

IN THE LAND CLAIMS COURT OF SOUTH AFRICA

Held in RANDBURG on 3 November 2003
before **Moloto J**

CASE NO: LCC 37/02

Decided on: 27 November 2003

In the matter between:

MILES DEREK LAPPEMAN
BUSHWILLOW (PTY) LTD
STEPHANUS MARTINUS STEYN
JOHANNES MICHEL ERASMUS
BARENDINA JACOBA HERMANN

First Applicant
Second Applicant
Third Applicant
Fourth Applicant
Fifth Applicant

and

ANDREW MAPHIRI MPHELA N.O
ABIDNEGO BOITUMELA HUMA
MAGALIES WATER BOARD
THE MINISTER OF LAND AFFAIRS

First Respondent
Second Respondent
Third Respondent
Fourth Respondent

JUDGMENT

MOLOTO J:

[1] The applicant launched an application on 30 August 2002 for an order in the following terms: -

- (1) That the publication of Notice 2141 of 1999 in terms of section 11(1) of the Restitution of Land Rights Act, 22 of 1994 in the Government Gazette dated 23 September 1999 by Andrew Maphiri Mphela (hereinafter referred to as the “first respondent”) be reviewed and set aside;
- (2) Costs of suit, if opposed;
- (3) Further and/or alternative relief.

[2] Each of the five applicants is a registered owner of one or more portions of the land forming the subject matter of this application and it is on the basis of such ownership that each participates in this application.

[3] The first respondent is the Land Claims Commissioner for Gauteng and Northwest Provinces appointed to such position by the Minister of Land Affairs in terms of section 4 of the Restitution of Land Rights Act, 22 of 1994 (“the Act”). The second respondent acts in his personal and representative capacity on behalf of eleven families who lodged a claim for restitution of rights in the land with the first respondent in terms of the Act. The applicants, third and fourth respondents own various portions of the claimed land. The third and fourth respondents are cited for any interest they might have in these proceedings. No costs are sought against the third and fourth respondents, unless they oppose the application. Only the first, second and fourth respondents participated in this application.

[4] After the first respondent had received the second respondent’s claim and had done some preliminary investigations, he published a notice in the Government Gazette about the claim as required in terms of section 11(1) of the Act. That is the notice that precipitated this application.

[5] The facts of the case are briefly as follows. The ancestors of the eleven families represented by the second respondent used to jointly own the farms Bulhoek 75 JQ and Vaalkop 76 JQ both in the district of Rustenburg. According to the racial policies of the Apartheid Government these farms were situated in an area designated for occupation by whites. The families owning the farms were black. There was a farm, Welgevonden 267 JQ in the district of Rustenburg which, according to the Government of the day was in an area designated for occupation by black people. This farm was owned by a white person. Under the racially discriminatory laws of the day, and in particular the Development Trust and Land Act 18 of 1936 and the Black Laws Amendment Act 76 of 1963, an “exchange transaction” (as described in the reports of the first respondent) was arranged in terms of which the farms Bulhoek and Vaalkop were transferred to the white person in exchange for his farm Welgevonden 267 JQ. Another farm, Waaikraal 396 JQ, then owned by the South African Native Trust, was also transferred to the eleven black families. It appears the farm Waaikraal was acquired for the black families in

order to ensure that the exchanged properties were equal in area. I say so because the areas of the different farms are as follows :

Bulhoek was	1007,9754 hectares
Vaalkop was	<u>1340,1456</u>
Total	<u>2348,1210</u>

Welgevonden was	1862,8144
Waaikraal was	<u>485,3067</u>
Total	<u>2348,1211</u>

[6] The farms Bulhoek and Vaalkop were sold to the white person, a Mr Matthys Johannes Hermann (“Hermann”) for the sum of R17 812,00 on 3 May 1948. Hermann’s farm Welgevonden was sold to the black families on 3 May 1948 for the sum of R14 129,00. The farm Waaikraal was sold to the black families on 3 June 1957 for R3 683,00. Hermann had deposited an amount of R3 782,00 with the Department (presumably the Native Affairs Department) for the purchase of Waaikraal for the black families. So it appears the money exchanged for the farms was also equal as the sum of R14 129,00 and R3 683,00 is R17 812,00. It is not clear what became of the difference between R3 782,00 paid by Hermann to the department and R3 683,00 paid for Waaikraal, neither is any explanation proffered for the fact that the amount of R3 683,00 is the value of Waaikraal in 1957, some 9 years after the dispossession of Bulhoek and Vaalkop in 1948. The result is that the value of Waaikraal in 1948 is not known.

[7] It was contended on behalf of the applicants that the black families received just and equitable compensation calculated at the time of their dispossession and that, therefore, the first respondent should have made that finding when he acted in terms of section 11(1) of the Act. Consequently, so the argument went, he should not have published the notice in the Gazette.

[8] Section 11(1) of the Act provides: -

- “(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 shall take steps to make it known in the district in which the land in question is situated.”

Section 2 reads: -

- “(1) A person shall be entitled to restitution of a right in land if -
- (a) he or she is a person dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices; or
 - (b) . . . ;
 - (c) he or she is the direct descendant of a person referred to in paragraph (a) who has died without lodging a claim and has no ascendant who -
 - (i) is a direct descendant of a person referred to in paragraph (a); and
 - (ii) has lodged a claim for the restitution of a right in land; or
 - (d) it is a community or part of a community dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices; and
 - (e) the claim for such restitution is lodged not later than 31 December 1998.
- (2) No person shall be entitled to restitution of a right in land if -
- (a) just and equitable compensation as contemplated in section 25(3) of the Constitution; or
 - (b) any other consideration which is just and equitable,
- calculated at the time of any dispossession of such right, was received in respect of such dispossession.”

Section 25(3) of the Constitution¹ provides:

- “(3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interest of those affected, having regard to all relevant circumstances, including -
- (a) the current use of the property;
 - (b) the history of the acquisition and use of the property;

1 Act 108 of 1996.

- (c) the market value of the property;
- (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
- (e) the purpose of the expropriation.”

[9] The following defences were raised on behalf of the participating respondents:

In limine

- (a) the second applicant has no *locus standi*;
- (b) there was unreasonably excessive delay before the applicants initiated the review proceedings; and
- (c) the applicants failed to establish a *prima facie* case.

The merits

- (d) The first respondent acted procedurally fairly in deciding to publish the notice in the Gazette in terms of section 11(1) of the Act.

I deal with the defences *seriatim*.

- (a) Second applicant’s *locus standi*

Mr Miles Derek Lappeman (“Lappeman”), deposed to the founding affidavit in his personal capacity as the first applicant. He also deposed to a confirmatory affidavit in a representative capacity as a director of the second applicant. In this latter capacity he referred to a resolution of the second applicant authorising him to so act and stated that it was annexed to the affidavit. There was no such annexure to the affidavit. The authority was disputed but no resolution was later filed with the replying affidavit. However, the lack of authority did not mean that the second

applicant had no *locus standi*. The effect of such lack of authority or mandate can only mean that the second applicant was not before Court, as the purported representative had no authority to represent it. For purposes of this judgment the second applicant is not before the Court.

(b) Unreasonable delay in bringing review application

The notice sought to be reviewed was published in the Government Gazette on 23 September 1999. By letter dated 26 October 1999 the first respondent communicated with the applicants' attorneys about the claim. The applicants' attorney's reply was dated 13 January 2000 and referred in the heading of the letter to "Notice No 2141/1999 dated 23 September 1999". Therefore by 13 January 2000 the applicants were aware of the notice in the Gazette. This application to review the publication of the notice was issued on 30 August 2002. That is a period of about two years and seven months.

Mr Bergenthuin, appearing for the applicants, argued that there was no indication when the applicants became aware of the publication, but that applicants asked for the reasons for the publication on 29 May 2000, and these were not given. To date, so the argument went, the reasons have not been given. I have already referred to the fact that the applicants must have been aware of the publication of the notice at the very latest by 13 January 2000. Although the Act does not stipulate the time limit for bringing review applications, section 7 of the Promotion of Administrative Justice Act² ("PAJA") provides that proceedings for judicial review, must be instituted without delay and not later than 180 days. I am mindful of Mr Bergenthuin's submission that this review should be in terms of the common law, in terms whereof the application should be brought within a reasonable time.³ In terms of the common law, what is reasonable will often depend on the

2 Act 3 of 2000.

3 *Chesterfield House (Pty) Ltd v Administrator of the Transvaal & Others* 1951 (4) SA 421 (J) at 424D-E; *Shepherd v Mossel Bay Liquor Licensing Board* 1954 (3) SA 852 (C).

circumstances of each case. It appears our courts viewed unreasonable delay to be a bar to review proceedings, hence a delay of two months⁴ has been held to preclude such proceedings. However, in another case⁵ the court indicated that in exceptional circumstances a delay of three months might be condoned. I do not agree with the submission that this application should be determined according to the common law. The Constitution and PAJA have changed the common law in this regard.⁶

There was no application for condonation *in casu*.

Ms Cassim, for the first and fourth respondents, contended that the delay *in casu* was not only unreasonably long, but also that the first respondent was prejudiced by investing money and man power in the matter in the interim.

I am satisfied that the delay of two years and seven months was unreasonable in the circumstances regard being had to the provisions of section 7 of PAJA. On this point alone, the application ought to fail. However, if I am wrong in my finding, I deal with the remaining defences hereunder.

(c) *Prima facie* case

The attack on the first respondent's decision to publish the notice in the Gazette was that he had no basis to decide that just and equitable compensation had not

4 *Hepworths Ltd v Thornloe & Clarkson Ltd* 1922 TPD at 336.

5 *Visser & Du Toit v Union Government* 1943 CPD 297.

6 See section 33 of the Constitution and PAJA. See also *Farjas (Pty) Ltd v Regional Land Claims Commissioner, KZN* 1998 (2) SA 900 at 910F; [1998] 1 All SA 490 at 498E.

been received, or put differently, that the facts he relied on did not objectively justify the finding that just and equitable compensation had not been received.

Grounds of review at common law have been held to be :

- (a) absence of jurisdiction
- (b) interest in the cause, bias, malice or corruption
- (c) gross irregularity and
- (d) admission of inadmissible or incompetent evidence, or the rejection of admissible or competent evidence⁷

Dodson J, as he then was, stated, however, that the “right to administrative justice has now been elevated to the status of a constitutional right by reason of section 24 of the interim Constitution.”⁸ The interim Constitution has, of course, since been overtaken by the final Constitution.⁹ In compliance with section 33(3) of the Constitution, the PAJA¹⁰ has been enacted. This Act has widened the grounds of review considerably. Section 6(2) of that Act provides:

- “(2) A court or tribunal has the power to judicially review an administrative action if -
- (a) the administrator who took it -
 - (i) was not authorised to do so by the empowering provision;
 - (ii) acted under a delegation of power which was not authorised by the empowering provision; or
 - (iii) was biased or reasonably suspected of bias;
 - (b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;
 - (c) the action was procedurally unfair;

7 Section 24(4) of Act 59 of 1959.

8 In *Farjas (Pty) Ltd v Regional Land Claims Commissioner*, KZ-N 1998 (2) SA 900 at 910F; [1998] 1 All SA 490 at 498E.

9 Act 108 of 1996, section 33.

10 See footnote 2 above.

- (d) the action was materially influenced by an error of law;
- (e) the action was taken -
 - (i) for a reason not authorised by the empowering provision;
 - (ii) for an ulterior purpose or motive;
 - (iii) because irrelevant considerations were taken into account or relevant considerations were not considered;
 - (iv) because of the unauthorised or unwarranted dictates of another person or body;
 - (v) in bad faith or
 - (vi) arbitrarily or capriciously;
- (f) the action itself -
 - (i) contravenes a law or is not authorised by the empowering provision; or
 - (ii) is not rationally connected to -
 - (aa) the purpose for which it was taken;
 - (bb) the purpose of the empowering provision;
 - (cc) the information before the administrator; or
 - (dd) the reasons given for it by the administrator;
- (g) the action concerned consists of a failure to take a decision;
- (h) the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; or
- (i) the action is otherwise unconstitutional or unlawful.”

None of the grounds in the PAJA were mentioned as grounds for the review of the first respondent’s decision. The ground relied upon was that the facts relied on by the first respondent do not objectively justify a finding that the claimants’ forebears were not justly and equitably compensated. In other words, a wrong decision has been made. The contention that the claimants’ ancestors were justly and equitably compensated is based on the equation, a wrong one in my view, of market value with just and equitable compensation. Just and equitable compensation is defined in the Constitution¹¹ and in my view, also entails a consideration of, among others,

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11 See the provisions of section 25(3) of the Constitution quoted at para 8 above.

- (1) the amount of compensation or any other consideration received in respect of the dispossession, and the circumstances prevailing at the time of dispossession;
- (2) market value of the land in question
- (3) whether the dispossessed person/persons were also compensated for improvements on the dispossessed land;
- (4) the comparative adaptability of the dispossessed and compensatory land to the needs of the dispossessed;
- (5) whether *solatium* was paid or not.

As will appear below from the facts considered by the first respondent in making the decision to publish the claim in the Government Gazette, he was entitled to make the decision.

- (d) the first respondent's action was procedurally fair :

Section 3(2) and (5) of PAJA provides that -

“(2)(a) A fair administrative procedure depends on the circumstances of each case.

In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1)-

- (i) adequate notice of the nature and purpose of the proposed administrative action;
- (ii) a reasonable opportunity to make representations;
- (iii) a clear statement of the administrative action;
- (iv) adequate notice of any right of review or internal appeal, where applicable; and
- (v) adequate notice of the right to request reasons in terms of section 5.

- (5) Where an administrator is empowered by any empowering provision to follow a procedure which is fair but different from the provisions of subsection (2), the administrator may act in accordance with that different procedure.”

For purposes of sub-section (5) above, section 11(1) read with section (2) constitute the empowering provisions for the first respondent *in casu*. These provisions have been quoted above at paragraph 8.

[10] It is undisputed that the second respondent lodged the claim in the prescribed manner in compliance with section 11(1)(a). The claim was in writing, on a duly completed form as prescribed by the first respondent and the Rules Regarding Procedure of Commission.¹² The second respondent and the rest of the claimants are direct descendants of the people dispossessed of the land being claimed in the contemplation of section 2(1)(c) or are a community as contemplated in section 2(1)(d) of the Act. The dispossession of the right in the land took place on 3 May 1948, being a date after 19 June 1913 as provided in section 2(1)(a). The claim was lodged on 20 December 1995, according to the first respondent's date stamp on the claim form. This is in compliance with section 2(1)(e) which prescribes that the claim must have been lodged not later than 31 December 1998. All the facts in this paragraph are common cause.

[11] The only dispute was with regard to section 2(2) in that the applicants allege that the dispossessed people were adequately compensated as explained at paragraph 9(c) above. With regard to this disputed issue the first respondent deposed to the fact that after receipt of the claim he procured several reports, some of which were procured only after the decision to publish was taken. It was agreed among the parties that any reports procured after the decision to publish the claim was made must not be considered for purposes of this judgment. Two reports were procured before the gazetting of the claim, namely annexure "ML2" to the applicants' founding affidavit entitled Report No 184/96 - Claim by the heirs (eleven families), for Bulhoek 75 JQ district of Rustenburg, North West Province and annexure "X" to the first respondent's answering affidavit. It is to these two reports that I will look for purposes of this judgment.

12 See Government Notice 703 published in Government Gazette 16407 of 12 May 1995 as amended at rule 3(1)(a)(i).

[12] According to annexure “ML2” the compensatory farms were not suitable for livestock farming and crop cultivation. The dispossessed families are said to have suffered loss of their livestock on these farms, and they had to purchase other livestock. The farms are said to not have sufficient water, whereas water is said to be plentiful on Vaalkop as the Elands River cuts across it. The Vaalkop Dam is on the border of the farm. It appears mineral rights were reserved and separated from surface rights some time around 1992, which would mean that at the time of dispossession in 1948 mineral rights were also transferred to Hermann.¹³ As against this position, mineral rights were reserved and separated from Waaikraal surface rights before this farm was transferred to the claimants’ ascendants.¹⁴ It therefore appears that while the claimants’ forebears were dispossessed of their land with its mineral rights, they were compensated with land without mineral rights.

[13] Annexure “X” reiterates the contents of annexure “ML2” in the main, in particular with regard to abundance of water on Vaalkop, suitability for farming, both agricultural and pastoral and other features except the position with regard to mineral rights, about which it is silent. What is however noteworthy in annexure “X” is the mention of a mining corporation next to Vaalkop, which makes mineral rights significantly important.

[14] Based on the abovementioned facts, the first respondent deposed as follows:

“My conclusion was that it was difficult to determine whether the exchange was just and equitable at that time. However in my opinion, and having applied my mind to the version of the claimants, that the lands which were received as an exchange were not appropriate. Consequently I arrived at the conclusion that the claim was not precluded by provisions of section 2(2) of the Act . . .

In the light of all the above facts and the procedures after lodgment of the claim having been followed, I was satisfied that: -

- The claim had been lodged in the prescribed manner;
- The claim is not precluded by the provisions of section 2(2)(a) and/or (b) of Act No 22 of 1994, more particularly in that ‘it is difficult to determine whether the exchange was just and equitable at that time . . .
- The claim is not frivolous or vexatious”¹⁵

13 See Record p 32, first paragraph.

14 Record p 33, penultimate paragraph; mineral rights separated on 19 February 1937; p 34 first paragraph mineral rights reserved on 3 and 24 April 1937; p 34 second paragraph mineral rights reserved on 20 October 1930.

15 Record pp 120 to 122 at paras 4.5 and 4.6.

[15] It was contended on behalf of the applicant that the test for the decision to gazette is an objective one, while for the participating respondents it was contended that the test is subjective. Both Ms Cassim and Ms Kathree, the latter appearing for the second respondent, relied on the wording of section 11(1) of the Act for their contention. Section 11(1) states that: -

“If the regional land claims commissioner having jurisdiction is satisfied that -” (my emphasis)

[16] It is not necessary for me to decide whether the test for the decision to gazette a claim is objective or subjective. It is not necessary to do so because from the facts extracted from annexure “ML2” and “X” above, it appears that the claimants have an arguable case on the question whether or not the compensatory land given the claimants’ forebears was just and equitable. Whether such case is sufficiently strong to sustain a restitution claim, is matter for inquiry in the main action.

“To require applicants to prove their cases before the Regional Land Claims Commissioner would be to exceed the constitutional and statutory mandates conferred on the Commission. In broad terms, the Act attributes an investigative and facilitative role to the Commission, on the one hand, and an adjudicatory function to the Court on the other.

A preliminary assessment of the claim is the meaning which is, in my view, conveyed by the words ‘ the claim is not precluded by . . . ’”¹⁶

[17] Costs

Ms Cassim argued that the applicants be ordered to pay the costs of suit, such costs to include costs of engaging senior counsel, as the matter is complex. I am not quite convinced that the matter is so complex as to justify senior counsel. However, no answer was proffered to this application and I note that the applicants also engaged silk, which may suggest that the applicants were also of the view that a silk was merited.

The following order is made :

1 The application is dismissed.

16 Per Dodson J (as he then was) in *Farjas (Pty) Ltd v Regional Land Claims Commissioner, KZN SA* at p 923I - 924A referred to above at footnote 6.

- 2 The first, third, fourth and fifth applicants, are ordered to pay the costs, such costs to include the costs of engaging senior counsel for the first and fourth respondents, jointly and severally the one paying the others to be absolved.

JUDGE J MOLOTO

On behalf of the applicants :

Adv J G Bergenthuin SC instructed by *Gildenhuis van der Merwe Inc*, Pretoria

On behalf of the first and fourth respondents:

Adv N Cassim SC instructed by *The State Attorney*, Pretoria

On behalf of the second respondent:

Adv F Kathree instructed by the *Legal Resources Centre*, Johannesburg.