IN THE LAND CLAIMS COURT OF SOUTH AFRICA

Held at **Randburg** on **11 May 2004**

CASE NO: LCC 74/03

before **Meer J**

Decided on: 14 September 2004

In the matter of

MASHILANE COMMUNITY

First Applicant

MOLETELE COMMUNITY

Second Applicant

and

MINISTER FOR AGRICULTURE AND LAND AFFAIRS First Respondent
REGIONAL LAND CLAIMS COMMISSIONER: Second Respondent
MPUMALANGA
MINISTER OF PUBLIC ENTERPRISES

Third Respondent

AVENTURA LIMITED Fourth Respondent

JUDGMENT

MEER J:

INTRODUCTION

[1] This is a judicial review of an administrative action as contemplated in section 6(3)(a) read together with Section 6(2)(g) of the Promotion of the Administrative Justice Act No 3 of 2000 (hereinafter referred to as PAJA).

[2] The applicants, the Mashilane and Molotele Communities are claimants in a land claim for Restitution of Rights in land in the Mpumalanga area. The validity of their claims is not disputed and the respondents accept that applicants were dispossessed of rights in land as contemplated at Section 2 of the Restitution of Land Rights Act No 22 of 1994.[1] (hereinafter referred to as Athe Restitution Act@. This being the case, in June 2003 the applicants submitted settlement agreements as contemplated at Section 42(D)[2] of the Restitution Act, for the settlement of their claims, to the first respondent, The Minister for Agriculture and Land Affairs, for her consideration and signature. To date the first respondent has neither signed the agreements nor taken a decision as to whether she will sign the agreements.

[3] This application by the second applicant only in terms of Section 33(3)(a) read with Section 6(2)(g) of PAJA was consequently brought calling for the judicial review of the first respondent=s failure to take a decision. At the time this application was brought, negotiations were in progress for the settlement of the first applicant=s claim, and hence it did not

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1The relevant part of Section 2 for the purpose of this application states:

2. Entitlement to restitution

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

(a) ……

(b) ……

(c) ……

(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.

(f) .....

(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.

2 "**42D Powers of Minister in case of certain agreements**

(1) If the Minister is satisfied that a claimant is entitled to restitution of a right in land in terms of section 2, and that the claim for such restitution was lodged not later than 31 December 1998, he or she may enter into an agreement with the parties who are interested in the claim ……

participate in this action.

[4] The application is brought on the grounds that there has been an unreasonable delay on the part of the first respondent in taking a decision as to whether to give effect to the Section 42(D) agreement which was reached after a long and arduous process of negotiation.

[5] The order sought by the applicants was one compelling the first respondent to sign the Section 42(D) agreement within 14 days alternatively compelling the first respondent to take a decision regarding the signing of the agreement within 14 days. In the event of her not signing the agreement, reasons were to be furnished.

[6] On 12 May 2004 I granted the application and made the following order in terms of Section 8 of PAJA.

> 1.The 1st and 3rd Respondents are directed to enter into and conclude all negotiations within 3 weeks from date hereof, i.e. by 1 June 2004, pertaining to the Notarial Deed of Lease for the lease by 2nd Applicant of the area known as Aventura Swadini situate on portions 1 and 2 of the farm Blyderivierpoort 595 KT, in particular the terms and rental thereof.
>
> 2.The 1st Respondent shall by 22 June 2004 take a decision regarding the signing of the settlement agreement in terms of Section 42(D) of the Restitution of Land Rights Act, No 22 of 1994, between 1st Respondent and 2nd Applicant.
>
> 3.In the event of 1st Respondent deciding not to sign the agreement referred to in paragraph 2 above, reasons for such decision shall be furnished simultaneously with such decision.
>
> 4.The 1st Respondent shall pay the costs of this Application.

a)

b)<u>FACTUAL BACKGROUND</u>

[7] The land in the Mpumalanga area claimed by the Applicants is currently owned by the

State. The first applicant=s claim is in respect of land known as Claremont 414 KT Mpumalanga and the second applicant=s claim is in respect of land known as Blyde Rivierpoort 595 KT Mpumalanga. Two resorts of which the State is the sole shareholder, are situated on portions of the land claimed by each applicant community. The Aventura Blydepoort Resort is situated on Portion 3 of the farm Claremont 414 KT claimed by the first applicant. The Aventura Swadini Resort is situated on portions 1 and 2 of the farm Blyde Rivierpoort 595 KT claimed by the second applicant.

[8] The two land claims in relation to the portions of land on which the aforementioned Aventura resorts are situated were dealt with separately to the larger claims of both communities. The claims in respect of these portions were also negotiated together.

[9] As mentioned, it has never been disputed by any of the respondents that the applicants had a valid claim in terms of Section 2 of the Restitution Act and that they were entitled to restitution or equitable redress as compensation for the dispossession of the land in question.

[10] Since1998 the third respondent, The Minister of Public Enterprises, (the official responsible for the privatisation of state assets), has, as part of state policy for the privatisation of state assets, been attempting to alienate the Aventura land.

[11] As land claimants on such land, the applicants, in reaction to the privatisation attempt obtained an interdict restraining the alienation of the land until the finalisation of their claims. After successfully obtaining their interdict the applicants themselves were invited to become involved in the privatization planning process, which they did.

[12] Between 1998 and May 2003 there were protracted negotiations about the potential land usage of Aventura. An agreement was finally reached by May 2003. On 17 May 2003, agreements of notarial lease were signed between the 2 applicant communities and Aventura Limited. The agreements clearly acknowledged the communities' claims to the land on which the Aventura Resorts were situated, as is evident from the following terms recorded in both notarial deeds of lease:

- The applicants will lease the land to Aventura for a period of 99 years;
- Aventura will pay rental for the entire lease period at the amount of R100.00;
- At the end of the lease period, the applicants will not be liable to Aventura or its successor for any improvements to the land or buildings;
- The lease agreement is conditional upon the signing of a Section 42(D) agreement in terms of the Restitution of Land Rights Act No 22 of 1994 between the applicants as claimants and the Minister of Agriculture and Land Affairs.

[13] Of note is that the period for fulfillment of the conditions prescribed in the lease, including the condition pertaining to the signing of the Section 42(D) agreements was recorded as being Auntil 30 June 2003"; with a *proviso* that the parties shall be entitled by agreement to extend the period for fulfillment.

[14] It is furthermore of note that the Section 42(D) agreements were conditional upon the applicants concluding a lease agreement with Aventura Ltd.

[15] On 23 May 2003 the two original Section 42(D) agreements pertaining to the settlement of both land claims, signed by the respective applicant communities together with the two notarial lease agreements and accompanying documents, were sent to the first respondent. An accompanying letter requested that she sign the Section 42(D) agreements.

[16] Whilst the signed documents might have been dispatched to the first respondent in May 2003, it is clear from the pleadings that both she and the second respondent had some time earlier received copies of the documents in draft form. They had begun applying their minds to these documents as early as August 2002. A memorandum from the Chief Land Claims Commissioner to the first respondent dated 27 August 2002 in this regard, expressed concern that the notarial deeds of lease provide only for a nominal rental of R100.00 to be paid to the applicant communities for their lease of the land over 99 years as opposed to a market related rental. The first respondent=s comments on the matter appear as hand written notes on the memorandum of 27 August 2002. These are to the effect that she supported that the matter be settled as recommended, on condition that the agreements are amended as

advised by the Chief Land Claims Commissioner. It is not clear from the comments of the Chief Land Claims Commissioner exactly what amendments he advised, but presumably this was a reference by the first respondent to the concern about the nominal rentals.

[17] Nothing further ensued between May 2003 when the Section 42(D) agreements were sent to the first respondent and 30 June 2003. On that date in response to a telephonic enquiry, the applicant=s attorney wrote a letter to the Commission on Restitution of Land Rights explaining that the lease agreements provided for the claimants to receive only a nominal rental, because it was not envisaged that the communities would compensate Aventura for the improvements on the land, estimated at nearly R90 million. It was recognised that the applicants were not in a position to compensate Aventura for the improvements. The letter recorded that various options were investigated by a team of experts and that this solution was arrived at because it would not put the properties at risk. There was no response to this letter from either the first or second respondents.

[18] By 28 August 2003 when there was still no response from the first respondent about her signing the Section 42(D) agreements, the applicant=s attorney wrote to her asking that she take a decision about signing the agreements or provide adequate reasons for not taking such decision, on or before 5 September 2003. The letter also stated that an application to court would be made if no response was received. In response thereto, a letter dated 3 August 2003 from the first respondent=s office informed the applicant=s lawyers that the matter was receiving the necessary attention.

[19] When by 17 October 2003 nothing further had been heard from the first respondent, the second applicant proceeded with this application. As aforementioned the first applicant, did not participate as negotiations were at that stage in progress regarding its situation.

SUBMISSIONS

[20] The second applicant was of the view that the first respondent had delayed unduly in taking a decision to sign the Section 42(D) agreement since May 2003 when the agreement as signed by the second applicant was sent to her. At no stage did she raise her concerns directly

with second applicant and her delay in the circumstances was unreasonable.

[21] The first respondent in an answering affidavit denied that she had not been attending to the matter. In support thereof she annexed a letter dated 13 April 2004 from the Minister of Public Enterprises, the third respondent in response to her queries pertaining to the nominal rental. In that letter the third respondent too explained that the reason the notarial deeds of lease provided for a nominal rental of R100.00, was because the applicants would not be expected to compensate Aventura for improvements on the land. This was the same explanation furnished by the applicant=s legal representative to the Commission on Restitution of Land Rights, on 30 June 2003.

21.1 Denying that there had been an unreasonable delay on her part, the first respondent in her replying affidavit went on to state that she had always acted in the utmost good faith. She had not signed the agreements as she wanted to ensure that the communities understood and appreciated the consequences thereof and were satisfied with the agreements. Her concern, she explained was to protect the claimant communities. In the past, she said there had been instances when she had signed agreements only to find that a part of a community was unhappy with the contents thereof. The only aspect of the lease agreement which concerned her was the provision that the Aventura Resorts would pay a nominal rental of R100.00 for an entire lease period of 99 years after which the property would revert to the communities.

21.2 On 18 March 2004 she had held a meeting with the second applicant community and voiced her concerns. At that meeting it became overwhelmingly clear to her that there was an apparent breakdown in communication between committees representing the community and the community itself.

21.3 As a consequence a resolution was signed by the chairperson of the Mashilane Community, the first applicant to the effect that the current application be suspended pending further negotiations on the rental amount and lease period.

21.4 The first respondent emphasized that she had not taken a decision to refuse to sign the agreement. She believed that the matter could be resolved amicably and her intention was to negotiate with the third respondent in an effort to resolve the matter. Her stance, nonetheless was that if the communities at large wanted her to sign the agreements she would sign immediately.

[22] The Constitution of the Republic of South Africa, Act 108 of 1996 (hereinafter referred to as Athe Constitution@ at Section 33(1) enshrines the right to fair administrative action as follows:

> AEveryone has the right to administrative action that is lawful, reasonable and procedurally fair,@
>
> This right has been given further and detailed expression in PAJA. The relevant sections of PAJA for the purposes of this application are Sections 6 and 8(2) which appear under the heading:
>
> "**JUDICIAL REVIEW OF ADMINISTRATIVE ACTION.**
>
> Section 6
>
> (1)Any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action.
>
> (2)A court or tribunal has the power to judicially review an administrative action if:
>
> (a) ....
>
> b)....
>
> c)....
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> d)....
>
> e)....
>
> f)....
>
> g)The action concerned consists of a failure to take a decision.
>
> 3)If any person relies on the ground of review referred to in Sub-Section 6(2)(g), he or she may in respect of a failure to take a decision, where;
>
> (a) (i) An administrator has a duty to take a decision;
>
> (ii) There is no law that prescribes a period within which the administrator is required to take that decision; and

(iii) The administrator has failed to take that decision,

Institute proceedings in a court or tribunal for judicial review of the failure to take the decision on the ground that there has been unreasonable delay in taking the decision.@

Section 8(2) provides as follows:

A8(2) The court or tribunal, in proceedings for judicial review in terms of section 6(3), may grant any order that is just and equitable, including orders-

a)directing the taking of the decision;

b)declaring the rights of the parties in relation to the taking of the decision;
c)directing any of the parties to do, or to refrain from doing, any act or thing the doing, or the refraining from doing, of which the court or tribunal considers necessary to do justice between the parties; or
d)as to costs. A

[23] The judicial review of an administrative action comprising a failure to take a decision is not novel. De Ville, in *Judicial Review of Administrative Action in South Africa*[3], commenting on section 6(2)(g), reminds us that at common law where there is a duty on an administrative authority to perform some or other action, the authority cannot refuse or fail to do so[4]. A refusal or failure to act affords the person affected, the opportunity to bring an application for a mandanus to force the authority to act. Our courts recognise that where power is granted to a public authority to take a decision, such authority is obliged to do so and should a decision fail to emanate within the prescribed period or within a reasonable period, its actions would constitute unlawful administrative action and be subject to review[5]. PAJA at section 6(2)(g) therefore enunciates the common law duty of an administrator to take a decision within a reasonable time.

[24] Currie & Klaaren in *The Promotion of Administrative Justice Act Benchbook*[6]

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3 De Ville *Judicial Review of Administrative Action in South Africa* (Lexis Nexis Butterworths, Durban 2003) at p 185

4 *See Mohamood v Secretary for the Interior* 1974(2) SA 402(C) 404A-406H.

5 See *Vulindlela Furniture Manufacturers (Pty) Ltd v MEC, Department of Education and Culture, Eastern Cape and Others* 1998(4) SA 908 (Tk); *Mahambehlala v Member of the Executive Council for Welfare, Eastern Cape Provincial Government and Another 2001(9) BCLR 899 (SE*) 907H-980C.

6 Currie *& Klaaren, The Promotion of Administrative Justice Act Benchbook* 2nd ed *(*Siber Ink,

recognise that failure to take action or to take a decision is at common law in itself a ground for review.

> "This position is formalised and considerably clarified in the Act, where s 6(2)(g) and 6(3) together create a statutory ground for unreasonable delay. The standards for this ground of review are laid out in s 6(3) in terms of two grounds for review: unreasonable delay in expiry of a period for taking a decision, provided for in s 6(3)(a) and s 6(3)(b) respectively. The unreasonable delay ground of review is applicable where an administrator has a duty to take a decision, but there is no law prescribing the period in which the decision must be taken. If the administrator has failed to take the decision, this ground of review may be asserted. The effect of s 3(a) is to read a requirement of reasonableness into empowering provisions that do not explicitly provide a time period for the taking of a decision,…"[7].

[25] Hoexter & Lister[8], in commenting on the statutory ground of unreasonable delay created and formalized at section 6(2)(g) and 6(3) together, aptly state:

> AThe ground of unreasonable delay is a statutory addition that will be welcomed by anyone who has experienced the frustration of waiting for a government department to act. Because it has been made explicit and thus more accessible, the ground is likely to be used far more often than its common law ancestors@[9]

[26] Some guidance can be found in our case law as to what constitutes an unreasonable delay. In *Mahambehlala v Member of the Executive Council for Welfare, Eastern Cape Provincial Division and Another*[10], three, (and not seven) months was considered to be a reasonable time for a decision to be made by the Minister of Welfare and Population Development about an application for a social disability grant. in terms of section 2(a) of the Social Assistance Act 59 of 1992. Likewise in *Mbanga & MEC for Welfare Eastern Cape, &*

Landsdowne, 2001)

7 (Supra) no.5

8 Hoexter et al *The New Constitutional & Administrative Law*, Vol II (Juta, Landsdowne, 2002) at p162

9 *Ibid*

10 2001(9) BCLR 899 (SE): 2002(1) SA 342 (SE).

Another[11] three (and not thirty two) months was considered a reasonable period for the Minister of Population and Social Welfare to take a decision on an application for a social grant in terms of the Social Assistance Act 59 of 1992. More recently in *Ruyobeza & Another v Minister of Home Affairs & Others*[12] three months was considered to be an unreasonable delay, in the absence of any explanation, for taking a decision (in an application in terms of Section 27 of the Refugees Act 130 of 1998) whether to certify that an applicant refugee will remain a refugee indefinitely.[13] Much earlier and prior to PAJA in *Cape Furniture Workers Union v McGregor N.O.*[14] a delay of more than three months for the taking of a decision to register a trade union, was found to be unreasonable.

> [27] The orders that may be granted under Section 8(2) of PAJA may be any order that is just and equitable. This, it was correctly argued on behalf of the second applicant, enabled the Court to substitute its decision for that of an administrator. I accordingly was asked to substitute my decision for that of first respondent. It is recognised that a court will only substitute its decision for that of an administrator in special circumstances. In *Johannesburg City Council v Administrator, Transvaal,*[15] Hiemstra AJ distinguished 3 instances of such special circumstances:
>
> (i) Where the end result is a forgone conclusion, and it would be a waste of time to remit the decision to the original decision-maker.[16]
>
> (ii) Where any further delay would cause unjustified prejudice to the applicant.[17]
>
> (iii) Where the original decision-maker has exhibited bias or incompetence to such a degree that it would be unfair to ask the applicant to submit to its jurisdiction again.[18]

More recently in the matter of *Noupoort Christian Care Centre v The Minister of the National Department of Social Development and Another*[19] Kruger J remarked as

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11 2002(1) SA 359 at 368I, 369F.

12 2003(8) BCLR 920(c)

13 Ibid at 933E-H

14 1930 TPD 682.

15 1969(2) SA 72(T) at 76

16 See *Hartman v Chairman,Board for Religious Objection 1987 (1) SA 922 (O).*

17 See *Reynolds Brothers Ltd v Chairman, Local R*oad *Transportation Board, Johannesburg 1985(2) SA 790 (A), 805F-H.*

18 See *The Minister of Local Government and Land Tenure v Inkosinathi Property Developers (Pty)* Ltd 1992(2) SA 234 (TkA).

19 Case No 20053/2003 TPD at par 24. Unreported judgment by the Transvaal Provincial Division. Handed down on 21 May 2004

follows:

A*As a* general point of departure, the court will be slow to substitute its own decision for that of a functionary. @[20]

In Ruyobeza=s case (*supra)* Thring, J, in considering when a court will substitute its decision for that of an authority stated at 931G-H:

ANormally, where the legislature has entrusted a particular function to a statutory body a court will not, in the exercise of its review powers, usurp that function unless there are exceptional circumstances justifying such action. This is the more so where, as here, the statutory body concerned has taken no decision and has not even purported to perform its function by considering the first applicant=s request for a certificate under section 27(o) of the Refugees Act.@

With reference to section 172(1) of the Constitution and section 8(2) of PAJA he found it would be justified and equitable for the court in that case to substitute its decision for that of the Committee for Refugee Affairs. Exceptional circumstances which justified a substitution were unjustifiable prejudice occasioned by an unreasonable delay of three months and further delays occasioned by the setting aside of the Committee and the appointment of a new Committee.

In *Masamba v Chairperson, Western Cape Regional Committee, Immigrants= Selection Board and Others* 2001(12) BCLR 1239(C) Foxcroft J said at 1259D-G:

AThe purpose of judicial review is to scrutinise the lawfulness of administrative action in order to ensure that the limits to the exercise of public power are not transgressed, not to give courts the power to perform the relevant administrative functions themselves. As a general principle, therefore, a review court, when setting aside a decision of an administrative authority, will not substitute its own decision for that of the administrative authority, but will refer the matter back to the authority for a fresh decision. To do otherwise would be contrary to the doctrine of separation of powers in terms of which the legislative authority of the State administration is vested in the Legislature, the executive authority in the Executive, and the judicial authority in the courts. The Constitutional Court has held that both the interim and the final Constitutions provide for such a separation of powers and that this separation must be vigilantly upheld, "otherwise the role of the courts as an independent arbiter of issues involving the division of powers between the various spheres of government, and the legality of legislative and executive action measured against the Bill of Rights and other provisions of the Constitution, will be undermined" (per Chaskalson, P in *South African Association of Personal Injury Lawyers v Heath and Others* 2001(1) SA 883(CC) at paragraph *26.....).*@

[28] I do not believe that the circumstances of this case warrant this Court substituting its decision for that of the first respondent. The first respondent=s reservations concerning the

20.(Supra) at paragraph 40

notarial agreement of lease as well as her concerns about the representivity of the first and second applicants as communities are valid and relevant concerns. These and the circumstances in this case do not in my view give rise to special circumstances that would justify this Court=s taking a decision for first respondent. This case is clearly distinguishable from those instances where our courts have deemed it appropriate to substitute a decision for that of an administrator. It cannot be said that the first respondent has exhibited bias or incompetence to such a degree that it would be unfair for her to consider the agreement again. Nor can it be said (applying the standard of Hiemstra J in the Johnannesburg City Council Case *supra*), that any further delay would cause unjustifiable prejudice to the applicant or that the end result is a foregone conclusion and it would be a waste of time to remit the decision to the first respondent. I am also unable to find that the circumstances of this case warrant an order compelling the first respondent to sign the Section 42(D) agreement.

[29] Regard being had to all of the above I came to the view that a just and equitable order in the circumstances of this case would be to direct the first respondent to take a decision about the signing of Section 42(D) agreement within a reasonable time and in the event of her deciding not to sign the agreement, to provide reasons therefor. The time frames provided in my order, (namely 3 weeks for consultation between the first and third respondents and 3 weeks thereafter for the taking of the decision by first respondent, alternatively for providing reasons for failing to take a decision), were agreed to as being reasonable in the circumstances of this case, by the legal representatives of the second applicant and first respondent, and incorporated into the order.

> [30] For completion I add that on 25 June 2004, the first respondent provided a decision and reasons as requested. Her decision was not to sign the settlement agreement as it currently stands. The reasons for the decision were threefold. Firstly, it is her belief that the nominal rental amount is totally inadequate and that a higher rental amount should be paid by Aventura Resort. Secondly, on 18 March 2004 she had a meeting with the members of both applicant communities where a resolution was adopted recording their dissatisfaction with the nominal rental amount in the notarial agreements. Thirdly, she stated that in terms of clause 2.2 read with clauses 2.1 and 2.3 of the notarial deed of lease entered into and between the Moletele Community Trust and Aventura Limited, the said notarial deed of lease is now null and void. This means that a new notarial deed of lease will have to be renegotiated.

COSTS.

[31] A cost order was awarded against the first respondent. This matter is distinguishable from cases where this Court has deemed it appropriate to make no order as to costs. An indigent community was forced to bring this application due to the first respondent=s delay in taking a decision. The first respondent was furnished with the Section 42(D) agreement in May 2003 and up until the date of granting the order no decision had been taken. The second applicant was prompted in the circumstances to bring this application. It did not act unreasonably or prematurely in doing so. The reluctance on the part of the first respondent to come to a decision was unreasonable when applying the tests laid down by PAJA as well as the facts of the case. I accordingly came to the view that the circumstances of this case warranted a cost order against the first respondent.

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JUDGE Y. S MEER

For the applicants:

Adv. Louw instructed by the *Legal Resources Centre, Pretoria*

For the respondents:
Adv. De Jager, instructed by *the State Attorney, Pretoria*