

IN THE LAND CLAIMS COURT OF SOUTH AFRICA

Held at **DURBAN** on 7 March 2002
before **Meer, Gildenhuis AJJ** and **Hugo** (Assessor)
Decided on: 23 April 2002

CASE NUMBER: LCC 100/99

In the application of:

MOGAMBERRY MOODLEY NO

Applicant

relating to

the restitution of rights in land in Sub 1 of SB3 of the farm Cato Manor No 812

JUDGMENT

GILDENHUYS AJ:

[1] This is an interlocutory application in a restitution of land rights claim in which is sought the substitution of the claimant and a sequential amendment of his statement of case, as well as a declaratory order that the restitution claim was properly lodged in terms of section 2(1)(e) of the Restitution of Land Rights Act.¹ I shall refer to that Act as “the Restitution Act”. Notices to participate in the proceedings were delivered by some interested parties (including the Department of Land Affairs). The parties indicated, however, that they would abide the decision of the Court in this interlocutory application.

[2] According to an affidavit filed in support of the application by the applicant (Mogamberry Moodley), his grandfather, the late Vedachellam was married in community of property to his grandmother, the late Lutchmi. Subdivision 1 of SB3 of the farm Cato Manor No 812, Durban, was part of their joint estate during their lifetime. Vedachellam died during 1955. A certain Valaytham Moodley was appointed executor of his estate on 15 March 1956 by the Master of the Supreme Court at Pietermaritzburg. The property was proclaimed a white group area on 6 June 1958. Lutchmi died in 1964. Valaytham Moodley was appointed executor, also of her estate, by the Master of the Supreme Court at Pietermaritzburg on 29 October 1964. By reason of the group areas legislation applicable at the time, the property could not be transferred to the heirs of the

1 Act 22 of 1994, as amended.

estates. The executor, Mr Moodley, sold it on 15 October 1965 by private treaty to the Community Development Board. It was transferred to the Community Development Board on 27 January 1966. The applicant contends that the sale was a compulsory sale and that it constituted a dispossession as envisaged in the Restitution Act. The executor, Mr Moodley, passed away on 27 November 1966.

[3] On 9 January 1997 a land claim form in respect of the property was signed by Krishna Moodley, Mogamberry Moodley and Rookmaney Moodley as the claimants. All three are descendants of the late Vedachellam and the late Lutchmi. The present applicant is one of the three. The claim form was received by the Regional Land Claims Commissioner by at the latest 21 January 1997.² The claim form indicates Vedachellam and Lutchmi as the persons who lost the right in land. The claimants did not indicate on the claim form itself the capacity in which they bring the claim. According to an annexure submitted with the claim form, they are the sole intestate heirs of a deceased son of the late Vedachellam and the late Lutchmi. The late Vedachellam and the late Lutchmi also had other children. The claimants did not profess to bring the claim also on their behalf.

[4] Under 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.”

2 This is indicated by the stamp date of the Commission for the Restitution of Land Rights which appears on the claim form.

The procedure for lodging a claim, as envisaged in section 2(1)(e), is contained in section 10(1) of the Restitution Act.

[5] The Regional Land Claims Commissioner investigated this claim together with a large number of other claims relating to the same area, and referred them to this Court for hearing.³ Together with the referral, the Regional Land Claims Commissioner filed a detailed report.⁴ In response to the referral report, a statement of case was filed dated 15 January 2001. In that statement of case, the claimants are described as follows:

“13. The claimants are grandchildren and great grandson of the Late Vedachellam and Lutchmi. At the time of submitting this statement of case an application has been made to the Master of the High Court to appoint them as executors dative in the estates of the Late Vedachellam and Lutchmi. It is clear that the estates of the Late Vedachellam and Lutchmi were dispossessed of the right in land after 1913 as a result of the Group Areas Act.”

The names of the individual claimants were not set out in the statement of case. In the heading, the claimants are referred to as “Mogamberry Moodley and Others”.

[6] On 19 January 2001 the Master of the High Court, Pietermaritzburg, appointed the applicant as sole executor in the estate of the late Lutchmi and on 13 August 2001 as sole executor in the estate of the late Vedachellam.

[7] On their statement of case, the applicants are faced with at least two difficulties. Firstly, the restitution claim clearly vests in the executor of the estates of the late Vedachellam and the late Lutchmi. Secondly, can the restitution claim lodged by the three descendants on 21 January 1997 constitute compliance with section 2(1)(e) of the Restitution Act, given that it was not lodged by the executor by 31 December 1998? In an endeavour to overcome these difficulties, the present applicant applied to this Court for an order that the previous claimants be substituted by himself as executor in the estates of the late Vedachellam and the late Lutchmi, and that the statement of claim be amended to reflect *inter alia* this substitution. In the same application, he also asked for

3 The referral was done in terms of section 14(1)(d) of the Restitution Act.

4 The report was filed in terms of section 14(2) of the Restitution Act.

a declaratory order that section 2(1)(e) of the Restitution Act was duly complied with. Oral evidence was submitted and the application was argued before us on 7 March 2002. We are satisfied that the substitution and the application for the amendment of the statement of claim must be granted. They are necessary to bring the claim within the confines of section 2(1)(b) of the Restitution Act. The declaratory order, however, is more problematic. I will proceed to consider it.

[8] The right to restitution of property dispossessed as a result of past racially discriminatory laws or practices, is a constitutional right contained in the Bill of Rights.⁵ The standing of a claimant for the assertion of such a right must be considered in a manner which will promote the spirit, purport and objects of the Bill of Rights.⁶ An injunction that takes the form of a limitation which might altogether bar the right to restitution, must be strictly interpreted⁷ so as not to deny to a person a right which the Constitution had intended to give.⁸ That requires a broad interpretation to the standing of a claimant.⁹ If the injunction was complied with to such an extent that the objects of the right to restitution contained in the Constitution and explicated in the Restitution Act were achieved, it would be substantial compliance,¹⁰ sufficient to satisfy the injunction.¹¹

5 Section 25(7) of the Constitution of the Republic of South Africa, Act 108 of 1996. See also section 121(2) of the Interim Constitution, Act 200 of 1993.

6 Section 39(2) of the 1996 Constitution.

7 See *Union Government v Rosenberg (Pty) Ltd* 1946 AD 120 at 129.

8 *Carmichele v Minister of Safety & Security (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC), 2001 (10) BCLR 998 (CC) at para [33], [36], [39] and [54].

9 *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC) at para [165] and [167].

10 Compare the *dictum* by Henochsberg J in *John Newmark & Co (Pty) Ltd v Durban City Council* 1959 (1) SA 169 (N) at 179G (dealing with section 254(2) of Ordinance 21 of 1942 requiring prior notice of a damages claim to be given to a local authority): “It seems to me, as has been held elsewhere in South Africa in respect of similar enactments, what is required by such a section as sec. 254 (2) is substantial performance of the duty imposed. In my view too strict an interpretation should not be put on this section.”

11 Real compliance does not necessarily mean literal compliance. See *Comrie and Another v Liquor Licensing Board for Area 31 and Others* 1975 (2) SA 494 (N) at 496E, approved by the Cape High Court in *Guardian National Insurance Co Ltd v Van der Westhuizen* 1990 (2) SA 204 (C) at 213D.

[9] Section 2(1)(e) of the Restitution Act is a peremptory injunction. It was held by Van Winsen AJA in *Maharaj and Others v Rampersad*¹² that, in deciding whether there has been compliance with an injunction-

“... the object sought to be achieved by the injunction and the question whether this object has been achieved are of importance.”¹³

The provisions of the Restitution Act¹⁴ make it clear that the objects of the required procedure for bringing a restitution claim are threefold. Firstly, to exclude restitution claims not lodged by 31 December 1998.¹⁵ Secondly, to enable the Commission on Restitution of Land Rights to inform interested parties of the claim.¹⁶ Thirdly, to enable the Commission to investigate the claim, and to prepare a report for the Court,¹⁷ or to achieve and implement a settlement agreement.¹⁸ In this case, all these objects have been achieved. The claim was accepted by the Commission as a claim for further investigation in terms of section 11(1) of the Restitution Act, and a report on the claim has been submitted.

[10] The only facet amiss in the claim form is that it was given by three descendants (who may ultimately also be heirs), and not by the executor of the two estates. It is legally possible for heirs to take valid steps for protecting the assets of an estate.¹⁹ The claim form signed by the three descendants was intended to secure the right to claim. The claim form states that the prejudiced parties are Vedachellam and Lutchmi, although it was not stated that they had both passed away when the alleged dispossession occurred. The standard claim form provided by the Commission does not cater for a claim by a deceased estate. That might be so because section 2(1) of the

12 1964 (4) SA 638 (A).

13 Above n 12 at 646E.

14 Particularly section 2(1) and sections 10-12 of the Restitution Act.

15 Section 2(1)(e) of the Restitution Act.

16 Section 11(6)(a) of the Restitution Act.

17 Under section 14(2) of the Restitution Act.

18 In terms of section 42D of the Restitution Act.

19 *In re Kara* LCC 44/98, 7 November 2001, available from www.law.wits.ac.za, at para [17]-[18].

Restitution Act, as it read at the time when the claim form was lodged,²⁰ did not provide in so many words for a claim by a deceased estate. The present wording²¹ is an interpretative amendment,²² which clarified but did not change the previous legal position.²³ An informed interpretation of the claim form in the light of the surrounding circumstances should, however, bring to light that the true claimants are the deceased estates. The persons who signed the claim form were obviously acting for the benefit of heirs.

[11] I do not think that the signing of a restitution claim form by a person not directly entitled to a right of restitution at the time, is necessarily fatal to the claim. If it is clear (albeit from external sources) that the claim was lodged for the gain of persons ultimately entitled to the benefit thereof, that would be substantial compliance with section 2(1)(e) of the Restitution Act. In the case of *Legal and General Assurance Co Ltd v South African Railways and Harbours*²⁴ the court had to consider the validity of a notice of claim in terms of the Railways and Harbours Control and Management (Consolidations) Act²⁵ given by a person who at the time did not have a cause of action against the Railway Administration, but who was entitled to cession of such a

20 Section 2(1) of the Restitution Act was amended many times. On 21 January 1997, when the claim form was lodged, it read:

“(1) A person shall be entitled to enforce restitution of a right in land if-

- (a) he or she is a person or community contemplated in section 121 (2) of the [Interim] Constitution or a direct descendant of such a person;
- (b) the claim is not precluded by section 121 (4) of the [Interim] Constitution; and
- (c) the claim for such restitution is lodged within three years after a date fixed by the Minister by notice in the *Gazette*.”

21 Quoted in para [4] above.

22 The amendment applies retrospectively from 2 December 1994. See the Land Restitution and Reform Laws Amendment Act 63 of 1997.

23 *In re Former Highlands Residents* 2000 (1) SA 489 (LCC) at para [16].

24 1962 (1) SA 660 (O).

25 Section 64 of Act 70 of 1957 (since repealed).

cause of action. The court held that it could never have been the intention of the legislature that such a person “is not entitled to give the required notice under the section before he has actually acquired the rights under the cession.”²⁶ Similar reasoning must apply to a notice given in terms of the Restitution Act by a claimant who himself had no claim for restitution, if it was the intention at the time that the claim would enure to the advantage of the persons ultimately entitled to its benefits.

[12] For the above reasons, the following order is made:

- (a) Mogamberry Moodley in his capacity as executor in the estates of the late Vedachellam and the late Lutchmi is hereby substituted as claimant in this case.
- (b) The applicant is granted leave to amend his statement of case by substituting it with the amended statement of case annexed to the notice of motion dated 22 October 2001.
- (c) It is declared that the applicant’s claim for restitution of a right in land in respect of subdivision 1 of SB3 of the farm Cato Manor was properly lodged for purposes of section 2(1)(e) of the Restitution of Land Rights Act 22 of 1994.

ACTING JUDGE A GILDENHUYS

I agree

ACTING JUDGE Y S MEER

I agree

G HUGO
ASSESSOR*

* (Assessor appointed in terms of section 28(5) of the Restitution of Land Rights Act, Act 22 of 1994).

For the applicant:

Adv N Singh SC instructed by *Legal Resources Centre, Durban.*

For the Department of Land Affairs:

Ms S Naidoo instructed by *State Attorney, Durban.*