

IN THE LAND CLAIMS COURT OF SOUTH AFRICA

Held at **Cape Town** on 17 Nov 1999 and 3 Aug 2000
before **Meer** and **Moloto AJJ**

CASE NUMBER: LCC152/98

Decided on: 12 October 2000

In the matter of

DEPARTMENT OF LAND AFFAIRS

Applicant

and

WITZ M

Respondent

concerning

VARIOUS PORTION OF GRASSY PARK

JUDGMENT

MEER AJ:

Introduction

[1] This is an interlocutory application by the Department of Land Affairs in terms of rule 57 of the Land Claims Court Rules¹ for the determination of certain preliminary issues pertaining to a claim by the respondent (the claimant for restitution in the main claim) under the Restitution of Land Rights Act (“the Act”)². Rule 57(1) provides:

- “(1) Should the Court, upon application by any party or of its own accord, be of the opinion that there is an issue of law or fact in a case which may conveniently be decided -
- (a) before further documents are delivered in the case;
 - (b) before evidence is led in an action; or
 - (c) separately from some other issue,
- the Court may order a separate hearing of that issue . . .”

1 Land Claims Court Rules published in Government Gazette 17804, 21 February 1997, as amended.

2 Act 22 of 1994, as amended.

The claim is for restitution of rights in land in respect of several properties situated in Grassy Park, Western Cape, and is for financial compensation only.

[2] The respondent claims that his predecessors, of the White group, were dispossessed of their rights in land when the properties were declared to be in a Coloured Group Area in terms of the Group Areas Act³ in 1961, and thereafter had to be sold by law to members of the Coloured group at a loss. The claim for compensation stems from the allegation that the properties were bought by the respondent's grandfather purely for investment purposes, and when they were forcibly sold at a loss the respondent and his family were deprived of a secure investment, and accordingly prejudiced. This appears more fully from a detailed account of the facts and circumstances giving rise to the claim at paragraphs [9] and [10] below.

[3] At a conference in terms of rule 30 of the Land Claims Court Rules it was agreed that the rule 57 interlocutory hearing will determine the following preliminary issues:

- (I) Whether this court will grant leave to the claimant in terms of section 38B(1) of the Act to lodge this application for financial compensation;
- (II) Whether the claimant was dispossessed of a right in land in the present case;
- (III) Whether such dispossession occurred as a result of a racially discriminatory law;
- (IV) Whether the claimant has complied with the procedural requirements of the Act, more particularly whether a claim should have been lodged with the Regional Land Claims Commission prior to coming to court, and if so whether such failure, if any, to comply is fatal to the claim.

3 The properties were declared to be "affected" in terms of the Group Areas Act 77 of 1957. A permit was granted in terms of the Group Areas Act 36 of 1966, restricting the sale of the property to members of the Coloured group only within a period of one year. An endorsement was effected on the title deed.

[4] At the hearing the applicant properly conceded that issue I fell to be answered in the affirmative. The applicant also properly conceded with regard to issue IV that the claimant had complied with the procedural requirements of the Act and that a claim need not have been lodged with the Commission. Concessions were also made in respect of issues II and III. However, the Court of its own accord⁴ questioned, in relation to issues II and III, whether there had in fact been a dispossession. This concern stemmed from the fact that the properties were not sold within a year as required by a Group Areas Act permit⁵ and that title to two of the properties had been retained, as appears more fully at paragraph [12] below. The respondent was asked to address these matters before a determination on issues II and III could be made. That was done and, these issues now remain to be determined by me. Before proceeding to do so, I deem it necessary to briefly allude to issues I and IV.

Leave to the claimant in terms of section 38B(1) to lodge the claim for financial compensation
(Issue I)

[5] The restitution claim was brought by way of direct access to the Court in terms of section 38B(1) of the Act which states:

“Notwithstanding anything to the contrary contained in this Act, any person who or the representative of any community which is entitled to claim restitution of a right in land and has lodged a claim not later than 31 December 1998 may apply to the Court for restitution of such right: Provided that leave of the Court to lodge such application shall first be obtained if -

- (a) an order has been made by the Court in terms of section 35 in respect of a right relating to that land; or
- (b) a notice has been published in the *Gazette* in terms of section 12(4) or 38D(1) in respect of that land and the period specified in the said notice has expired.”

Section 12(4), in turn, reads as follows:

“If at any stage during the course of an investigation by the Commission, the Chief Land Claims Commissioner is of the opinion that the resources of the Commission or the Court would be more effectively utilised if all claims for restitution in respect of the land, or area or township in question, were to be investigated at the same time, he or she shall cause to be published in the *Gazette* and in such other manner

4 Inquisitorial powers are accorded to the Court by section 32(3)(b) of the Act. See also the discussion in *Mlifi v Klingenberg* [1998] 3 All SA 636 (LCC); 1999 (2) SA 674 (LCC) at paras [105] - [111].

5 See above n 4.

as he or she deems appropriate, a notice advising potential claimants of his or her decision and inviting them, subject to the provisions of section 2, to lodge claims within a period specified in such notice.”

Unbeknown to the respondent notices in terms of section 12(4) of the Act were published in the Government Gazette on 6 September 1996⁶ inviting potential claimants “to lodge their claims for restitution of land rights in Grassy Park (Hardvlei), Cape Town by not later than 30 November 1996”. On 17 January 1997 a further notice in terms of section 12(4) was published in the Government Gazette⁷ to the effect that “the final date of 30 November 1996 has been extended to 31 March 1997 for the lodgment of restitution claims for Grassy Park (Hardvlei), Cape Town”.

[6] Mr Farlam, for the respondent, drew attention to the fact that there had not been strict compliance with section 12(4) in the publication of the notices. The notices were published in the Government Gazette only, and not “in such other manner” as well as specified in section 12(4). Whilst this may indeed be so, section 38B(1) does not suggest that there be strict compliance with section 12(4). This is so because it is the publication of a notice in the Gazette in terms of section 12(4) (and not publication in “such other manner” as well) which is referred to in section 38B(1)(b), and which gives rise to the provision that leave must be obtained. Mr Farlam went on to explain that the respondent was completely ignorant of the time periods specified in the Government Gazette, as such notices do not reach the attention of many people. There had been no negligence or fault attributed to the respondent in not being aware of the notices and accordingly the respondent was entitled to leave to lodge his claim. Another problem with the notices alluded to by Mr Farlam is that the notices were published by the Deputy Land Claims Commissioner instead of by the Chief Land Claims Commissioner as required by section 12(4). There is, I believe, little substance to this view as section 7(3) of the Act allows for the delegation of duties to the Deputy Land Claims Commissioner.⁸ This

6 Government Gazette 17400.

7 Gazette 17718.

8 Section 7(3) as amended states:

“(3) If the office of the Chief Land Claims Commissioner is vacant or if the Chief Land Claims Commissioner is absent or unable to perform any or all of his or her functions, the Deputy Land Claims Commissioner shall act in his or her stead and whilst the Deputy Land Claims Commissioner so acts, he or she shall perform all the functions of the Chief Land Claims Commissioner.”

notwithstanding, I accept the respondent's explanation that the failure to publish the notices through a widely accessible medium and not his negligence led to his not being aware of them. This and the fact that the claim appears, in my view, to be neither vexatious nor frivolous, leads me to conclude that the interests of justice favour the granting of leave to lodge his claim with the Court. This view is, I believe, in accordance with section 34 of the Constitution⁹ which provides for rights of access to the courts.¹⁰ The claimant is accordingly granted leave in terms of section 38B(1)(b) of the Act to lodge an application for restitution of a right in land in which financial compensation is claimed.

Has claimant complied with the procedural requirements of the Act? (Issue IV)

[7] The procedural requirements for a claim brought by way of direct access under section 38B(1) are specified in rule 53A. It must be noted that the direct access provisions inserted at Chapter IIIA by the 1997 amendments¹¹ to the Act introduced a drastic change. Prior thereto direct access to the Court by claimants was not possible. Instead, claimants were required to lodge their claims with the Land Claims Commission in terms of section 10, and the Commission undertook investigatory work and prepared referral documents for the Court under section 11. The effect of the direct access provision was that claimants were given the option to approach the Court via the Commission in terms of Section 10, or directly via section 38B(1) before 31 December 1998.¹² In the latter case the investigation of the claim and preparation of referral papers became the responsibility of the claimants. I am satisfied that the respondent satisfactorily undertook that responsibility and that he satisfactorily lodged his claim directly with the Court in terms of sections 38B(1) read with rule 53A. It was not necessary for him to lodge the claim with the Land Claims Commission.

The section was revised by s 3(b) of the Land Restitution and Reform Laws Amendment Act, 18 of 1999 and the amendment operates retrospectively (s 15(2)).

9 The Constitution of the Republic of South Africa, Act 108 of 1996.

10 See the discussion on s34 in *Dormehl v Minister of Justice and others* 2000 (2) SA 987 (CC) especially at 990A.

11 Inserted by s 29 of Land Restitution and Reform Laws Amendment Act, 63 of 1997.

12 This, however, does not preclude those claimants who lodged their claims with the relevant commission before 31 December 1998 from nonetheless applying to this Court directly in terms of section 38B(1).

Issues II and III

[8] The questions posed by issues II and III can, I believe, conveniently be dealt with together. They probe a threshold requirement for a successful restitution claim, namely “dispossession as a result of racially discriminatory laws or practices” which, if satisfied, will enable the respondent to proceed with his claim for financial compensation. 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.

In addition section 2(2) provides that 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.”

A consideration of these issues requires a closer look at the background facts and circumstances giving rise to the restitution claim.

Background Facts

[9] The respondent's late grandfather, Joseph Witz, of the White group, bought various properties in Lotus River, Grassy Park in 1947 allegedly for investment purposes. Proclamation 34 of 1961 issued in terms of the Group Areas Act 77 of 1957 declared the properties to be for occupation and ownership by members of the Coloured group. Joseph Witz however continued to own the properties until his death in 1967. The will of Joseph Witz bequeathed the Grassy Park properties to his son Jack Witz, the respondent's late father. Jack Witz took transfer of the Grassy Park properties as erven 2240, 2247, 2473 and 2257¹³ Grassy Park on 19 February 1969 under deed of transfer T3688/69. The transfer occurred under the auspices of a permit which was issued to Jack Witz in terms of section 21 of the Group Areas Act 36 of 1966 authorising him to acquire the properties. An endorsement on the deed of transfer reflected that the properties had been acquired by virtue of a permit and that the acquisition was conditional upon their being subdivided and sold to Coloured persons within a year. The endorsement states as follows:

“ENDORSEMENT IN TERMS OF THE GROUP AREAS ACT No 36 of 1966

The within property was acquired under authority of a permit issued in terms of Section 21 of the Group Areas Act No 36/66 and is subject to the following condition. That the properties will be subdivided as per Annexure 'A' and transferred to members of the qualified group within one year of this permit. Vide permit dated 2/1/1969 (and signed by the Registrar of Deeds).”

[10] In accordance with the endorsement the properties were subdivided as follows :

Erf 2240: was subdivided into six erven being erven 2241-2246 Grassy Park.

Erf 2247: was subdivided into seven erven, being erven 2248-2243 and the remainder of Erf 2247, Grassy Park.

Erf 2473: was subdivided into thirteen erven, being erven 2474-2485 and the remainder of Erf 2473, Grassy Park.

Erf 2257: remained undivided.

[11] Although the properties were subdivided by Jack Witz as directed by the permit, they were not sold within a year as also so directed. The first sales of the properties occurred in 1972 when erf 2240, erf 2247

13 These have since been subdivided into several erven.

and part of erf 2473 were sold to Maigroup Investments for R21000 (twenty one thousand rand). Most of the remaining subdivisions of erf 2473 were sold to Coloured persons by Jack Witz from 1972 to 1981 for a total amount of approximately R7250 (seven thousand two hundred and fifty rand).¹⁴ Two erven, however, remained in the name of Jack Witz (a fact which proved to be a hurdle to the respondent as appears more fully below). These were the remainders of erven 2247 and 2473 respectively. The founding affidavit states:

“Erf 2247 is a remainder portion of the original property, and as such is still in the name of Jack Witz. A copy of the Aktex print-out is annexed hereto, marked ‘MW19’.

...

Erf 2473 is a remainder portion of the original property and as such is still in the name of Jack Witz. A copy of the Aktex print-out is annexed hereto, marked ‘MW26’.”

Erf 2257 was sold to the Community Development Board on 9 June 1972 for R11 335 (eleven thousand three hundred and thirty five rand), and is currently owned by the Cape Metropolitan Council. According to the respondent his father was forced to sell the properties because failure to comply with the permit would have led to their expropriation by the Community Development Board or some other authority.

Was claimant dispossessed of a right in land in the present case. Did such a dispossession occur as a result of a racially discriminatory law? (Issues II and III)

[12] From the above chronology of events and circumstances it became apparent to the Court that the respondent faced two hurdles in an enquiry as to whether he was dispossessed of a right in land. As has already been alluded to,¹⁵ the Court raised these hurdles of its own accord. The first of these is that despite the endorsement on the Group Areas permit requiring Jack Witz to sell the subject properties within a year (and the aforementioned assertion by the respondent that failure to do so would have resulted in their being

14 Erf 2474 to R Valentine in 1974 for R1350, Erf 2475 to A Gallant in 1981 for R1000, Erf 2476 to S Adams in 1972 for R2500, Erf 2483 to W Warner in 1973 for R800, Erf 2484 to J Stringer in 1973 for R800, Erf 2485 to D Mathews in 1979 for R800. Some of these properties have since been resold. The respondent has ascertained the names of the current owners by means of a deeds office search, and the current owners have been served with copies of the restitution claim.

15 Above para [4].

expropriated) he sold them only between 1972 and 1981. They were clearly not expropriated for failure to comply with the endorsement on the permit. This poses the question whether these sales were in fact forced and constituted dispossessions, or whether, as is alleged by the applicant, the sales were arms-length, open market transactions over a period of time. The second hurdle faced by the respondent is that two of the subject properties continue to be registered in the name of his late father. This leads one to ask whether there can be a dispossession when title to two of the affected properties is still held by the person allegedly dispossessed, or, put differently, how one can claim to have been forced by law to sell all the affected properties when one still holds title to two of them.¹⁶ The respondent was unable to respond to these matters at the hearing, and accordingly sought leave to supplement his papers in an attempt to deal with them. The hearing was postponed *sine die* and the parties were granted leave to supplement their papers, if necessary.

[13] Two supplementary affidavits filed by the respondent attempted to address the concerns of the Court. The first of these is the primarily hearsay or speculative evidence of Jean Witz, the respondent's mother, who was married to the late Jack Witz until 1983. On the question of the sales being forced she states as follows:

“7. . . As far as I can remember, my late ex-husband was being pressurised by the State to sell the properties. He successfully approached the State for an extension of the permits on a number of occasions, so that the Properties would not be expropriated prior to his having an opportunity to sell them. As will be seen below, whilst sales were concluded they were entered into in order to have the properties transferred to meet the requirement of the State.

8. . . . The bulk of the land was sold to Maigroup Investments (Pty) Ltd (“Maigroup”) and the Community Development Board. Jack did not have any shares or any interest in Maigroup.

...

10. I remember my late ex-husband also selling intermittently other erven that made up the Properties, to private buyers. As far as I was aware, my late ex-husband received little compensation for these sales. In fact, because of the requirement to get rid of the Properties, the erven were, as I understood it, transferred to the buyers prior to the full purchase price being paid. The transfers were effected to meet the deadlines imposed by the State. . . . [I]t proved difficult to recover all the money owed and the majority of the individual purchasers were not really in a financial position to pay for the properties, and finally he gave up.

16 Local Trustees of the Brownlee Congregational Church and Another v Goldacre and Another, LCC 21/97, 24 June 1998, [1998] JOL 2749 (LCC), internet web site <http://www.law.wits.ac.za/lcc/1998/brownlee.html>.

11. . . . He had become very exasperated and had felt pressurised by the whole situation, and in particular being compelled to get rid of the properties, when there was no real market for them. . . . He at all times felt that he had no choice in the matter whatsoever.”

On the subject of the two properties still being registered in the name of the late Jack Witz, she states:

“12. It came as a complete surprise to me to learn, from Claimant’s application, that my late ex-husband is still reflected in the Deeds Office as the owner of the remainder of Erf 2247 and the remainder of Erf 2473, which, from the map annexed hereto marked ‘MW40’, appear to be part of public roads. (The erven appear to be part of Hilton Street and Civic Road, respectively). . . [T]here has been an oversight in respect of these erven, which were effectively expropriated for public use, without any legal transfer of title.

13. . . . I am not aware of who would have built the roads in question without expropriating the land.”

The second supplementary affidavit filed on behalf of the respondent, is that of Allan Witz, the respondent’s attorney. This affidavit demonstrates, with reference to the map of the area¹⁷ and photographs, that remainders of erven 2473 and 2247 now form part of public roads in Grassy Park, namely, Civic and Hilton Roads respectively. A supplementary affidavit filed by the applicant in response, cautions that as the affidavit of Jean Witz contains hearsay evidence the Court should give such weight to it as it deems appropriate as required by section 30(3) of the Act.¹⁸

[14] It was not refuted that the remainders of erven 2473 and 2247 formed parts of public roads. That this is indeed the case is evident from a map reflecting the subdivided subject properties. The remainder of erven 2473 is reflected on the map of the subject properties as part of Civic Road and the remainder of erf 2247 as part of Hilton Road, both in Grassy Park. I am prepared to accept on the basis of the depiction of these erven as public roads on the map , that erven 2473 and 2247 were at some declared to be public roads.

17 Annexure “MW40” of the papers.

18 S 30(1), (2) and (3) provide:

“Admissibility of evidence

(1) The Court may admit any evidence, including oral evidence, which it considers relevant and cogent to the matter being heard by it, whether or not such evidence would be admissible in any other court of law.

(2) Without derogating from the generality of the foregoing subsection, it shall be competent for any party before the Court to adduce-

(a) hearsay evidence regarding the circumstances surrounding the dispossession of the land right or rights in question and the rules governing the allocation and occupation of land within the claimant community concerned at the time of such dispossession; and

(b) expert evidence regarding the historical and anthropological facts relevant to any particular claim.

(3) The Court shall give such weight to any evidence adduced in terms of subsections (1) and (2) as it deems appropriate.”

[15] The question as to whether the sales of the properties constituted a dispossession is not as easily resolved. Whilst the evidence of Jean Witz to the effect that Jack Witz obtained extensions of the permit on a number of occasions, might explain how the latter managed to hold onto the properties, it does not suffice to make out a case that the sales of the properties by Jack Witz constituted a dispossession. I make mention also that the evidence of Jean Witz is not the best evidence that permit extensions were granted. The better evidence would have been the extended permits themselves, which surprisingly the respondent made no effort to secure.

[16] In my quest to establish whether the sales of the properties constituted dispossessions, I called for and retrieved the file of Jack Witz from the National Archives of South Africa, Cape Town Archives Repository in terms of the inquisitorial powers accorded to me under section 32(3)(b) of the Act,¹⁹ I called for and retrieved the file of Jack Witz from the National Archives of South Africa, Cape Town Archives Repository. Given the ease with which the file was accessed I am surprised that neither of the parties consulted and referred to this vital source of information. A clearer picture of the facts and circumstances surrounding the acquisition and sale of the properties by Jack Witz emerges from the documents in the file as appears below.

[17] On 15 October 1968 Jack Witz applied for a permit in terms of section 21 of the Group Areas Act, 1966 to acquire the Grassy Park properties out of the estate of his late father. This was necessitated by the fact that as a disqualified person he was prevented by the Group Areas Act²⁰ from acquiring the affected properties bequeathed to him, without the requisite permit. The permit application as appears from the archival file, is on form GC 162 of the Department of Community Development and indicates that the nature of the application is to “Acquire in terms of will” various erven at Lotus River and Grassy Park. It is signed by Jack Witz. The form reflects that the Estate Late Joseph Witz²¹ is the registered owner of the

19 See above n 4. See the discussion Van Loggerenberg “Die hof vir klein eise: adversief of inkwisitories” July 1987 *De Rebus* 343 at 344.

20 S 23 of Group Areas Act, 36 of 1966.

21 Page 3 of form GC162.

property and is signed by Lionel Frank, the executor of the estate. Following on the application, a letter dated 29 October 1968 from the executor addressed to the Regional Representative, Department of Community Development, states as follows:

“We confirm the interview Mr. Jack Witz, the son of the deceased, had with your Mr van der Werken on the 25th instant when you agreed:

- (a) To give him an extension for a further year after his late Father’s death to dispose of all the properties which were bequeathed to our client and which have been zoned for the Coloured Group.
- (b) That he be allowed to dispose of the erven piecemeal.

We have been confronted by difficulty from the Deeds Office with regard to transfer being passed to our client, in that they want a Certificate from you to the effect that your Department has no objections to the transfer to our client Mr. Jack Witz.

As it is urgent that transfer be registered as soon as possible, this transfer being one in a batch in which other heirs are also interested and which are not zoned for the Coloured Area, we shall be grateful if you would write to us forthwith so that we can submit your letter to the Registrar of Deeds.

On a separate Annexure ‘A’ we give you a description of 24 of the properties, 3 to follow in due course.

These are the sub-divided properties but for Deeds Office purposes the description you should use in your Certificate is as per Annexure ‘B’.”

[18] Thereafter on 2 January 1969 a permit was issued to Jack Witz to acquire the properties subject to the condition “that the properties be subdivided as per Annexure ‘A’ and transferred to members of the qualified group within one year from the date of issue of this permit.” On 5 December 1969, less than a month before the permit was due to expire, a letter signed by J.Witz was sent to the Secretary, Department of Community Development, seeking an extension to the permit to retain ground in a Coloured area. Extracts from the letter state:

“I have sold 5 of these plots during the year. . . .As stated previously, I am keen to sell the ground as evidenced by the fact that the property is in the hands of estate agents, one of whom I have instructed to approach your department.”

A handwritten note on the letter dated 8 December 1969, by an official of the Department states as follows:

“Mnr Mouton

Mnr Witz het mnr de Wit genader om die oorblywende erwe aan die G.O. Raad aan te bied. Hy is aangeraai om dit eers aan die afdelingsraad aan te bied. Hy sal hierdie kantoor verwittig van onderhandelinge. Sy saak vir ‘n permit sal dan moontlik sterker wees.”

[19] The last document in the file is a letter which appears to be dated 8 January 1970 to J Witz from HS Mouton, Regional Representative in response to Witz’s letter of 5 December 1969. The letter states:

“As regards the disposal of the properties in question, I shall be glad to learn the outcome of your negotiations with the Cape Divisional Council. Upon receipt hereof your application for an extension of the permit, will be accorded further attention.”

A handwritten note on this letter dated 20 February 1970 states:

“ Mnr Witz het verwittig dat hy die erwe aan die Raad gaan aanbied dat die afdelingsraad nie belangstel nie.”

[20] As the archival file had not featured in the proceedings, I furnished the parties with copies thereof. I also invited them to submit representations with reference thereto, as to whether there had been a dispossession or a voluntary acceptance of the permit conditions to sell the properties in accordance with the subdivisions emanating from the permit application of Jack Witz.

[21] Submissions by respondent asserted that the archival file of Jack Witz supports the contention that there was a dispossession as a result of a racial law. Respondent also concludes that in the light of the chronology of events discernible from the file an extension to Jack Witz’s permit must have been given. This in my view does not necessarily follow. Applicant submitted that the documents in the archival file reveal there was a voluntary acceptance of the permit conditions to sell the property in accordance with the subdivisions emanating from the permit application, and that there was no forced sale. A letter from the Chief Land Claims Commissioner to the State Attorney annexed to applicant’s submissions supports this contention.

[22] The vexed question as to whether the sales of the properties constituted a dispossession can, I believe best be determined by a careful assessment of the implications and effect of Jack Witz’s taking transfer of the properties. As a disqualified person, who was prevented by law from inheriting the properties in an affected area, Jack Witz voluntarily elected to acquire the properties from the estate of the late Joseph Witz under a permit which he voluntarily applied for. He further elected to effect the subdivisions of the 4 erven bequeathed to him in accordance with Annexure “A” to the permit and sell them piecemeal. The extract from the executor’s letter of 29 October 1968 suggests that Annexure “A”, describing the subdivisions, was submitted in motivation of the permit application.

[23] Jack Witz’s voluntary election to acquire the properties through a permit, subdivide and sell them piecemeal was the preferred but by no means the only option available to him. The alternative option would have been not to elect to acquire the properties, but to allow the law to run its course. In that latter instance

the executor of the estate of the late Joseph Witz in whom the estate vested, would have had to sell the properties to Coloured persons or the Community Development Board, as opposed to transferring them to a disqualified heir. Jack Witz would then have been able to inherit the proceeds of the sale. Had the executor sold the properties out of the estate in this way, and had he not realized a just and equitable price there would have been a dispossession of the estate in terms of section 2(1)(b)²² of the Act.

[24] Presumably Jack Witz elected to acquire and sell the properties himself because he thought he would realize a better price than the executor. To this end he caused the properties to be subdivided, enlisted the services of an estate agent and sold over a period of time, not because of, but despite the Group Areas Act. The logical consequence of the act of electing to acquire and sell in this manner, must be a bar to a claim of dispossession. Put another way his election resulted not in his dispossession, but on the contrary in his (taking) *possession* of the properties and being accorded the opportunity to sell with the possibility of realising their investment potential, the purpose for which the properties were in any event purchased. The subsequent failure of the purchase prices to meet with expected investment potential, if indeed that is what occurred, cannot in my view constitute a dispossession as contemplated by the Act. To do so would be akin to compensating him for the failure of a business risk. The fiscus cannot be expected to bear the brunt of that loss.

[25] What also emerges from the archival file, is that there are no records of extensions to the permit granted to Jack Witz in 1969. How he managed to hold on to the properties beyond 1970 remains uncertain, and even gave rise to speculation at the resumed hearing, by Mr Farlam that the properties were not taken away from Jack Witz because he was a White person.

22 Section 2(1)(b) quoted in para [8] above, which permits a deceased estate to be dispossessed of a right in land was introduced by section 2 of the 1999 Amendment Act (see n 8 above). As indicated in n 8 above the revised section 2(1)(b) was deemed to have come into operation on 2 December 1994. Section 14 of the Amendment Act provides that all proceedings which were pending when it 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. Respondent's claim was pending on 23 April 1999. I cannot find any good reason why the amended wording of section (2), in particular that pertaining to the dispossession of an estate at section 2(1)(b), should not have application in this case, in the interests of justice. See also *In re The Former Highlands Residents* 2000 (1) SA 489 (LCC) at para [3]. For a discussion on the dispossession of a deceased estate and the position and standing of the executor and heirs in relation thereto see *Jacobs v Department van Grondsake (Erf 38 Upington)*, LCC 120/99, 28 February 2000, internet web site <http://www.law.wits.ac.za/lcc/2000/12099sum.html>.

[26] In the circumstances I am unable to find that there was a dispossession. At best there was the sale of investment properties precipitated by the Group Areas Act, sales, which it is fair to assume would inevitably have occurred at some stage, such being the nature of investments.

[27] An alternative argument was proffered on behalf of the respondent in the event of my finding, as I have, that there was not a dispossession as a result of a racial law. Mr Farlam argued in the alternative, that as the respondent's predecessors had not only been dispossessed of land but also of a right in land, even if it were to be found that there were no forced sales, or dispossession of land, there was nonetheless a dispossession of a right in land. This stemmed from the fact that the endorsement on the title deed had downgraded the right in land enjoyed by the respondent's predecessors from that of free and unfettered ownership and the right to sell to whomsoever they might please, to that of fettered ownership. Such a downgrading in itself, he argued, constituted a dispossession and entitled the respondent to compensation.

[28] I do not accept that a downgrading as formulated by Mr Farlam constitutes a dispossession and entitles one to compensation. It is trite that apartheid land legislation and the Group Areas Act in particular imposed restrictions on rights pertaining to all land in South Africa. The rights of landowners to sell to whomsoever they wished were restricted, the rights of tenants to rent wheresoever they wished, were restricted and so on. All rights in property, if one likes, were downgraded. It would be ludicrous if the mere fact of a downgrading on its own, unaccompanied by a tangible loss or deprivation, or even an extinction in title was considered sufficient to constitute a dispossession, entitling a claimant to compensation. This would permit a claim in respect of every right held in land in South Africa, for all such rights were impacted upon or downgraded by apartheid land legislation, whether or not the holders of these rights incurred resultant loss. Persons would be entitled to claim on the basis of the theoretical downgrading of their rights in land alone. The result would be a limitless pool of claimants and an unsustainable burden on the fiscus for compensation. That would be an absurd result which cannot be said to be a purpose which underlines the Constitution and the Act.²³

23 *Minister of Land Affairs and Another v Slamdien and Others* [1999]1 All SA 608 (LCC) at para [33](ii).

[29] In order for there to be a dispossession as contemplated by the Act there must be a deprivation or loss beyond the mere theoretical downgrading of a right in land. This is reflected in the definitions ascribed to dispossession and the understanding thereof in the context of land reform, as referred to in *Dulabh and Another v Minister of Land Affairs*.²⁴

“[28] . . .

- According to Jowitt's Dictionary of English Law, dispossession means ‘ouster’. ‘Ouster’ is defined as follows :

‘Dispossession, a wrong or injury which may be sustained in respect of hereditaments, corporeal or incorporeal, carrying with it the deprivation of possession, for thereby the wrongdoer gets into the actual occupation of the land or hereditament and obliges him who has a right, to seek his legal remedy in order to gain possession and damage for the injury sustained. An ouster may either be rightful or wrongful. A wrongful ouster is a disseisin.’

‘Ouster of the freehold is effected by abatement, intrusion, discontinuance of [sic] deforcement.’

- Black's Law Dictionary defines dispossession as follows :

‘*Ouster, a wrong that carries with it the amotion of possession. An act whereby the wrongdoer gets the actual occupation of the land or hereditament. It includes abatement, intrusion,²⁵ disseisin,²⁶ discontinuance,²⁷ deforcement.²⁸*’

[29] The literature on dispossession pertaining to the context of land reform tends to contemplate dispossession in relation to ethnic groups that have suffered a particular kind of deprivation: the confiscation and denigration of their resources and culture under imperialism and colonial exploitation.”²⁹ (Some footnotes omitted).³⁰

[30] I note in passing that a recurring argument by Mr Arendse, for the applicant, was that the Act did not contemplate the restitution of rights in land to persons of means advantaged by the previous regime,

24 See *Dulabh and Another v Department of Land Affairs* 1997 (4) SA 1108 (LCC); [1997] 3 All SA 635 (LCC)

25 “*The act of wrongfully entering or taking possession of the land of another.*” [Page 642]

26 “*To dispossess, to deprive.*” [Page 377]

27 “*Ending, causing to cease, ceasing to use, giving up, leaving off, refers to the termination of a project, structure, highway or the like.*” [Page 372]

28 “*To withhold wrongfully, to withhold the possession of lands from one who is entitled to them.*” [Page 347]

29 See further the examples cited in *Dulabh* above n 24 at fn 22.

30 *Dulabh* above n 24 at paras [28] - [29].

such as the respondent, whose claim pertained to land purchased for investment purposes. The argument suggested that a consideration of the factors which the court is required to have regard to in terms of section 33 of the Act,³¹ in particular those of justice and equity, should lead to a determination that there had not been a dispossession in this case, and accordingly prevent the respondent from benefitting under the Act. I am mindful of the fact that the respondent and his predecessors do not fit the profile of persons usually associated with dispossessions in this country. The victims of land dispossessions and forced removals in South Africa were mostly the poor and disadvantaged. Whilst they are acknowledged in the preamble to the Act, the relevant part of which states:

“AND WHEREAS legislative measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken to promote the achievement of equality;”

there is nothing to suggest that persons beyond this category cannot claim restitution. This was succinctly alluded to by Dodson J in *Minister of Land Affairs and Another v Slamdien and Others*³² where, he commented as follows on this excerpt from the preamble:

“... That, in my view, points to the category of persons who are meant to be the primary (though not exclusive) beneficiaries of the restitution process.”³³

31 S 33 provides:

“In considering its decision in any particular matter the Court shall have regard to the following factors:

- (a) The desirability of providing for restitution of rights in land to any person or community dispossessed as a result of past racially discriminatory laws or practices;
- (b) the desirability of remedying past violations of human rights;
- (c) the requirements of equity and justice;
- (cA) if restoration of a right in land is claimed, the feasibility of such restoration;
- (d) the desirability of avoiding major social disruption;
- (e) any provision which already exists, in respect of the land in question in any matter, for that land to be dealt with in a manner which is designed to protect and advance persons, or categories of persons, disadvantaged by unfair discrimination in order to promote the achievement of equality and redress the results of past racial discrimination;
- (eA) the amount of compensation or any other consideration received in respect of the dispossession, and the circumstances prevailing at the time of the dispossession;
- (eB) the history of the dispossession, the hardship caused, the current use of the land and the history of the acquisition and use of the land;
- (eC) in the case of an order for equitable redress in the form of financial compensation, changes over time in the value of money;
- (f) any other factor which the Court may consider relevant and consistent with the spirit and objects of the Constitution and in particular the provisions of section 9 of the Constitution.”

32 See above n 23.

33 Above n 23 at para [29].

Anomalous though it may appear to some, persons of means are not excluded from the operation of the Act. Had Parliament intended their exclusion it would have said so expressly.

[31] For all of the above reasons I find that the claimant was not dispossessed of a right in land. Neither party asked for an award of costs, in keeping with the general policy of this Court not to grant cost orders in restitution cases,³⁴ they being in the genre of social litigation I accordingly do not award costs. I make the following finding:

1. Leave is granted to the claimant in terms of section 38B(1) to lodge his application for financial compensation;
2. The claimant was not dispossessed of a right in land;
3. Issue III falls away because of the finding in 2 above.
4. The claimant has complied with the procedural requirements of the Act. It was not necessary for the claim to have been lodged with the Regional Land Claims Commissioner;
5. There is no order for costs.

34 See *Hlatswayo and Others v Hein* [1997] 4 All SA 630 (LCC); 1998 (1) BCLR 123 (LCC); 1999 (2) SA 834 (LCC) at paras [15] - [26] per Dodson J on the issue of costs in labour tenant matters; *Farjas (Pty) Ltd and Another v Regional Land Claims Commissioner, Kwazulu-Natal* 1998 (2) SA 900 (LCC); [1998] 1 All SA 490 (LCC) at para [59] on costs in Restitution matters.

ACTING JUDGE Y S MEER

I agree

ACTING JUDGE J MOLOTO

For the applicant:

Mr Arendse instructed by *State Attorney, Cape Town.*

For the respondent:

Mr Farlam instructed by *Smiedt-Witz, Cape Town.*