

IN THE LAND CLAIMS COURT OF SOUTH AFRICA

Held at **RANDBURG** on **24 August 1999**
before **Gildenhuis J**

CASE NUMBER: LCC116/98

In the matter of

THE FORMER HIGHLANDS RESIDENTS

Claimants

concerning

**THE AREA FORMERLY KNOWN AS THE HIGHLANDS (NOW NEWLANDS,
EXTENSION 2) PRETORIA**

JUDGMENT

GILDENHUIS J:

Factual background

[1] The claimants, or their forebears, were owners of properties in the Township of Highlands. The claimants allege that they, or their forebears, were dispossessed of their properties in the mid nineteen sixties as a result of past racially discriminatory laws or practices. With the exception of three intervening claimants, with whom I will deal later in this judgment, they all lodged claims for restitution in terms of the Restitution of Land Rights Act ¹ before the cut-off date of 31 December 1998, as imposed by section 2(1)(e) of that Act. I will refer to that Act as “the Restitution Act”. The claims were investigated by the Regional Land Claims Commissioner for Gauteng and North West Province and referred to this Court in terms of section 14(1) of the Restitution Act. The claimants do not claim actual restoration of the dispossessed land, but equitable redress in the form of monetary compensation.

[2] After the claims were referred to this Court, the claimants filed statements of claim. With the exception of the intervening claimants, they all employed the same attorney, Mr Moshwana, to act for them. The Department of Land Affairs indicated that it wished to participate in the action,

1 Act No 22 of 1994, as amended.

and delivered responses in respect of all the claims.² For purposes of convenience and saving costs, the claims were processed together and will be heard together.³ I have convened several pre-trial conferences to identify and limit the issues in dispute, and to point out where the particulars of the claim fall short of the requirements of the Restitution Act. These shortcomings relate mainly to the family trees of claimants whose forebears were dispossessed, and who claim as their direct descendants.⁴

Applicable statutory provisions

[3] In terms of section 2(1) of the Restitution Act, 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) it is a deceased estate dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices; or
- (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 was lodged not later than 31 December 1998.”

The wording of section 2(1) originates from an amendment contained in section 2 of the Land Restitution and Reform Laws Amendment Act,⁵ to which Act I shall refer as the Amending Act. The Amending Act provides that the provisions of section 2 (as presently worded) must be deemed

2 Responses may be delivered under rule 38(7)(b) of the Land Claims Court rules and fulfill a function similar to that of a plea.

3 Rule 12(1) of the Land Claims Court Rules.

4 In terms of section 2(1)(c) of the Restitution Act.

5 Act No 18 of 1999.

to have come into operation on 2 December 1994.⁶ All proceedings which were pending before a court when the Amending Act came into operation on 23 April 1999, must be disposed of in accordance with the amended wording of section 2, unless the interests of justice require otherwise.⁷

[4] Certain issues of law became evident in respect of some of the claims. At a pre-trial conference held by the parties on 19 August 1999, it was agreed that these issues would be argued and decided by the Court before evidence is led in the action.⁸ The issues came before me and were argued on 24 August 1999.

Failure to lodge claims with the Commission on Restitution of Land Rights before 31 December 1998

[5] The first legal issue argued before me concerns a claim lodged by M O Buys, D M Walton and R E Patrick. They allege (in their statement of claim) that they are the direct descendants of the late Christinah Magdalena Morris, who was an owner of a property known as Lot No 97, Highlands, and who was dispossessed of that property as a result of the Group Areas Development Act.⁹ They lodged their claim with the Commission on Restitution of Land Rights (hereinafter “the Commission”) before 31 December 1998, and the Commission referred it to the Court in terms of section 14(1) of the Restitution Act.

[6] On 10 August 1999, I granted leave to three further claimants, E M Magamana, M K Thuketana and J M Rikhotso, to intervene in this claim. I will refer to them as the intervening claimants. They allege (in their statement of claim) that they are the direct and immediate descendants of the late Eric Magamana, and that they bring a restitution claim in that capacity. The intervening claimants alleged that the late Magamana and the said Christinah Magdalena Morris lived together in the property which is the subject of this claim. Their statement of claim then proceeds with the following allegations (I quote *verbatim*):

“ERIC MAGAMANA purchased the property which is the subject of this case but because of the law of the country at the time black people were not able to be the registered owner of property. This did not

6 Section 15(2) of the Amending Act.

7 Section 14 of the Amending Act.

8 This is permissible under Rule 57(1) of the Land Claims Court Rules.

9 Act No 69 of 1955.

apply to coloured people and accordingly ERIC MAGAMANA has the property registered in the name of CHRISTINA MORRIS. The improvements made the property were paid by ERIC MAGAMANA who collected the rentals during such periods when the property was not occupied by himself and/or CHRISTINA MORRIS.

On or about the 15th September 1964 CHRISTINA MAGDALENA MORRIS and so too ERIC MAGAMANA was dispossessed of the land in favour of the City Council of Pretoria as a result of the Group Areas Development Act.”

[7] The Department of Land Affairs pleaded that the intervening claimants did not lodge a claim with the Commission prior to their intervention in the case and prior to 31 December 1998. At a pre-trial conference on 19 August 1999, it was admitted on behalf of the intervening claimants that they have not submitted any claim to the Commission in terms of section 10 of the Restitution Act. The Department of Land Affairs then notified their attorney that, on the basis of this admission, a point *in limine* will be taken that the intervening claimants do not have a right to restitution by virtue of the provisions of section 2(1)(e) of the Restitution Act.¹⁰

[8] Section 2(1) of the Restitution Act sets out the different categories of persons who shall be entitled to restitution. One of the categories is direct descendants of a dispossessed person.¹¹ Section 2(1)(e) of the Restitution Act qualifies all the categories of claimants, and provides that a person shall only be entitled to restitution if a claim¹² for such restitution was lodged with the Land Claims Commission by not later than 31 December 1998.

[9] There are limitations to the right to restitution. One limitation is the cut-off date of 31 December 1998. Mr Havenga, on behalf of the intervening claimants, submitted that where a constitutional right is concerned, as is the case here,¹³ a generous rather than a legalistic

10 Section 2(1) of the Restitution Act is quoted in full in par [3] of this judgment.

11 See section 2(1)(c) of the Restitution Act.

12 The Restitution Act (in section 1) defines “claim” as follows:

“(a) any claim for restitution of a right in land lodged with the Commission in terms of this Act; or
 (b) any application lodged with the registrar of the Court in terms of Chapter IIIA for the purpose of claiming restitution of a right in land;”

13 The constitutional right concerned is contained in section 25(7) of the Constitution (Act No 108 of 1996, as amended), which reads:

“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”

perspective should be favoured.¹⁴ Mr Havenga conceded that, if section 2(1)(e) (containing the cut-off date) is “narrowly interpreted”, the intervening claimants would not be entitled to restitution. He submitted that if a restitution claim had been lodged with the Commission in respect of a particular property by one or more timely descendants, late descendants would be able to piggy-back home on the claims lodged by the timely descendants. This, so he argued, would constitute substantial compliance with the Restitution Act. He pointed out that the wording of neither section 2(1)(c) nor section 2(1)(e) requires a claim for restitution to be lodged by or on behalf of a descendant personally.

[10] Apart from section 2(1)(d), which entitles a community or part of a community to restitution of a dispossessed right in land, the Restitution Act limits restitution to persons who have lodged claims. The important elements are that the claimants¹⁵ must be persons, and that those persons must have lodged claims. This is evident from the following:

- S section 10(1) entitles a person to lodge a claim;
- S section 2(4) provides for the apportionment of a right to restitution or equitable redress between direct descendants who have lodged claims; and
- S the Court may order the restoration of land¹⁶ or the payment of compensation¹⁷ only to a claimant. A claimant is defined as a person who has lodged a claim.¹⁸ A claim is defined as a claim for restitution lodged with the Commission in terms of the Restitution Act.¹⁹

14 Chaskalson P held in *S v Makwanyane and Another*, 1995 (3) SA 391 (CC) at 404A, that where constitutional principles are at stake, legislation must be construed in a way “which secures for individuals the full measure of its protection”.

15 “Claimant” is defined in section 1 of the Restitution Act as “any person who has lodged a claim”.

16 Section 35(1)(a) of the Restitution Act.

17 Section 35(1)(c) of the Restitution Act.

18 Section 1 of the Restitution Act.

19 Section 1 of the Restitution Act. Under that definition, “claim” also includes an application lodged with the Registrar of the Court in terms of Chapter IIIA of the Restitution Act. Chapter IIIA deals with direct access to the Court, that is access not consequent upon a referral by the Commission under section 14(1). In terms of section 38B, direct access is only possible by a person or a representative of a community who has lodged a claim not later than 31 December 1998.

[11] Although Mr Havenga conceded that the restitution process cannot be of unlimited duration,²⁰ he urged me to interpret the Restitution Act purposively,²¹ in a manner which would secure for the intervening claimants the full benefit of their constitutional right to restitution.²² The benefit provided by the Constitution is, however, subject to limitation by “an Act of Parliament”, in this case the Restitution Act.²³ A purposive approach to the Restitution Act makes it clear that it is not focused simply on restoring the *status quo ante*.²⁴ Dodson J pointed out in the case of *Ex Parte Mayibuye: In Re Sub 121, Farm Trekboer*:²⁵

“The legislation is also a product of compromise and aims at achieving a balanced approach to the problem of redressing racial dispossessions which does not amount to a simple turning back of the clock. Thus, there are limits placed on the number of potential claims. One of these is that only racial dispossessions after 19 June 1913 can form the basis of a claim. There is also a limited time period in which claims can be lodged.

The Restitution Act limits the benefit of restitution to persons who have lodged their claims with the Commission by 31 December 1998. The intervening claimants endeavoured to ride home on the fact that other claimants have timeously lodged claims with the Commission in respect of the same property. I fail to appreciate how the fortuitous circumstances of other claimants having lodged claims in respect of the same property can relieve the intervening claimants from complying with the threshold requirements of the Restitution Act.²⁶ Late demands cannot gain validity just because other people lodged timely claims for restitution in respect of the same

20 He referred to the need to “put the country’s unjust past behind us”, as expressed by Dodson J in *Minister of Land Affairs and Another v Slamdien and Others* [1999] 1 All SA 608 (LCC) at 623b.

21 He referred to past decisions of the Court, where such an approach was adopted: *Dulabh and Another v Department of Land Affairs* 1997 (4) SA 1108 (LCC) at 1123I-1128B, [1997] 3 All SA 635 (LCC) at 648e to 652a; *Minister of Land Affairs and Another v Slamdien and Others* supra n 20 at 615b-617d; *Blaauwberg Municipality v Bekker and Others* [1998] 1 All SA 88 (LCC) at 103c; *Ex parte Mayibuye: In Re Sub 121, Trekboer* [1998] 4 All SA 604 (LCC) at 615d and 616a-b.

22 The benefit is contained in section 25(7) of the Constitution (quoted in note 13 above) and is subject to an Act of Parliament which would determine the extent of the benefit.

23 Section 25(7) of the Constitution, supra n 13.

24 See the analysis of Dodson J in *Minister of Land Affairs and Another v Slamdien and Others* supra n 20 at 617e-624d.

25 Supra n 21 at 615g.

26 In the case of *In re Macleantown Residents’ Association*, 1996 (4) SA 1272 (LCC); [1996] 3 All SA 259 (LCC), to which Mr Havenga referred, this Court distinguished between a claim on behalf of a community and a claim by individual claimants. This case is no authority for the proposition that an individual claimant is entitled to rely on a restitution claim lodged by a different claimant to show compliance with the threshold requirement of section 2(1)(e).

property. I conclude that the intervening claimants do not have a right to restitution, and that their statement of claim must be struck out.

Dispossessions of land belonging to deceased estates

[12] The Department of Land Affairs filed special pleas to the restitution claims brought by the descendants of the late Jacob Golliath, by the descendants of the late George Cornelis Veldman and by the descendants of the late Austin Augeal. The special pleas are based on the fact that, when the properties which were registered in the names of Golliath, Veldman and Augeal were disposed of, they (as registered owners) had already passed away. Accordingly, so the Department pleads, it is the estates of the deceased owners, and not the owners themselves, that were dispossessed.²⁷ In the result, the restitution claims accrue to the estates, and not to the descendants. None of the descendants, in the papers before the Court, professed to be an executor of any of the estates concerned, or to be acting on behalf of any of those estates. The distinction is more than an academic one. If the estate is entitled to restoration or equitable redress, those benefits must go to the heirs, which are not necessarily the same persons as the descendants.

[13] There are good reasons why a dispossessed deceased estate had been given the right to claim restitution, as opposed to the direct descendants of the deceased person. Firstly, the heirs and legatees of the deceased person obtain vested rights to the assets of the estate as from the death of the deceased.²⁸ The right to restitution is such an asset. Secondly, the heirs and legatees of the deceased estate are not necessarily the same persons as the descendants of the deceased person. If the legislature would have awarded the right to claim restitution consequent upon the dispossession of a deceased estate to the descendants of the deceased person, it might thereby have frustrated the will of the deceased person or the law of intestate succession.

[14] My view that, if a deceased estate has been dispossessed, the legislature never intended that the claim for restitution should accrue to the descendants of the deceased person, finds support in the wording of section 2(3) of the Restitution Act, which deals with a similar situation and which reads as follows:

“(3) If a natural person dies after lodging a claim but before the claim is finalised and -

27 This distinction is apparent from section 2(1)(b) of the Restitution Act. Section 2(1) is quoted in full in par [3] above.

28 Corbett, Hahlo et al, *The Law of Succession in South Africa*, (Juta & Co Ltd, Cape Town 1980) at 133ff.

- (a) leaves a will by which the right or equitable redress claimed has been disposed of, the executor of the deceased estate, in his or her capacity as the representative of the estate, alone or, failing the executor, the heirs of the deceased alone; or
 - (b) does not leave a will contemplated in paragraph (a), the direct descendants alone,
- may be substituted as claimant or claimants.”

[15] The distinction between a claim by the executor of a dispossessed estate and a claim by the descendants of a dispossessed person, was explicitly made in the 1999 amendment of section 2(1). Section 2(1) was amended many times. Immediately before the 1999 amendment, it read:²⁹

- “(1) A person shall be entitled to restitution of a right in land if -
- (a) he or she is a person or community dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices or a direct descendant of such a person; and
 - (b) the claim for such restitution is lodged not later than 31 December 1998.”

The above formulation gave rise to many difficulties. Mr Grobler, for the Department of Land Affairs, submitted that the 1999 amendment of section 2(1) is, in effect, a declaratory or interpretative amendment.³⁰ It put to rest uncertainties of interpretation innate in the previous wording. I agree with that submission.

[16] Even under the wording of section 2(1) as it read before the 1999 amendment,³¹ it could not be said that a deceased person who passed away before the dispossession is a person who was

29 In terms of section 3(1) of the Land Restitution and Reform Laws Amendment Act, No 63 of 1997.

30 See Du Plessis “Statute Law and Interpretation” in Joubert (ed), *The Law of South Africa*, Vol 25 (Butterworths, Durban 1991) at para 285(c) on p 254:

“It should, however, be borne in mind that a declaratory enactment (say X) usually settles a dispute, in that it authoritatively opts for one possible interpretation of the legal position (say A) in preference to another (say B). If X is therefore promulgated, it validly excludes possibility B with, it is submitted, truly retroactive effect.”

31 The wording is quoted in para [15] above.

dispossessed of a right in land.³² Consequently, even under that wording, the descendants of the deceased person could not be descendants of a person who was dispossessed of a right in land, and they would have no claim in their capacity as descendants.³³ The Amending Act did not alter the position. Although section 14 of the Amending Act allows me in the interests of justice to dispose of these proceedings otherwise than in accordance with the amended wording of section 2, I cannot find any good reason for doing so.

[17] I conclude that the descendants of Golliath, Veldman and Augeal are not descendants of a person who was dispossessed of a right in land, and consequently they are not entitled to restitution under section 2(1)(c) or any other section of the Restitution Act. Claims in respect of those dispossessions will have to be made by the estates concerned. Accordingly, the special pleas filed by the Department of Land Affairs must be upheld. This finding does not exclude possible claims by the estates, if the statutory prerequisites for such claims have been met.

[18] During argument, Mr Grobler indicated that the Department of Land Affairs has no intention to obstruct valid restitution claims. If the claimants are also heirs in the dispossessed estates, they may still have a right to claim in that capacity. I make no finding on that issue. The claimants should, however, be given leave to amend their particulars of claim so as to incorporate, on a different basis, any restitution claim which they may have.

Costs

32 Upon the death of a person, his or her heritable estate passes to a management body with legal personality. See Van Zyl, *Universele Opvolging in die Suid-Afrikaanse Erfreg*, Annale, Universiteit van Stellenbosch, Vol 5, Series B, No 1, 1981 at 281:

“The true position is that the persons in control of a deceased estate, that is, the interim curator, if any, the executor or executors, the Master and his assistants and the State, acting through the Court, *constitute a management body with legal personality* . . .

This management body, constituted to administer the deceased estate in question, is the universal successor of the deceased at his death.”

33 It might be argued that the personality of a deceased person survives his or her death, at least for the period while the estate is being administered, and that the dispossession of the deceased estate is equivalent to the dispossession of the deceased person. If this was the approach of the legislature, it would not have been necessary to enact section 2(1)(b) at all.

[19] Litigation for the restitution of land rights is public interest litigation. Unless special circumstances exist, this Court has, in the past, not given orders for costs.³⁴ In this case, I do not consider that any special circumstances exist which would justify costs orders. Accordingly, I will make no orders as to costs.

Orders

[20] For the reasons set out above, I make the following orders:

- (a) In the matter of M O Buys, D M Walton and R E Patrick (original claimants) and E M Magamana, M K Thuketana and J M Rikhotso (intervening claimants) v The Department of Land Affairs:
 - (i) the intervening claimants do not have a right to restitution in terms of the Restitution of Land Right Act, 1994;
 - (ii) the statement of claim of the intervening claimants is struck out; and
 - (iii) no order is made as to costs.

- (b) In the matter of M Shongwe and Four Others v The Department of Land Affairs, the matter of D Veldman and Eight Others v The Department of Land Affairs and the matter of D Augeal v The Department of Land Affairs:
 - (i) the special pleas filed by the Department of Land Affairs in each of the cases are upheld and the claimants' particulars of claim are set aside;
 - (ii) the claimants are given leave, if so advised, to file amended particulars of claim by 30 September 1999; and
 - (iii) no order is made as to costs.

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34 No costs orders were granted in the cases of *Minister of Land Affairs and Another v Slamdien and Others* [1999] 1 All SA 608 (LCC) and *Boltman v Kotze Community Trust concerning Farm Quispberg 805, district of Calvinia*, LCC5/99, 11 August 1999, as yet unreported. The Court found that special circumstances did exist which warranted costs orders in the cases of *Farjas (Pty) Ltd and Another v Regional Land Claims Commissioner, KwaZulu-Natal* 1998 (2) SA 900 (LCC), [1998] 1 All SA 490 (LCC) and *Singh and Others v North Central and South Central Local Councils and Others* [1999] 1 All SA 350 (LCC).

Heard on: 24 August 1999

Handed down: 17 September 1999

For the Claimants:

Mr G N Moshoana, of *Mohlaba and Moshoana Inc*, Pretoria.

For the Department of Land Affairs:

Mr G L Grobler SC, with him Ms S K Hassim, instructed by the State Attorney, Pretoria.

For the intervening claimants:

Mr H Havenga, instructed by *Attorney R E Megaw*, Pretoria.