

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 96/99

In the application of:

RATHIPAL SINGH NO

Applicant

relating to

the restitution of rights in land in Sub 846 of SB3 of the farm Cato Manor No 812

JUDGMENT

GILDENHUIS 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”. Some of the interested parties (including the Department of Land Affairs) delivered notices to participate in the proceedings. They 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 (Mr Singh), his mother (the late Parbiteer) was the owner of Sub 846 of SB3 of the farm Cato Manor No 812, Durban. She died intestate in 1965. Shortly thereafter, the area in which the property is situated, was declared a white group area. Mr Singh was appointed the executor in his mother’s estate by the Master of the Supreme Court on 15 October 1968. Consequent upon a family arrangement that was concluded with his siblings, Mr Singh became the sole heir in the estate. The property could not be transferred to him because it was situated in a white group area. He was, in his capacity as executor, forced to sell the property to the Community Development Board. It was transferred from the estate of the late Parbiteer to the Community Development Board on 22 May 1972.

1 Act 22 of 1994, as amended.

[3] On 16 June 1994 Mr Singh, in his personal capacity, lodged a claim for restitution of the property with the Commission on Land Allocation in terms of the then applicable provisions of the Abolition of Racially Based Land Measures Act.² In the claim form, he stated that the “estate late Parbiteer” was “the person who was prejudiced”, and he described his relationship with “the person prejudiced” as “son”.

[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.”

The procedure for lodging a claim, as envisaged in section 2(1)(e), is contained in section 10(1) of the Restitution Act. In terms of section 41(2) of the Restitution Act, if an application was lodged with the Commission on Land Allocation before the commencement of the Restitution Act,³ such application shall be deemed to have been lodged in accordance with the provisions of section 10(1) of the Restitution Act.

[5] The Regional Land Claims Commissioner investigated the claim of Mr Singh together with a large number of other claims relating to the same area, and referred them to this Court for hearing.⁴ Together with the referral, the Regional Land Claims Commissioner filed a detailed report.⁵ In

2 Act 108 of 1991. The relevant provisions have been superceded by the Restitution Act (see section 41 of the Restitution Act).

3 The Restitution Act commenced on 2 December 1994.

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

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

response to the referral report, Mr Singh (through his attorneys) filed a statement of case dated 15 January 2001. On that statement of case, he is faced with two difficulties. Firstly, the restitution claim clearly vests in the executor of the estate of the late Parbiteer, not in Mr Singh personally.⁶ Secondly, can the restitution claim lodged by Mr Singh on 16 June 1994 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, Mr Singh applied to this Court for an order that he be substituted as claimant in his capacity as executor in the estate of the late Parbiteer,⁷ and that his statement of claim be amended to reflect *inter alia* this substitution. In the same application, he also asked for 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. I have no difficulty with granting the substitution and allowing the amendment of the particulars of claim. They are necessary to bring the claim within the confines of section 2(1)(b) of the Restitution Act. The declaratory order, however, presents some difficulty. I will proceed to consider it.

[6] The right to restitution of property dispossessed as a result of past racially discriminatory laws or practices, is a constitutional right.⁸ An injunction which takes the form of a limitation which might altogether bar that right, must be strictly interpreted,⁹ in a manner which will not deny to a person a right which the Constitution had intended to give. If the injunction was complied with in such a way that its objects were achieved, it would be substantial compliance,¹⁰ sufficient to discharge the duty of compliance.

6 Section 2(1)(b) of the Restitution Act.

7 Since his original appointment, he was never relieved of his duties as executor.

8 Section 25(7) of the Constitution of the Republic of South Africa, Act 108 of 1996.

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

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.”

[7] 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*¹¹ 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.”¹²

It appears from a reading of the Restitution Act¹³ 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. Secondly, to enable the Commission on Restitution of Land Rights to inform interested parties of the claim. Thirdly, to enable the Commission to investigate the claim, and to prepare a report for the Court,¹⁴ or to achieve and implement a settlement agreement.¹⁵ All these objects have been achieved. The interested parties were informed, the claim was published in the *Government Gazette* on 5 March 1999, and a report on the claim has been submitted.

[8] The only facet amiss in the notice of claim is that it was given by Mr Singh in his capacity as son, and not in his capacity as executor of the estate. Mr Singh is the sole heir in the estate. It is legally possible for an heir to take valid steps for protecting the assets of an estate.¹⁶ The claim form lodged by Mr Singh was intended to secure the right to claim.¹⁷ The claim form makes it

11 1964 (4) SA 638 (A).

12 Above n 11 at 646E.

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

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

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

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

17 This is apparent from oral evidence given by Mr Singh at the hearing of the application.

clear that the prejudiced party is the estate. In my view, section 2(1)(e) of the Restitution Act has been substantially complied with.

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

- (a) Rathipal Singh in his capacity as executor in the estate of the late Parbiteer 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 a portion of the property known as subdivision 993 of lot 76 of the farm Cato Manor (formally subdivision 846 of SB3 of the farm Cato Manor 812) 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*.