

# IN THE LAND CLAIMS COURT OF SOUTH AFRICA

CASE NUMBER: LCC66/01

Held in **Randburg** on 1 June 2005  
Before **Moloto J** and **Hugo G (Assessor)**

Decided on: XXXXX

In the matter of:

**MMULE MOLLY MPHELA**  
(and the other plaintiffs listed in Annexure A  
to the Notice of Action)

First Plaintiff

and

**GRAHAM ENGELBRECHT**  
(and the other defendants listed in Annexure B  
to the Notice of Action)

First Defendant

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## JUDGMENT

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### **MOLOTO J:**

On 9 March 2005 a judgment was handed down in this case and the following order was made:

“(1) It is ordered that the plaintiffs are entitled to restoration of the farm Remaining Extent of the farm Haakdoringbult 542, Registration Division KQ, Thabazimbi, Limpopo Province.

(2) The parties are requested to present argument by no later than 18 April 2005 on whether the government can waive its rights under section 33 (eA) of the Restitution of Land Rights Act, 22 of 1994, and if not, how this section should be applied in the circumstances of this case.

(3) The matter is postponed to a date to be arranged between the Registrar and the parties.

(4) Costs of suit are reserved.”

[1] After postponing the matter on 18 April 2005, argument was finally presented on 1 June 2005. The Court is indebted to counsel in the matter for their lucid and erudite argument.

[2] At a pre-trial conference held on 8 April 2005 it was clarified that the hearing envisaged in paragraph 2 of the above order would deal only with legal argument and not with any evidence as envisaged in the body of the judgment<sup>1</sup>. Directions on the further conduct of the case and any need to hear evidence would be given after hearing argument, if necessary. In view of the finding I intend to make, there will be no need for the further conduct of the case or the hearing of further evidence.

Section 33(eA) of the Restitution of Land Rights Act<sup>2</sup>, (“the Act”) provides that-

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

(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.

A similar section and which was raised during argument is section 35(2)(f). It provides that

“(2) The Court may in addition to the orders contemplated in subsection (1)-

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1 At p68 lines 6 to 9 of the unreported judgment.

2 Act 22 of 1994, as amended.

(f) Make an order in respect of compensatory land granted at the time of the dispossession of the land in question.”

[3] The contention on behalf of the claimants on the interpretation of section 33 of the Act went somewhat as follows:-

(a) Section 33 is only peremptory to the extent that it obliges the Court to consider the factors listed in it (including section 33(eA)) when making a decision. Consequently, no rights or duties are created by section 33; rather, it provides a statutory framework for the exercise of the Courts discretion when making decisions in terms of the Act, including decisions in terms of section 35(1) and (2). Therefore, neither section 33(eA) nor section 35(2)(f) confer any substantive right on the State or any other party. The use of the word “may” in section 35(2) confirms that the Court’s power to make an order in terms of section 35(2)(f) in respect of compensatory land is a purely discretionary power and the Court is not in any way obliged to make such an order.

(b) Based on the above the argument went on to state that, the State is, therefore, entitled (but not obliged) to file a counterclaim, seeking an order in respect of the compensatory land in terms of section 35(2)(f). Where the State elects not to file such a counterclaim, as was the case *in casu*, it waives its rights under section 35(2) read with section 33(eA). Therefore, for the Court to make an order in terms of section 33(eA), so the argument went, a request for such an order must be pleaded. This is in line with the fundamental *audi alteram partem* rule of our law. Otherwise a claimant may be faced with an adverse order the grant of which he/she did not have an opportunity to answer to. This approach has been confirmed in decisions<sup>3</sup> of our Courts.

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3 Kranspoort Community 2000(2) SA 124(LCC) at para 82; Mayibuye I – Cremin Committee – unreported judgment of the Land Claims Court dated 21/11/97 under case no. LCC 28/96 in the order made; In re Macleantown Residents Association 1996(4) SA 1272(LCC) at para 11; and Makuleke Community – concerning the Pafuri area of the Kruger National Park and Environs, Soutpansberg District, Northern Province, unreported judgment of the Land Claims Court under case no. LCC 90/98. It was submitted that inasmuch as this Court made an order on the compensation received in Allie N.O & Another v DLA & others case no.13/2000 dated 1/10/02 without a pleading counterclaiming for such an order, that case was wrongly decided on the point.

- (c) The relationship between the discretionary power to make an order in terms of section 35(2) based on the peremptory consideration of the section 33 factors was said to be akin to the discretion exercised by the Court when considering evictions in terms of section 11(2) of the Extension of Security of Tenure Act<sup>4</sup>. In that Act, section 11(2) gives the Court the discretion to grant an eviction under certain circumstances, but subsection 3 lists certain factors which the Court must consider in determining whether such order is just and equitable.

[4] Mr. Mokotedi, appearing for the 13<sup>th</sup> defendant (the State represented by the Minister of Land Affairs) aligned himself with the abovementioned argument tendered on behalf of the claimants. The 13<sup>th</sup> defendant had stated at the beginning of the trial that she does not claim return of the compensatory land.

[5] On behalf of the remaining participating defendants, it was argued that-

- (a) section 33(eA) should not be read only in relation to section 35, because it (section 33(eA)) goes to the heart of restitution. Where there has been proper compensation, there is no restitution. This position raises two extremes, namely where there has been dispossession and full compensation and another where there has been dispossession and no compensation. In between these extremes, so the argument proceeded, there are lots of possibilities. In this case the shortfall was small, therefore the case leaned towards, and should be treated as, the Allie<sup>5</sup> case.

- (b) The argument for the remaining participating defendants went further to say that there is no need to plead return of the compensatory land. The Court must apply the law as stated in the Act. Therefore an absence of a plea should not be interpreted as a waiver. The cases referred to in footnote 3 above in which no order was made on compensatory land should not be accepted as authority for the position contended for by the

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4 Act 62 of 1997, as amended.

5 See fn 3 above

claimants because they were all settled. Instead we were asked to follow the Allie case.

[6] Section 2(2) of the Act is the very heart of restitution, that I suppose Mr Havenga for the participating landowners said section 33(eA) referred to. The section reads:-

“(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”.

The subsection sets the extremes referred to above. In between the extremes sections 33 and 35 come into play by way of the exercise of judicial discretion.

[7] The language of section 33 is clear that it requires the Court to consider as opposed to order, the factors listed therein. Therefore the compulsion of the section is to the extent of considering and having so considered, grant an order in its discretion. Clearly, therefore, the section must be read with section 35, which is discretionary.

[8] However, while it may be so that, based on the *audi alteram partem* rule a claim for the return of compensatory land should, ideally, be pleaded, this Court is not precluded from inquiring into the desirability of such return merely by the failure to plead the return. This Court is clothed with inquisitorial powers<sup>6</sup> and when the requirements of equity and justice<sup>7</sup> so demand, the Court will enquire into a matter which was not pleaded. Having so enquired into and considered the matter, the Court will, in the exercise of its discretion as to the orders it may make under section 35, make an appropriate order. That order, in the case of section 33(eA) may, in appropriate circumstances, be an order for the return of the compensatory land or any

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6 See section 32(3)(b) of the Act.

7 Section 33(c) of the Act.

compensation received at the time of dispossession. Yet in other circumstances it may not order such return.

[9] In the circumstances of this case, it is just and equitable not to order the return of the compensatory land for the following reasons:

- (a) The population on Pylkop is much larger than it was on the claimed land at the time of dispossession hence ordering return of Pylkop to the State would cause major social disruption.
- (b) There are many solid buildings on Pylkop for which compensation would have to be paid if restoration of Pylkop to the State were ordered.
- (c) The improvements on Pylkop may well turn out to be more expensive to compensate for than to leave the land in the hands of the current occupants.
- (d) It is unlikely that the expanded population on Pylkop could be accommodated on Haakdoringbult.
- (e) It is likely that the community would not be able to farm Haakdoringbult according to its true agricultural potential. It is important that restitution is seen to contribute towards development.
- (f) There are no schools currently on Haakdoringbult. There are two schools at Pylkop, which can only be relocated to Haakdoringbult at great expense. The alternative would be for students to travel the estimated 18 kilometres from Haakdoringbult to school at Pylkop. There is no transport for the purpose.
- (g) There are people other than the claimants who have been accepted into Pylkop, but who have no claim to Haakdoringbult. Such people would be left homeless and landless.
- (h) The claimants were not compensated for all their loss at the time of dispossession, for example, some of their livestock.

- (i) The claimants were engaged in several legal proceedings in an attempt to ward off dispossession and were not compensated for the cost of such litigation.
- (j) The claimants were not compensated for the use of their land for many years by the Botha brothers before final dispossession.

[10] The claimants indicated that the claimed land would be registered in the name of a communal property association to be formed if they should succeed in their claim. Where the claimant is a community, as in this case, section 35(3) provides as follows:-

“(3) An order contemplated in subsection (2)(c) shall be subject to such conditions as the Court considers necessary to ensure that all the members of the dispossessed community shall have access to the land or the compensation in question, on a basis which is fair and non-discriminatory towards any person, including a tenant, and which ensures the accountability of the person who holds the land or compensation on behalf of the community to the members of such community.”

In the light of the abovementioned provisions of section 35(3), the parties will have to return to Court once the communal property association has been formed, for the Court to satisfy itself that the provisions of the subsection have been complied with.

[11] It was argued on behalf of the remaining participating defendants that, in the event restoration of the whole dispossessed land is ordered, a road servitude in favour of the present Portion 5 of the farm Haakdoringbult be reserved. However no particulars of the said servitude were given. It will, therefore, be appropriate that at the hearing when the particulars of the communal property association are heard, the description of the servitude in favour of Portion 5, be also furnished.

**Costs:**

[12] Mr. Havenga referred us to the Supreme Court of Appeal case of Johanna Magdalena Cornelia Prinsloo v The Ndebele-Ndzundza Community & others<sup>8</sup>. His argument was that in that judgment, which was handed down the day before hearing of argument in this last round of this case, costs were not ordered. For that reason we were asked not to award costs in this case.

[13] This Court has already expressed its views on the question of costs in the initial judgment. However, costs were reserved because the initial judgment was not final. The outstanding issues referred to this round of proceedings went the same way as the first round. I see no reason for not following the approach we followed in the first round on this issue. The weight of authority referred to in the first round still stands.

[14] A few issues were left outstanding in the initial round of proceedings. Now that a final order is about to be given, those issues need to be attended to. Those issues are:-

- (1) The position of the parties who indicated an interest in the matter but decided not to contest the case because they were assured that their interests would be protected.
- (2) A description, in the order, of the claimed land in such a way as to allow no ambiguity.

The issues will be catered for in the order.

The following order is made:-

[1] The 13<sup>th</sup> defendant being, the State represented by the Minister of Land Affairs, is hereby ordered to acquire and restore to a communal property association to be formed by the claimants, the property known as-

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<sup>8</sup> An as yet not reported judgment of the Supreme Court of Appeal under case no. 136/2003 handed down on 31 May 2005.

Remaining Extent of the farm Haakdoringbult 542 Registration Division KQ, Thabazimbi, Limpopo, measuring 636, 1188 hectare, (742 morgen, 398 roods) as formerly held by Daniel Rakgokong Mphela in terms of Title Deed No. T5132/1932 and transferred in terms of Title Deed No. T22933/1961

And after subdivision and consolidation, consisting of:

- (a) Portion 7 of the farm, measuring 101, 1038 hectare as per Surveyor General's Diagram number 6189/2001
- (b) Portion 6 of the farm (a portion of portion 2), measuring 271,6941 hectare, as per Surveyor General's Diagram number 6188/2001
- (c) A portion of the farm Drie Jongens Geluk No. 562 KQ corresponding with the former Portion 3 of the farm Haakdoringbult, measuring 172, 5105 hectare as per Surveyor General's Diagram number 8441/1990

And

- (d) That portion of Portion 5 of the farm indicated by the figure

pNMLBCKh middle of the Crocodile River p on Surveyor General's Diagram number 8086/1997 being the last Remainder of the farm, measuring 90, 8065 hectare as per Surveyor Generals' Diagram 15798/1916

Including all such rights to minerals as are transferable

subject to existing servitudes and free of mortgage bonds.

Subject further to a road servitude in favour of the present Portion 5 of the farm Haakdoringbult, the particulars of which are to be furnished

[2] The matter is postponed to a date to be arranged with the Registrar of this Court to determine–

(a) the conditions on which the communal property association to be formed shall hold the claimed land on behalf of the claimant community.

and

(b) the particulars of the servitude to be reserved in favour of Portion 5 of the farm Haakdoringbult.

[3] Costs of suit including qualifying costs of experts.

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**JUDGE J MOLOTO**

I agree,

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**G HUGO – Assessor**

For the plaintiffs:  
Adv A Dodson instructed by the Legal Resources Centre, Pretoria.

For the defendants:  
Adv H Havenga instructed by Peet Grobbelaar Attorneys, Pretoria.

For the 13<sup>th</sup> defendant:  
Adv Mokotedi instructed by the State Attorney, Pretoria.