IN THE LAND CLAIMS COURT OF SOUTH AFRICA

RANDBURG **CASE NUMBER**: LCC 30/02
In chambers: **MOLOTO J**

Decided on: 30 May 2003

In the case between:

THE DUKUDUKU COMMUNITY Applicant

and

First Respondent
REGIONAL LAND CLAIMS COMMISSIONER: KWAZULU-NATAL

MINISTER OF WATER AFFAIRS & FORESTRY Second Respondent

JUDGMENT

MOLOTO J:

1. This is an application to review the decision of the first respondent dismissing the applicant's claim in terms of the Restitution of Land Rights Act[1] ("the Act") for the restitution of a right in land. The applicant is a community living in the Dukuduku Forest near St. Lucia in northern KwaZulu-Natal. The first respondent is the Regional Land Claims Commissioner for the province of KwaZulu-Natal who has been appointed as such in terms of section 4 of the Act. The first respondent is responsible for receiving land claims in KwaZulu-Natal and for investigating them for compliance with the requirements of the Act. Where such claims do not comply with certain requirements of the Act, the first respondent has the power to dismiss them. Where they do comply, she is required to process them to

1 Act22 of 1994, as amended.

finality through mediation or by referring them to this Court where there is no settlement.[2] The second respondent is the Minister responsible for the actual land claimed by the applicant and is cited for any interest he may have in the land. No order is sought against the second respondent and he did not participate in these proceedings.

2. The applicant lodged the claim with the first respondent on 21 December 1998. After investigating the claim the first respondent stated that she was not satisfied that it complied with the provisions of section 11(1) and (2) of the Act. She advised the applicant of her decision by letter dated 1 March 2002, which reads, in part, as follows;

> "Upon research it was found that your claim does not satisfy the minimum requirement criteria as set out in section 11(1) and (2) of the Restitution Act.
>
> In terms of the Act if the minimum requirement criteria have not been met the Regional Land Claims Commissioner shall advise the claimant accordingly. The circumstances in Dukuduku are as follows:
>
> (1) people live on the land that they are claiming.
> (2) people that were removed decided to return.
> (3) people have been repeatedly advised to furnish the Commission with people that were removed to no avail.
> (4) the claim was lodged in order to protect the currently existing rights in the forest against Dwarf's developments.
>
> On the basis of that I now conclude that there is no evidence beyond any proof that this is a valid claim according to the Restitution Act, 22 of 1994, as amended, and therefore advise yourself as the claimant that this claim is not accepted as a valid claim as it does not meet the minimum criteria for validity".

Dwarf presumably refers to Department of Water Affairs and Forestry

3. It is this decision that the applicant seeks to have reviewed. Section 36 of the Act confers exclusive jurisdiction on this Court to review acts and decisions of state officials in terms of the Act.

4. In reviewing the first respondent's decision it is necessary to analyse her reasons for such decision to determine whether they measure up to her powers as provided in the Act. The section giving her such powers is section 11 and the relevant parts of that section provide as follows:

> "(1) If the regional land claims commissioner having jurisdiction is satisfied that-

2 See section 14 of the Act.

1.the claim has been lodged in the prescribed manner.
2.the claim is not precluded by the provisions of section 2; and
3.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.

4.The regional land claims commissioner concerned may, on such conditions as he or she may determine, condone the fact that a claim has not been lodged in the prescribed manner.

1.A frivolous or vexatious claim may be dismissed by the regional land claims commissioner concerned.

2.If the regional land claims commissioner decides that the criteria set out in paragraphs (a), (b) and (c) of subsection (1) have not been met, he or she shall advise the claimant accordingly, and of the reasons for such decision."

The relevant part of section 2 provides:

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

(a) ...
(b) ...
(c) ...
5.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
6.the claim for such restitution is lodged not later than 31 December 1998.

7. No person shall be entitled to restitution of a right in land if-

5.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".

[5] The first respondent should have determined the validity or otherwise of the claim against the abovementioned criteria. She did not do so. The reasons she gave in the letter of 1 March 2002 for not accepting the claim are irrelevant to the factors to be considered under section 11 and Mr Naidu, appearing for the first respondent, rightly, in my view, readily conceded as much. He, however, argued that, in as much as the first respondent did not dismiss the claim in terms of section 11(3), she had not finally rejected the claim. On the contrary, she expected further representations from the applicant to motivate why the claim should not be finally dismissed in terms of section 11(3). Therefore, the argument continued, the application to review was premature and must be dismissed for that reason. In the alternative, Mr Naidu argued that if it is found that the decision of the first respondent stood to be set aside, the

Court should not substitute its decision for that of the first respondent, but should rather refer the matter back to the first respondent to consider it afresh in terms of section 11(1).

[6] I do not agree with either argument. As regards the main argument, the letter of 1 March 2002 is clearly final in its terms and tone, particularly the last paragraph of the quoted portion above. The letter does not invite further representations. Even when clarification[3] of the letter was sought on behalf of the applicant, none was forthcoming. Moreover, the first respondent has done nothing to process the matter further since 1 March 2002 to date. Even when it was quite clear to her that the applicant understood her letter to be final, she did not try to correct that impression. She must have become aware of the applicant's interpretation of her letter when she received the application to review. Far from behaving like someone who still expected representations, she defended the application. In this regard it is worth noting that the Act enjoins the first respondent to assist claimants in processing their claims.[4] She does not appear to have assisted the applicant by inviting it to make representations. I am not satisfied that this application is premature.

[7] The alternative argument is equally unacceptable. The first respondent filed a research report of the claim. In that report it is quite clear that the applicant complied with the provisions of section 11(1). Therefore, there is nothing for the first respondent to reconsider in terms of section 11(1). I quote from the report to demonstrate such compliance.

> "It appeared from oral history as represented (sic) by the claimants that there were indigenous people who resided in the Dukuduku forest from time immemorial".
>
> and
>
> "Despite all the unclarity on the foundation of the claim the removals did take place in the 1970's particularly 1974 as encapsulated in the file. As a result of these removals people who were resident in the forest lost certain rights which they used to have. Those were beneficial and occupational rights".
>
> and

3 By a letter dated 17/4/2002 (annexure"M" to the founding affidavit on behalf of the applicant).

4 See sections 6(1)(b) and 12(3).

"... show that the Dukuduku people were dispossessed of their rights in land as alluded to above as a result of the practice or conduct of the then government officials which was utterly discriminatory".

and

"Furthermore it has been established that there was no compensation paid to the victims of these removals".

From the above quotations the following provisions except (a) below, appear to have been complied with. The first respondent has raised no query about (a) and the form used appears to comply with section 11(1)(a).

1.that the claim was lodged in a prescribed manner[5]

2.the applicant is a community or part of a community

3.the applicant was dispossessed of a right in land after 19 June 1913 (in the 1970's).

4.as a result of racially discriminatory laws or practices

5.the claim was lodged not later than 31 December 1998 (on 21 December 1998).

6.the applicant received no compensation or other consideration calculated at the time of dispossession.

To refer the matter back to the first respondent would serve no purpose and would be a waste of time. The applicant's claim has been in abeyance since 1 March 2002. It is important that the matter be finalised expeditiously.

[8] It remains to determine whether the first respondent's decision falls to be reviewed. Dodson J, as he then was, gave a detailed exposition of the legal framework for reviewing administrative acts and decisions in *Farjas (Pty)Ltd and Another v Land Claims Commissioner, KwaZulu-Natal*.[6] I do not intend repeating that legal framework here save to mention the common law approach to review, on the basis of which I understood this case to have been argued. According to that approach administrative action would be reviewable on

5 The claim form is substantially similar to Annexure A to the Rules Regarding Procedure of the Commission contained in Government Notice 703 published in Government Gazette 16407 of 12 May 1995, as amended.

6 1998 (2) SA 900 (LCC); [1998] 1 All SA 490 (LCC).

grounds of illegality, irrationality or procedural impropriety.[7]Since the *Farjas* judgment the Promotion of Administrative Justice Act[8] ("PAJA"), whose origin can be traced to section 33(3) of the Constitution,[9] was enacted. The provision of section 33(1) of the Constitution, that "everyone has the right to administrative action that is lawful, reasonable and procedurally fair" has been incorporated into the preamble of the PAJA and to that extent, PAJA seems to be a restatement of the common law. Section 3(2)(b) of PAJA provides as follows:

> "(2)(b) In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection(1) -
>
> 8.adequate notice of the nature and purpose of the proposed administrative action;
> 9.a reasonable opportunity to make representations;
> 10.a clear statement of the administrative actions;
> 11.adequate notice of any right of review or internal appeal, where applicable; and
> 12.adequate notice of the right to request reasons in terms of section 5."

[9] In *Pharmaceutical Manufacturers Association of S A and Others; In Re: Ex Parte Application of President of the R S A and Others*,[10] the Constitutional Court held that the common law grounds of review have been subsumed under the Constitution. I will therefore determine this matter under the Constitution and PAJA. Under the two Acts (the Constitution and PAJA), administrative action has to be "lawful, reasonable and procedurally fair".

[10] I have referred earlier to the facts, contained in the letter of 1 March 2002, on which the first respondent relied in deciding to dismiss the applicant's claim. I have also found that such facts are irrelevant to the facts which the law[11] empowers the first respondent to consider in making such a decision. This decision was unreasonable because there is no basis for considering those facts for purposes of the decision she took. She disregarded the facts which, according to the law she was supposed to consider, while they were available to her in her research report and other documents at her disposal. Disregarding relevant facts, as the first respondent did, constitutes a serious breach of duty and borders on improper motives. I find

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7 *Farjas* at para [21] and the authorities quoted there.

8 Act 3 of 2000.

9 Act 108 of 1996.

00 2000 (3) BCLR 241 (CC); 2000 (2) S A 674 (CC)

11 Section 11(1) of the Act.

that the first respondent's action stands to be reviewed and set aside on the grounds that her action was unreasonable.

[11] I turn now to the question of costs. Mr Goddard, for the applicant, asked for an order of costs against the first respondent, while Mr Naidu left the matter in the Court's discretion. Quite clearly the first respondent based her decision not only on irrelevant factors, but on factors which, even if they had been relevant, would not defeat a claim for restitution. It is immaterial whether the applicants live on the land.[12] Similarly, that people decided to return to the claimed land has no bearing on the validity of the claim. The third reason is not correct. The applicant furnished a list of the dispossessed people either at the time of lodging the claim or sometime thereafter. The first respondent then demanded a list in a format she prescribed. A second list to her specification was later furnished. There is no record of her dissatisfaction with this second list. In any case, the Act enjoins the first respondent to assist the applicant in processing its claim. She does not seem to have provided this assistance once she had written the letter of 1 March 2002 and if she was not satisfied with the list she should have arranged for a meeting of the applicant to obtain same. Instead, she demonstrated an element of high handedness in demanding "proof that this is a valid claim". The fact that the first respondent found, during her investigations, that there had been a dispossession as contemplated in the Restitution Act, that there is prima facie a community and that the applicant had received no compensation, yet still dismissed the claim; tends to suggest bias or mala fides or improper motive on her part. As a result the applicant was put to the expense of an application to review her decision. In the premises, it is only fair that the applicant be compensated with an award of costs. The applicant did not ask for a special costs award.

[12] The following order is made:

> 13. The decision of the Regional Land Claims Commissioner, KwaZulu-Natal dated 1 March 2002 dismissing the applicant's claim for restitution of a right in land in the Dukuduku forest, is hereby set aside and the following is substituted therefor:

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

"the claim of the Dukuduku community is hereby accepted as a valid claim in terms of section 11(1) of the Restitution of Land Rights Act, 22 of 1994, as amended".

14. The first respondent is ordered to cause notice of the claim to be published in the Gazette and be made known in the district in which the land in question is situated within 30 days of this order being served on her.

15.The first respondent is ordered to process the claim of the applicant to finality in terms of the remaining provisions of the Restitution of Land Rights Act.

16.The first respondent is ordered to pay the costs of the applicant.

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JUDGE J MOLOTO

For the applicant:
Mr G.E Goddard instructed by *Campus Law Clinic*, Durban.

For the respondents:
Mr H.K Naidu S.C., with him Mr. T G Madonsela instructed by *State Attorney*, Durban.