to the Land Claims Court in terms of s 14 of the Restitution of Land Rights Act 22 of 1994 (the Restitution Act). The trial commenced during November 2010 until judgment was delivered on 7 December 2012.

[5] At the end of a protracted trial, the court below found that the second and third respondents had in fact been deprived of this property as a result of racially discriminatory laws or practices. Furthermore, the court below found that the amount of R13 550 paid as the purchase price did not qualify as just and equitable compensation. Based on the fact that the second and third respondents had opted for alternative State land and not restoration of the original land, the court below made an order for Erf 1783 Constantia to be allocated to the respondent. In the result both parties had achieved substantial success. As pointed out, the court below declined to make any order in respect of costs.

[6] On 8 February 2013 the court below varied its original allocation of Erf 1783 Constantia and substituted it with a portion of Erf 142 Constantia. It seems that the court below was under the mistaken belief

that this property was vacant and free to be allocated and transferred to the respondents as alternative State land.

[7] This variation of the order gave rise to an application by the South African Riding for the Disabled Association, Cape Town Branch (the intervening party) for leave to intervene in the appeal and for the rescission of the judgment of the court below. This application was dismissed with costs at the hearing of the appeal. In addition, the application to rescind the judgment of the court below was struck off the roll with costs. The reasons for these orders follow.

[8] The ground upon which the application was advanced was the undisputed fact that the intervening party had been occupying Erf 142 Constantia, on the strength of a written lease signed with the secretary of the School Board, Cape Town on 8 December 1981. This property was expropriated for educational purposes by the Cape Provincial Government during 1966. The intervening party avers that it had occupied the property for some 34 years and, that in the process, it had effected substantial improvements to it with the consent of the lessor to the value of R7, 5 million.

[9] It is common cause that this property was allocated and transferred to the respondents as alternative State land without the knowledge or consent of the intervening party. The intervening party avers that by virtue of being a tenant of the property, it is entitled to just and equitable compensation. No such compensation was paid to the intervening party. It is for this reason that the intervening party seeks leave to intervene in the appeal proceedings before us with the aim of rescinding the main judgment of the court below.

[10] Counsel for the intervening party relied on s 35(11) of the Restitution Act for the contention that it was entitled to apply for the rescission of the judgment on appeal before this court Insofar as it is relevant this section provides that:

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

(a) in the absence of the person against whom that order or judgment was granted;

(b) which was void from its inception or was obtained by fraud or mistake common to the parties;

(c) in respect of which no appeal lies; or

(d) in the circumstance contemplated in section 11(5):

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

[11] Counsel for the intervening party submitted that, as the judgment, in respect whereof Erf 142 Constantia was transferred to the second respondent, was given in its absence and was obtained by a mistake common to the parties, it stood to be rescinded. He submitted further that as the judgment or order of the Land Claims Court was the subject of an appeal in this Court, this Court had the authority to entertain the application for rescission. He contended further that, although the section refers to the judgment or order whilst the proviso refers to the order only, there is no real distinction between an order and a judgment as used in the section. He urged us to interpret the terms judgment or order liberally to mean one and the same thing which includes the reasoning, executive order of the judgment as well as that for costs. The fact that the appeal before us is confined to costs only is immaterial as the order is an integral part of the judgment, so he contended.

[12] On the other hand, counsel for the respondents contended that the proviso to s 35(11) is specific and not open-ended. It requires a party which invokes it to show that it is affected by the order appealed against. He submitted that as the appeal before us is confined to costs only the intervening party has no interest in the matter as it is not affected thereby. In essence, he pointed out that the part of the judgment on the merits which directly affected the appellants was not appealed against. Based on this, he contended further that as the intervening party conceded that the appeal on costs will not affect him in any manner, he therefore cannot rely on the proviso to s 35(11). Put plainly, the intervening party failed to show a direct and substantial interest in the subject of the appeal on costs, so went the contention.

[13] The following facts are common cause: that the intervening party was not a party to the previous proceedings in the court below; that the appeal before us is on costs only; that whatever the outcome of the appeal on costs might be, it will not affect the intervening party, and further that the order to be rescinded was not made on appeal by this Court, nor was it pending before us.

[14] It is clear from s 35(11) that for the applicant to succeed, it must prove that the pending appeal is in respect of the order made by the court below which the intervening party seeks to rescind. It suffices to state that the appellant has not succeeded in meeting this test. This means that the jurisdictional requirements laid down in s 35(11) have not been met. The application to intervene was accordingly dismissed with costs. Self-evidently this sounded the death-knell for the application for rescission.

[15] I now revert to the main appeal against costs. As I alluded to above, the court below did not deem it necessary to make an order in respect of costs. Given the fact that this appeal is on costs only, the appellants' legal representative was reminded of the reluctance of the appellate courts to interfere with the discretion exercised by a trial judge in awarding costs, and was asked whether this appeal was not hit by the provisions of s 21A(1) and (3) of the Supreme Court Act 59 of 1959 (the Supreme Court Act). For ease of reference this section insofar as it is relevant provides that:

'(1) When at the hearing of any civil appeal to the Appellate Division or any Provincial or Local Division of the Supreme Court the issues are of such a nature that the judgment or order sought will have no practical effect or result, the appeal may be dismissed on this ground alone.

(3) Save under exceptional circumstances, the question whether the judgment or order would have no practical effect or result, is to be determined without reference to considerations of costs.'

[16] In an attempt to scale the hurdle presented by s 21A(1), the appellants' legal representative sought refuge under s 21A(3) and submitted that this case presented 'exceptional circumstances' justifying the appeal to be heard. As support for this submission, he relied amongst others on the long duration of the trial which spanned 21 days. In addition, he called in aid the failure by the respondents to adopt measures to curtail the length of the case, the leading of irrelevant witnesses by the respondents and, what he described as defamatory or derogatory arguments made by the respondents about the appellants. Essentially, he complained about the manner in which the respondents conducted the trial, which he submitted contributed to its length with concomitant huge costs.

[17] Based on the above, he argued that, given the social importance of this legislation and the need to address the public quest for land restoration as speedily as possible, we should find the respondents' conduct to have been not only obstructive but, in the process, to have exposed the appellants to considerable unnecessary litigation costs. He contended further that such conduct should not be countenanced as it has the potential to defeat the underlying purpose of the Act. In conclusion, he submitted that the trial court erred in not awarding costs against the respondents to mark its displeasure at the manner in which they conducted the trial.

[18] On the other hand, the respondents' counsel countered that the facts adduced by the appellants do not qualify as exceptional or unusual, uncommon or out of the ordinary as envisaged by the Act. Based on this he urged us to dismiss the application.

[19] It is common cause that for the appellants to succeed, they need to prove 'exceptional circumstances' as required by s 21A(3). What then are 'exceptional circumstances'? I have found the following definition in *MV AIS MAMAS Seatrons Maritime v Owners, MV AIS MAMAS & another* 2002 (6) SA 150 (C) at 157E-F by Thring J to be a useful guide:

'I think that, for the purposes of s 5(5)(*a*)(iv) the phrase 'exceptional circumstances' must, both for the specific reason mentioned by Jones J and by reason of the more general consideration adumbrated by Innes ACJ in *Norwich Union Life Insurance Society v Dobbs*, (supra loc cit), be given a narrow rather than a wide interpretation. I conclude to use the phraseology of Comrie J in *S v Mohammed* (supra, loc cit), that, to be exceptional within the meaning of the subparagraph, the circumstances must be "markedly unusual or specially different"; and that, in applying that test, the circumstances must be carefully examined.'

[20] This is the test against which the facts or circumstances raised by the appellant must be measured to determine if they amount to 'exceptional circumstances' for purposes of s 21A(3) of the Supreme Court Act.

[21] As already alluded to above, the appellants relied amongst others on the duration of the trial, the conduct of the respondents' witnesses and legal representatives and the concomitant huge costs, as exceptional circumstances. Because the appellants relied on what happened during the trial, we had to wade through 30 volumes and 2737 pages of evidence to determine if the circumstances relied on by the appellant qualified as 'exceptional circumstances' as required by s 21A(3).

[22] The appellant sought support for its contention that exceptional circumstances were present in the decision of this court in *Oudebaaskraal (Edms) Bpk v Jansen van Vuuren* 2001 (2) SA 806 (SCA). In this case the appellants had applied in a Water Court for a permit in terms of the Water Act 54 of 1956, but the application was dismissed. The appellants appealed to this court against the dismissal of the application, but before the appeal was heard, the Water Act was repealed in its entirety by s 163 of the National Water Act 36 of 1998. The respondent contended that this court could accordingly no longer grant a permit to the appellants and although there could still be an appeal against the costs order of the Water Court, such an appeal would have no practical effect or result and should be dismissed in terms of s 21A of the Supreme Court Act 59 of 1959.

[23] This court held that there was no indication in the National Water Act that the legislature had intended the unfair result of depriving the

appellants of their right of appeal. Accordingly the appellants had not been deprived of their rights of appeal. This factor taken together with the fact that considerable costs had been incurred in the case constituted exceptional circumstances in terms of s 21A(3) of the Supreme Court Act. The question whether the judgment or order of the court of appeal would have a practical effect or result, could be determined with reference to considerations of costs. Accordingly if the appeal succeeded there would be a practical effect or result. It is therefore clear that a valid appeal on the merits had been lodged, but in the interim the grounds of appeal had been nullified by the repeal of the act upon which the appeal was based.

[24] The facts of the present case are quite clearly distinguishable from *Oudebaaskraal* as to the presence of exceptional circumstances. The mere fact that the costs are considerable in the present case and other factors called in aid do not in themselves constitute exceptional circumstances justifying the hearing of the appeal.

[25] I am consequently unable to find that the facts and circumstances on which the appellants sought to rely are so markedly unusual, specially different, unusual uncommon, rare or different so as to constitute 'exceptional circumstances' within the meaning of s 21A(3). The appeal must accordingly be dismissed.

[26] What remains is the question of the costs of appeal. Counsel for the respondents conceded, correctly in my view, that primarily because we are dealing with social legislation which has the noble and laudable objective of addressing the controversial problem of restitution of land

rights and payment of equitable compensation in appropriate cases, that it would not be proper to make an award of costs against the losing party as is the general rule in ordinary litigation.

[27] It is crucial for the promotion and maintenance of the rule of law that parties who approach the courts to resolve their land disputes should not be mulcted with costs, particularly where there are no allegations of wilfulness or vexatiousness as is in this case. Undoubtedly s 6 of the Restitution Act places an onerous duty on the office of the Land Claims Commission to take all reasonable steps to ensure that claims that are lodged are well investigated and properly prepared. Evidently, this is intended to ensure that all facts relevant to a particular claim are considered. In addition, it has as its rationale the fact that many of the people dispossessed of land have also been systematically disadvantaged in many other ways and may well be unlikely to be in a position to fund any adverse costs order. Such people might be dissuaded from pursuing the very rights provided for in the Restitution Act if costs orders were made in the ordinary course. If this was their response, it would defeat the very object of the Restitution Act. This is, perhaps, an additional reason for the exceptional circumstances envisaged in s 21A(3) to be required to meet an even higher standard in matters concerning costs arising from the Restitution Act.

[28] Where there is an unresolved dispute, the Commission is obliged to refer such dispute to the Land Claims Court for adjudication. The investigation and reports by the Commission play a pivotal role in the ultimate resolution of any ensuing dispute. Self-evidently, costs orders might be subversive to the spirit of social justice underlying the

Restitution Act. Dealing with this vexed issue, Harms ADP stated the following in *Haakdoringbult Boerdery CC & others v Mphela & others* 2007 (5) SA 596 (SCA) para 76:

'That leaves the costs on appeal. This Court has not yet laid down any fixed rule and there are judgments that have ordered costs to follow the result and others that have made no orders. I believe that the time has come to be consistent and to hold that in cases such as this there should not be any costs orders on appeal absent special circumstances.'

I agree and, as a result, we decline to make an order regarding the costs of the appeal.

[29] In the result, I make the following order

The appeal is dismissed.

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L O BOSIELO
JUDGE OF APPEAL

Appearances:

For Appellants	:	M Schreuder SC (with him JP du Plessis) Instructed by: Du Plessis, Hofmeyr Malan Inc.; Somerset West Honey Attorneys, Bloemfontein
For Respondents	:	DJ Jacobs SC Instructed by: State Attorney; Cape Town State Attorney, Bloemfontein
Intervening Party:		SP Rosenberg SC (with him S Wagener Instructed by: Bowman Gilfillan Inc.; Cape Town