IN THE LAND CLAIMS COURT OF SOUTH AFRICA

Held at **CAPE TOWN** on 23 July 1999 **CASE NUMBER:** LCC 5/99
before **Meer** and **Gildenhuys JJ**

In the case between:

P J BOLTMAN Applicant

and

THE KOTZE COMMUNITY TRUST Respondent

concerning:

FARM QUISPBERG 805, DISTRICT OF CALVINIA

JUDGMENT

MEER J:

Introduction

[1] This is an interlocutory application in terms of rule 57 of the Land Claims Court Rules[1]

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1 Rule 57 deals with the prior adjudication upon issues of law or fact and provides:

"57 (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, and grant any extensions of time periods prescribed in the rules which may be desirable because of the separate hearing.

(2) When the Court decides the issue, it may make an order thereon and if the order does not dispose of the case the Court -

(a) may allow any party in application proceedings to amend any notice or to file further affidavits; or
(b) may allow any party in an action to amend any notice, statement of claim, plea, reply or further particulars; and
(c) must determine how any remaining issues will be dealt with.

(3) Should the issue be a question of law and should the parties agree upon the facts, the facts may be admitted and recorded at the hearing and the Court may make an order without taking evidence."

which challenges the validity of the respondent's claim for restitution of land rights in respect of the farm Quispberg 805, district of Calvinia (hereinafter referred to as "the farm"). The applicant seeks to dismiss the respondent's claim on the grounds that it was not dispossessed of a right in land as a result of past racially discriminatory laws or practices[2] as required by section 2(1) of the Restitution of Land Rights Act[3] (hereinafter referred to as "the Restitution Act"). The farm was originally held in undivided shares by members of the white group and members of the coloured group. The members of the coloured group together held a one sixth undivided share. Respondent is a trust made up of , *inter alia*, persons who claim to be descendants of these coloured owners. The respondent's claim is for the restitution of the 1/6 undivided share in the whole farm. Respondent's members claim that their ascendants were dispossessed thereof in 1954 by the registration of a deed of partition transfer which transferred ownership of Portion 2 of the farm, also known as London, to their ascendants, and put an end to the access they enjoyed to the whole farm by virtue of their 1/6 undivided share. The respondent alleges, in the pleadings, that the Deeds Registry Office pushed through registration of the deeds of partition transfer and this constitutes a racially discriminatory practice, buttressed by the Group Areas Act No 41 of 1950 (hereinafter referred to as "the Group Areas Act"). During argument, this was expanded to include the actions of the Surveyor General.

[2] The applicant's contention is that the subdivision of the farm effected by the deeds of partition transfer in 1954 did not arise as a result of a racially discriminatory law or a racially discriminatory practice as contemplated in the Act, but occurred as a result of an agreement made by the joint owners of the farm Quispberg before or during 1920, that the land would be subdivided. The applicant is the owner of one of the subdivisions known as the Remainder of the farm Quispberg.

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2 Initially the application was based on several other grounds as well. As these other grounds did not go directly to the validity of the claim, they were not considered at the hearing.

3 Act 22 of 1994

Background

[3] The farm Quispberg (also known as Quetsberg) is in the district of Calvinia. It has a total surface area of 9576 morgen, 572 square roods (8202,9670 hectares).[4] From 1834 until approximately 1871 the farm was owned by various members of the Kotze family. The last Kotze to have sole ownership of the farm was Theunis Johannes Kotze. In 1869 the farm was transferred from his estate to his six heirs who each inherited a 1/6 undivided share in the farm. Five of these heirs disposed of their undivided shares. A sixth heir, namely Hugo Lambrechts Kotze, retained his 1/6 undivided share in the farm.[5]

[4] The 1/6 undivided share in the farm owned by Hugo Lambrechts Kotze was transferred to Nicolaas Kotze by deed of transfer T6254/1898, subject to a *fideicommissum* in favour of his children.

[5] In March 1920, a land surveyor in Calvinia, Mr T H Louw, prepared sub-divisional diagrams for the farm. The joint owners at that time were:

Hermias Cornelius Nel - 3/6 share
Nicolaas Everhardus Nel - 2/6 share
Nicolaas Kotze- 1/6 share

[6] A declaration dated 8 February 1996 by Mr FDJ Du Toit, the land surveyor who took over the land surveying practice of Mr T H Louw, provides information about the sub-divisional diagrams. The declaration refers to "Leggernommer 183a" of Mr T H Louw pertaining to the subdivision of the farm Quispberg and states:

> "In my besit is Leggernommer 183a van T H Louw van sy opmetings van die onderverdeling van die plaas Quispberg in die Suidoos Bokkeveld wat hy in Maart 1920 onderneem het.

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4 Department of Land Affairs Report 113/96 compiled by C Bestbier at 19

5 Ibid at 21

Uit hierdie legger is die volgende duidelik:
(a) Op die skutbladsy verskyn die volgende opsommings:

'OWNERS: H C Nel, N E Nel, Klaas Kotze
REMARKS: Subdivide into 3 portions'.

Dit beteken dat landmeter T H Louw die plaas Quispberg vir die drie eienaars hierbo vermeld, in 3 dele moes onderverdeel.

(b) Volgens die werkplan en notas in sy berekeninge en die werklike berekenings is daar wel 3 dele opgemeet naamlik Thee Berg synde 2/6de aandeel vir N E Nel; London synde 1/6de aandeel vir Klaas Kotze en 3/6de (restant) vir H C Nel.

(c) Alle landmeters het deur die jare die gebruik om die bakens en peilbakens van 'n opmeting name te gee vir identifikasie doeleindes. So is daar in hierdie opmeting name gebruik soos Alfaam, Daga, Mostert, Louw, Keller en dan ook die naam 'Klaas'.

Afleidings:-
Die storie van die legger vertel duidelik dat die landmeter 3 onverdeelde aandele in die plaas Quispberg tussen die eienaars HC Nel, NE Nel and Klaas Kotze uitgeken en opgemeet het. Aangesien die opmeting gegaan het oor die verdeling van juis onverdeelde aandele is ek oortuig dat al drie betrokke partye daar sou wees om die deel wat hy reeds benut het te beskerm. Verder is dit altyd met onverdeelde aandele die geval dat die bestaande grense aangepas moet word om die regte grootte te bereik. Hier is gewoonlik drama en is dit ondenkbaar dat van die partye afwesig sou wees. In daardie vroee jare het die landmeter gewoonlik alleen met sy kar gery tot op die plaas. Daarvandaan het almal op die plaas die landmeter bygestaan en gehelp instrumente dra, ketting sleep en klippe aandra vir die bakens wat gepak moes word. Daar bestaan by my geen twyfel dat die persoon Klaas Kotze onder andere ook teenwoordig was en aktief gehelp het, vandaar die baken genoem 'Klaas'.

Ten slotte is die diagramme van hierdie opmeting aan die Landmeter-generaal voorgelê en op 17 Augustus 1920 deur hom goedgekeur. As dit kom by breukdele is die Landmeter-generaal baie streng dat elke aandeelhouer sy regmatige deel van die geheel moet kry. In die legger is geen aantekening dat die meetkostes nie ten volle vereffen is nie en kan dit aanvaar word dat al drie eienaars sy regmatige deel bygedra het.

Professionele Landmeter H Louw, seun van die landmeter T H Louw, is op hoogte van hierdie verklaring en is bereid op dit te staaf."[6]

[7] In 1951 when the Group Areas Act was promulgated, it did not affect the Kotze ownership of 1/6 of the farm, as Calvinia, the district in which the farm is situated, was not proclaimed a group area under this Act. Instead it became a controlled area, which, without going into the intricacies of the legislation, was the term given to all the areas which were not proclaimed group areas.[7] The Group Areas Act restricted the transfer of immovable property from one race to

6 Department of Land Affairs Report supra n4 at 187-8

7 Group Areas Act, 1950 (Act 41 of 1950) published by the Government Printer in the Statutes of the Union 1950. See especially section 1(v) .

another in controlled areas.[8] This meant that, as Calvinia was not declared a white group area, the Kotzes could legally continue to own their share in the farm. They could not, however, transfer their undivided share to a person who was not of the coloured group, without obtaining a permit.

[8] After the death of Nicolaas Kotze his 1/6 share in the farm Quispberg was transferred to the seven fideicommissary heirs in 1953 by deed of transfer T6930/1953, namely:

Petrus Jacobus Kotze
Nicolaas Kotze
Jakob Kotze
Hugo Kotze
Petrus Jacobus Kotze (married to Anna J Kotze)
Jan Koopman (married to Susanna H Kotze)
Joint estate late Magrieta Katrina Kotze and surviving spouse Petrus Jacobus Kotze

[9] In 1954 the seven fideicommissary heirs of Nicolaas Kotze together with the other joint owners of the farm at that time, Nicolaas Everhardus Nel and Jacobus Nel Boltman, agreed to sub-divide the farm in accordance with the 1920 diagrams. They applied to the Deeds Office for the sub-division of the farm and it was subdivided into three portions, as follows:

Portion 1 - registered in the name of Nicolaas Everhardus Nel and held under deed of partition transfer T4799/1954 (2706, 6411 hectares)

Portion 2 - registered in the names of the seven Kotze fideicommissaries and held under deed of partition transfer T4798/1954(1373, 0208 hectares)

Remainder - registered in the name of Jacobus Nel Boltman and held under deed of partition transfer T4800/1954 (4123, 3051 hectares).

[10] The power of attorney and declaration for partition transfer, "Prokurasie en Verklaring vir Verdelings Transport" is signed by all the owners of the farm at that time, namely the seven

8 *ibid* sections 8 and 1(viii)

Kotze fideicommissary heirs (referred to in the document as transferors 1-7), Boltman and Nel (transferors 8 and 9). The signatures were attested by a commissioner of oaths, who certified that:

> "Die Verklarenders erken dat hulle ten volle op hoogte is van die inhoud van hierdie verklaring, en dit begryp."

[11] The document also contains a declaration by all the owners, the relevant excerpt of which states:

> "...verklaar elkeen afsonderlik en plegtig dat ons onderling ooreengekom het om die genoemde grond op die volgende manier te verdeel sodat elkeen 'n bepaalde gedeelte kry as sy afsonderlike en uitsluitende eiendom, naamlik:
>
> Aan 1
>
> (a) Petrus Jacobus Kotze (gebore 26 Mei 1913) Kleurling Groep
> (b) Nicolaas Kotze (gebore 17 Julie 1915) Kleurling Groep
> (c) Hugo Kotze (gebore 8 Desember 1918) Kleurling Groep
> (d) Jacob Kotze (gebore 17 Junie 1923) Kleurling Groep
> (e) Petrus Jacobus Kotze (gebore 2 Julie 1896) Kleurling Groep
> (f) Jan Koopman (gebore 15 Februarie 1907) Kleurling Groep
> (g) Petrus Jacobus Kotze (gebore 10 Oktober 1910) Kleurling Groep
> in gelyke aandele.
>
> Seker stuk afgeskafte erfpaggrond synde die plaas genoem LONDON gedeelte van Quispberg, gelee in the Afdeling Calvinia.
>
> Groot 1603 Morge
> Volgens Kaart NO: 3256/1920
>
> Aan 2 Nicolaas Everhardus Nel
> (gebore 1 Junie 1879) Blanke Groep
>
> Seker stuk afgeskafte erfpaggrond synde die plaas genoem THEE BERG, gedeelte van Quispberg, gelee in die afdeling Calvinia.
> Groot 3160 Morge
> Volgens Kaart No: 3255/1920
>
> Aan 3 Jacobus Nel Boltman
> (gebore 11 September 1880) Blanke Groep
>
> Seker stuk afgeskafte erfpaggrond synde die restant van die plaas genoem QUISPBERG, gelee in die Afdeling Calvinia.
>
> Groot volgens restant 4813 morge 572 vierkant roede."

[12] The following appears on the "Prokurasie en Verklaring vir Verdelings Transport" by the conveyancer:

> "I certify that Transferors 1-7 are Members of the Coloured Group and Transferors 8 and 9 are Members of the White Group as defined in the Group Areas Act."

[13] There is also the following conveyancer's note on the document:

> "Note: Group Areas Act permit to allow this partition is not necessary because partition agreement originated before 1920- see affidavit within."

[14] From the Deeds Office Examiner's notes lodged with deed of partition transfer T4798/54 (which effected the transfer of the 1/6 share to the Kotze fideicommissary heirs) the following appear:

> Note 13 by the examiner: 'Examiner is prepared to accept the position regarding the date of partition prior to the coming into force the Group Areas Act provided an affidavit is also obtained from the remaining partitioners.'
>
> Reply to Note 13 given by the conveyancer: 'Please pass. This is a very old transaction. The diagrams were framed in 1920. The Europeans have attested to the position. The Coloureds are very difficult to get in touch with.'

The Deeds Office examiner raised a further note, which for some or other reason is not contained in the papers before the court. The reply to that note is, however, contained in the papers.

> Reply to Note 14 given by the conveyancer: 'please pass. 'I certify there was no consideration (my emphasis) and that power was not amended or tampered with after execution' .

[15] To substantiate the conveyancer's reply that a permit under the Group Areas Act was not necessary, an affidavit dated 29 January 1954 was attested to by Nicolaas Everhardus Nel and Johannes Nel Boltman explaining how the transfer came about. The relevant part of the affidavit states as follows:

> "2. Jare gelede het die persone wie toe eienaars was van die onverdeelde aandele van die voormelde eiendom Quetsberg ooreengekom om die eiendom te verdeel sodat elke eienaar 'n bepaalde aandeel daarvan sal kry. Die presiese datum wanneer die verdelingsooreenkoms aangegaan is, is nie aan ons bekend nie.
>
> In 1920 was die voormelde Nicolaas Everhardus Nel tesame met Hermias Cornelius Nieuwoudt Nel en wyle Nicolaas Kotze, as 'fidusiarius', wie op 4 Julie 1942 oorlede is, die eienaars van die eiendom soos hierin tevore vermeld, en hulle het toe opdrag gegee aan Landmeter Louw om die voormelde plaas Quetsberg te verdeel in ooreenstemming met die verdelingsooreenkoms en waarvolgens elke eienaar 'n bepaalde aandeel van die eiendom sou kry.

Die opmeting is gedoen en die kaarte is goedgekeur. Hiervolgens kry elkeen die volgende aandeel:

(a) Nicolaas Everhardus Nel

Seker stuk afgeskafte erfpaggrond
synde die plaas genoem Theeberg
'n gedeelte van Quetsberg
GROOT: 3160 morge
VOLGENS: Kaart. no 3255/20.

(b) Hermias Cornelius Nieuwoudt Nel

Seker stuk afgeskafte ergpaggrond
Synde die restant van die plaas Quetsberg
GROOT: volgens restant: 4813 morge, 572 vierkante roede.

(c) Wyle Nicolaas Kotze

Seker stuk afgeskafte erfpaggrond
Synde die plaas London, gedeelte van Quetsberg
GROOT: 1603 morge
VOLGENS: Kaart no. 3256/20.

6. Sedert die tyd toe die Landmeter die opmetings en verdelings gedoen het het elke eienaar sy afsonderlike stuk grond as sy vrye en absolute eiendom gebruik sonder inmenging van die een of die ander. Hulle het in alle opsigte eiendomsregte ten opsigte van die bepaalde stukke grond uitgeoefen.

7. Na die dood van wyle Nicolaas Kotze in 1942 het sy erfgename sy gedeelte van die grond bekend as London voortdurend as hulle uitsluitelike en bepaalde aandeel gebruik.

8. Ons gaan nou voort tesame met die erfgename in boedel wyle Nicolaas Kotze om verdelingstransporte te laat registreer volgens die verdelingskaarte wat in 1920 goedekeur is."

[16] Thus in 1954 the seven Kotze fideicommissary heirs became the registered owners of portion 2 of the farm Quispberg known as London. Portion 2 is currently owned by the following persons in undivided shares:

Anna Johanna Kotze (born 9 August 1922)

Helena Johanna Kotze (born 6 February 1932)

Klaas Kotze (born 17 September 1936)

Nicolaas Kotze (born 18 June 1940)

Nicolaas Kotze (born 30 August 1941)

Susanna Kotze (born 5 March 1944) married in community of property to each other; and

Griet Kotze (born 1 February 1963)

All of the above, except Susanna Kotze, are descendants of the seven Kotze fideicommissary heirs.

[17] The other portions of the farm are currently owned as follows:

Remainder of portion 1 (formerly described as Thee Berg, and measuring 6456143 hectares) owned by Nicolaas Everhardus Nel.

Portion 3 (portion of portion 1, measuring 1374,0199 hectares) owned by Nicolaas Everhardus Nel.

Portion 4 (portion of portion 1, measuring 687,0069 hectares) owned by Johannes Jacobus and Hendrina Francina Mostert, and

Remainder of the farm Quispberg (measuring 4123,3051 hectares) owned by Petrus Jacobus Boltman, the applicant.

Argument

[18] In support of applicant's contention that the respondent's claim was not a dispossession of a right in land as contemplated by section 2 of the Restitution Act, Mr Burger, for the applicant, argued that the partition transfer (T4798/1954) took place as a result of a voluntary agreement by the owners of the farm in 1920, and not as a result of any past racially discriminatory laws or practices as contemplated by the Restitution Act. The transfer occurred in accordance with the requirements of the Deeds Registries Act No 47 of 1937**.** From the deed and accompanying documentation it is clear that the Kotzes voluntarily participated therein. He highlighted the fact that the farm was never proclaimed a group area in terms of the Group Areas Act, but became a controlled area. Owners of land in controlled areas did not, he said, "lose" their land for racial reasons.

[19] The onus, said Mr Burger, was on the applicant to show that the respondent could not make out a case for dispossession under the Act, an onus which the applicant had discharged.

[20] Mr Fisher, for the respondent, argued that the agreement prior to or during 1920 to sub-divide the farm was not voluntary, but had been forced upon Nicolaas Kotze, an unsophisticated person, by Boltman and Nel. Likewise the registration of the deed of partition transfer in 1954 did not occur with the approval of the Kotze heirs, but was pushed through by the Deeds Registries Office and the Surveyor General. He maintained that the seven Kotze fideicommissary heirs, unsophisticated like their ancestor, were "railroaded" by the officialdom of the day. The sub-division was, he argued, clearly a bad deal for the Kotze owners. It restricted them to an undesirable portion of the farm (London) and took away the access to the entire farm, which they had previously enjoyed. In his view, there should have been a proper investigation before the deed was registered. He also said that the partition transfer had to be seen against the background of the political climate of 1954 and the Group Areas Act. Viewed in that light, he argued, the act of the Deeds Registry Office and the Surveyor General in pushing through the deed of partition transfer constituted a racially discriminatory practice, buttressed by the Group Areas Act.

[21] Mr Fisher was unable to provide any support for his theory pertaining to the pushing through of the deed being a racially discriminatory practice. He conceded, moreover, that it would not be possible to produce direct evidence of a racially discriminatory practice, should respondent's claim proceed to trial. At best he could bring circumstantial evidence that the partition transfer should not have gone through.

[22] In the light of the above, I now turn to consider whether respondent's claim falls within the ambit of section 2 of the Restitution Act and is, accordingly, valid.

[23] Section 2(1)of the Restitution Act reads:

> "2 **Entitlement to restitution**
>
> (1) A person shall be entitled to restitution of a right in land if -

> *(a)* he or she is a person dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices; or
>
> *(b)* 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.

[24] The terms "racially discriminatory laws" and "racially discriminatory practices" are defined in section 1 of the Restitution Act as follows:

> "**racially discriminatory laws"** include laws made by any sphere of government and subordinate legislation;
>
> "**racially discriminatory practices**" means racially discriminatory practices, acts or omissions, direct or indirect by -
>
> (a) any department of state or administration in the national, provincial or local sphere of government;
>
> (b) any other functionary or institution which exercised a public power or performed a public function in terms of any legislation;"

[25] It is evident that there are other qualifying criteria for entitlement to restitution in section 2(1) of the Restitution Act, but these are not in issue for the purposes of this application. What must be decided is whether dispossession in this case was "as a result of past racially discriminatory laws or practices" as contemplated by section 2(1) of the Restitution Act.

[26] Dodson J (with whom I concurred), found in the case *The Minister of Land Affairs and another v Slamdien & others* [9] that in order to come within the ambit of section 2(1)(a) of the Restitution Act[10] a claimant must demonstrate that the dispossession was both the factual and legal

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9 [1999] 1 All SA 608 (LCC)

10 Section 2(1) has been amended since that judgment. The section 2(1)(a) referred to therein is similar
(continued...)

result of a racially discriminatory law or practice. Dodson J, in considering the meaning of the words "as a result of" in section 2 (1) (a) of the Restitution Act, quoted the Oxford Dictionary meaning of "result", being "the effect, consequence, issue, or outcome of some action, process, or design".[11] He also pointed out that our courts had interpreted the phrase "as a result of"' to mean "caused by" and as "requiring the court to identify the most immediate or direct cause"[12] or " the intervening cause", and not just those causes having "the status of a merely historical antecedent or background feature."[13]

[27] Dodson J stated, at pages 628 and 629 of his judgment:

> "... it is clear from these cases and the dictionary definition of 'result', as well as a proper consideration of the purpose of section 2(1)(a) of the Restitution Act, that the use of the words 'as a result of ' contemplates a causal connection being established between the dispossession complained of and a racially discriminatory law or practice. It has been recognised in relation to other branches of law that there are common themes in all legal enquiries into causation. In *Napier v Collett & Another* Grosskopf JA provided the following analysis:
>
> > 'Despite the differences between various branches of the law, the basic problem of causation is the same throughout. The theoretical consequences of an act stretch into infinity. Some means must be found to limit legal responsibility for such consequences in a reasonable, practical and just manner ...'
>
> The problem to which Grosskopf JA refers can also be stated from the perspective of a particular result (in this case, the dispossession). Such a result would usually have several antecedent events or conditions, without which the result would never have come about. The difficulty is to identify which of these must be regarded, for purposes of a legal enquiry, not just as a necessary condition for a result, but the actual cause of it. In other fields of law, this problem has been resolved by separating the causation enquiry into two stages. The first involves an enquiry into what has been termed 'factual causation'. Generally, this involves the application of the 'conditio sine qua non' or 'but for' test. In other words, but for the act or omission identified as a potential cause, would the result have followed. If this test identifies the act or omission as a necessary condition for the result to have occurred, there is a second enquiry into 'legal causation'. It is at this stage of the enquiry that the Court must isolate that event or condition which was sufficiently determinative of the result to be treated not just as a necessary condition, but as a legally recognised cause of the particular result. In order to achieve this, the courts (at least in the fields of criminal law and delict) adopt a flexible approach which draws on one or more of the recognised tests and on the dictates of reasonableness, policy, common sense and the facts of the particular case."

10(...continued)
to the present section 2(1)(a). The difference is irrelevant for the purposes of this judgment.

11 n9 at 627i

12 n9 at 628a

13 n9 at 628c

[28] Applying the 'conditio sine qua non' or' but for' test in the present case it is clear that a necessary condition for the partition transfers to have occurred in 1954 was the prior agreement before or during 1920. But for that agreement the partition transfers would not have been registered. This would make the agreement to sub-divide the factual cause of the sub-division. In my view, it is also the legal or determinative cause of the sub-division**.** The Deeds Registry Act and the actions of the Deeds Registry officials are no more than the means through which the partitioning of the farm was achieved. The respondent's suggestion that the registration of the partition transfer was a racially discriminatory practice buttressed by the Group Areas Act, does not detract from this. At best one can state that the Group Areas Act was in existence at the time that the partition transfers took place, no more no less. Neither the Group Areas Act nor a racially discriminatory practice inspired by it can be said to have been the determinative cause of the transfer.

[29] I am at a loss as to how Mr Fisher arrives at his assertions that the Registrar of Deeds and the Surveyor General of the day were party to a scheme to push through the registration of the partition transfer and thereby commit a racially discriminatory practice. This is all the more difficult to understand if regard is had to the fact that the role played by the Surveyor General was in 1920, when that official approved the sub-divisional diagrams. There is nothing to suggest that there was anything untoward in the registration of the deeds of partition transfer. The land surveyor's notes referred to in paragraph 6 above suggest acquiescence to the sub-division by all three of the then owners. The Surveyor General must have approved the plans and diagrams prepared by the land surveyor as he was required to do[14]. Thereafter, albeit many years later, the deeds of partition transfer implementing the sub-division were registered by the Registrar of Deeds.[15] It is clear that standard conveyancing procedures for a transaction of this nature were adhered to. If the legal requirements for a partition transfer are complied with, the Deeds Office officials must register the transfer. The registration is not subject to the discretion of these officials

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14 See section 3 (1) (c) of the Land Survey Act 9 of 1927 which requires the Surveyor-General "to examine all general plans and diagrams of surveys of land before any registration of such land is effected in a deeds registry, and approve all such plans and diagrams <u>if he is satisfied that such surveys have been carried out in such manner as to insure accurate results</u>, and that such general plans and diagrams have been prepared and the boundaries of the land surveyed have been defined in accordance with the regulations." (my emphasis)

15 In terms of Section 26 of the Deeds Registries Act 47 of 1937.

[30] The affidavit by Nel and Boltman in my view was made to explain that the actual agreement to sub-divide occurred prior to or during 1920 and, therefore, preceded the Group Areas Act. The sub-division transfer (being a transfer of undivided portions of land from members of one racial group to members of a different racial group in a controlled area) ought, therefore, not to be affected by the Group Areas Act. This explains also why Deeds Office Examiner**'s** Note 13 refers both to the date of partition preceding the Group Areas Act and the affidavit of Boltman and Nel. I find there to be nothing sinister in the affidavit of Boltman and Nel nor in the reference at Note 13 to "Europeans" and "Coloureds". The affidavit and the reply to Note 13 are, I believe, merely explanatory and provide necessary information to the official registering the deed**s** of partition transfer in 1954. They indicate that the partition transfers implemented a sub-division agreement which was entered into some 30 years previously and that the Group Areas Act was, therefore, not applicable.

[31] The seven Kotze fideicommissary heirs signed the Power of Attorney and Declaration of Partition Transfer and their signatures are duly attested to by a commissioner of oaths, who certified "Die Verklarers erken dat hulle ten volle op hoogte is van die inhoud van hierdie verklaring en dit begryp". There is not a shred of evidence pointing to anything untoward in the registration of the Deed of Partition Transfer T4798/1954. If they were railroaded into an unfavourable transaction by their white neighbours, their remedy does not lie within the provisions of the Restitution Act.

Costs

[32] The applicant asked for a special costs order *de bonis propriis* on an attorney and own client scale. In motivating such an order Mr Burger referred to a letter by him to respondent's attorney in which he had expressed the view that the claim did not fall within the parameters of the Restitution Act. The letter also quoted the conclusion of the Department of Land Affairs that from available information the claim did not constitute a restitution case. Despite the "warning" about the validity of the claim in this letter, he argued, the respondent had pursued the claim, and in his view this warranted the highly punitive cost order sought. I do not agree. The conduct of respondent's attorney in continuing with the claim can in no way be regarded as sufficiently negligent, defective or reprehensible as to warrant a special costs order of the nature sought. The respondent lodged its claim with the Regional Land Claims Commission. The Commission accepted the claim and caused

it to be published in the Gazette. In so doing the Commission expressed its satisfaction that the claim was not frivolous or vexatious as set out in section 11(1)(c) of the Restitution Act. Section 11 (1) provides:

> "11(1) If the regional land claims commissioner having jurisdiction is satisfied that-
>
> *(a)* the claim has been lodged in the prescribed manner;
> *(b)* the claim is not precluded by the provisions of section 2; and
> *(c)* the claim is not frivolous or vexatious,
>
> he or she shall cause notice of the claim to be published in the *Gazette* and shall take steps to make it known in the district in which the land in question is situated."

[33] The Regional Land Claims Commissioner thereafter went on to recommend, in his referral report dealing with the claim, that an application be brought to determine the validity of the claim. It was in the circumstances perfectly reasonable for the claimant to continue with the claim until the court determined its validity. It is ludicrous for the applicant to suggest that respondent's attorney should have dropped the claim simply because applicant's attorney had expressed the opinion that respondent had no claim, especially when the Commission had accepted the claim. It is, moreover, preposterous to suggest that the conduct of respondent's attorney in pursuing the claim is deserving of the special costs order sought. I am of the view that there are no grounds for finding that the conduct of respondent's attorney is of the kind identified by our courts for an award of a special costs order *de bonis propriis* on an attorney and own client scale.[16] The special costs order is, therefore, refused.

[34] The Land Claims Court has a wide discretion to make orders in relation to costs which it considers just.[17] In exercising that discretion this Court has not considered itself bound by the general

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16 Cilliers *Law of Costs* 3 ed (Butterworths, Durban, 1997) para 10.25 and the cases discussed therein. See also *Ntuli and Others v Smith and Another* 1999(2) SA 540 (LCC); [1999] 2 All SA 1(LCC).

17 Section 35(2)(g) of the Restitution Act provides that the court "may make such orders for costs as it deems just...". Rule 61(1)(a) states:

> "The court may make orders in relation to costs which it considers just, and it may, in exercising that discretion–
> (a) elect not to award costs against an unsuccessful party-
> (i) who has put a case or made submissions to the Court in good faith in order to protect or advance his or her legitimate interest; or

(continued...)

rule that costs should follow the result.[18] I am of the view that my discretion would be properly exercised in this case if no order as to costs is made. I am satisfied that the respondent brought its restitution claim in good faith in order to protect its interests. Whilst the claim was ultimately found not to fall within the ambit of the Restitution Act, it cannot be said to have been ill-conceived.

[35] I make the following order:

1. The seven Kotze owners who together held a one sixth undivided share in the farm Quispberg under Deed of transfer T6930/1953 were not by virtue of the registration of subdivisions of the farm Quispberg by way of partition transfers dispossessed of a right in land as a result of a racially discriminatory law or practice, as contemplated by section 2(1) of the Restitution of Land Rights Act 22 of 1994 (as amended);

2. The descendants of the seven Kotze owners are precluded from claiming restitution in terms of the provisions of the Restitution of Land Rights Act 22 of 1994 (as amended) of a sixth undivided share of the farm Quispberg 805.

3. There is no order as to costs.

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JUDGE YS MEER

I agree

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JUDGE A GILDENHUYS

17(...continued)

(ii) for any other sufficient reason;"

18 *Hlatswayo and Others v Hein* [1997] 4 All SA 630(LCC);1999(2) SA 834 ;.*New Adventure Investments 19 (Pty) and Another v Mbatha and Another* 1999 (1) SA 776 (LCC); *City Council of Springs v the Occupants of the farm Kwa Thema 210* [1998] 4 All SA 155 (LCC).

Heard on: 23 July 1999 **Handed down on:** 11 August 1999

For the applicants:
Mr S Burger Marais Muller Inc.

For the respondents:
Adv Fisher instructed by Mr Vezasie, Hofmeyer Walkers Inc.