IN THE LAND CLAIMS COURT OF SOUTH AFRICA

Held at **RANDBURG** on **5 August 2003** **CASE NUMBER:** LCC 109/99
before **Gildenhuys J** and **Wiechers** (Assessor)

Decided on: **5 April 2004**

In the matter between:

KHUMALO, MILTON MAFIKA, NO Plaintiff

and

THE MINISTER OF LAND AFFAIRS First Defendant
THE MINISTER OF EDUCATION Second Defendant

JUDGMENT

GILDENHUYS J:

[1] This is an action in which the plaintiff claims compensation in terms of the Restitution of Land Rights Act[1] ("the Restitution Act") for the alleged dispossession of property now known as portion 35 (a portion of portion 11) of the farm Nooitgedacht No 1041 ("the property"), in extent 4, 0469 hectares[2]. The property is situate in Klip River, KwaZulu-Natal.

[2] The pleadings have been amended several times. The plaintiffs were originally Dr Cleopas Mandla Khumalo ("Dr Khumalo) and Mr Milton Mafika Khumalo, the latter in his capacity as executor of the estate of the late Mr Josiah Mdlulini Khumalo ("the estate"). Mr JM Khumalo passed away on 23 March 1966. Following upon an amendent of the particulars of claim pursuant to a notice dated 20 June 2000, Mr MM Khumalo (in his capacity as executor of the estate) is now the only plaintiff. The first defendant is the Minister of Land Affairs and the second defendant is the Minister of Education. The State Attorney filed a plea on behalf of both these defendants. According to the particulars of claim there is also a third defendant, one Patrick Sikhakhane ("Sikhakhane"), in his capacity as the registered owner of the property. No papers

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1 Act 22 of 1994, as amended.

2 The property was previously known as Sub A of Lot 9 of Sub C "Nooitgedacht" No 1041, situated in the County of Klip River.

were ever served on him and no relief is claimed against him. He has no interest in the matter[3], and should not be a defendant.

[3] In his will, the late Mr JM Khumalo appointed his wife Mrs C Khumalo and his nephew Mr J Khumalo to be his executors. He left the property to his son, Dr Khumalo. During 1970, the executors lodged a liquidation and distribution account, in terms of which the property was awarded to Dr Khumalo. The property was, however, never transferred to Dr Khumalo. He was out of the country in political exile from 1955 until 1990.

[4] Mrs C Khumalo passed away on 20 July 1976 and Mr J Khumalo on 29 March 1979. On 9 May 1989 the present plaintiff was appointed executor of the estate.

[5] The estate lost the property through the transfer thereof to Mr Sikhakhane, pursuant to a certificate in terms of the Black Administration Act[4] given on 13 June 1979 by a Commissioner appointed under that Act, Mr LD Thompson. The Commissioner certified that, after due investigation and enquiry, he has determined that Mr Sikhakhane is entitled, upon payment of a registration fee of R2-00, to be registered as the lawful owner of the property. On the strength of this certificate, the Registrar of Deeds endorsed the Deeds Office copy of the title deed to the effect that the property has been awarded to Mr Sikhakhane.

[6] The first part of section 8(7) and section 8(9) of the Black Administration Act are relevant for an enquiry into the certificate which the Commissioner issued. The subsections read as follows:

> "8(7) When land is found by the commissioner to be in the occupation of a Native who is not the registered holder, he shall enquire into and determine who is the person entitled to be registered as the holder of such land, and a certificate by the commissioner in the form prescribed by regulations made under sub-section (10) that the person named therein is the person entitled to be registered as the holder of the land specified shall, without it being necessary to pass transfer to any intermediate owner or occupier, be sufficient authority for the registration in the appropriate registry of such person as the lawful owner, free of any transfer duty on payment of a fee of one pound: ....."

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3 The plaintiff does not seek restoration of the property, but only compensation from the government.

4 Act no 33 of 1927.

> 8(9) Any person deeming himself to be aggrieved by any decision of the commissioner may, in the manner and within the period prescribed by the regulations, appeal in writing to a board of three persons who shall be appointed by the Governor-General from time to time as may be required, with all the powers of a commissioner under this chapter and whose decision shall be final."

These subsections oblige the Commissioner, if he finds that land is occupied by a "native" who is not the registered holder thereof, to "enquire into and determine" who is entitled to become the registered holder. If and when he finds the person so entitled, he must incorporate his finding into a certificate. That certificate constitutes the necessary authority for the Registrar of Deeds to register the land in such person's name. Any person aggrieved by the Commissioner's decision may appeal against the decision to a specially constituted board of three persons. The decision of that board is final.

[7] Mr Thompson recorded the proceedings which culminated in the certificate as follows:

> "Patrick Sikakane ss: Some years ago my father purchased Lot 35 of 11 of Nooitgedacht No. 1041. First he made an agreement with Josiah Manyosi Kumalo, the owner, whereby he could build a shop and conduct business on the property. When, however, he had died I wished to place the matter on a proper footing and get title. Kumalo's heir resisted and ordered me off the place. I then demanded the value of my buildings & there the matter rests. Mr Vinen of Macaulay & Riddell represented me & knows the facts. Mr. v.d. Merwe was working in Mr. Vinen's firm at the time and handled the matter partly. Jabulani Kumalo was representing the sons of Josiah Kumalo. The heirs have agreed that I take over the Lot but they are quarrelling amongst themselves & I do not know to whom I must make payment."

There is no record of any written deed of sale ever having been produced to the Commissioner.[5]

[8] The plaintiff approached the Department of Development Aid for assistance to get the property back. On 23 September 1989 the Regional Representative: Natal wrote to the plaintiff's attorney as follows :-

> " .....
>
> The property, described as Sub 35 (of 11) of the farm Nooitgedacht No. 1041 and formerly described as Sub A of Lot 9 of Sub C of Nooitgedacht No. 1041 was, during 1979, the subject of an enquiry by Mr L.D. Thompson, who held an appointment as a Commissioner in terms of Section 8(1) of Act 38 of 1927 (Black Administration Act). At the conclusion of his enquiry he made a finding in terms of Section 8(7), and not 18(7), as mentioned by you, that Patrick Sikakane should be awarded this property. Arising from this award the relevant title deed was

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[5] In terms of the provisions of sec 1(1) of the then applicable Formalities in Respect of Contracts of Sale of Land Act No 71 of 1969, a contract of sale of land which is not reduced to writing and is not signed by or on behalf of both parties thereto, is of no force or effect.

> endorsed, under endorsement T12281/79, to the effect that Patrick Sikhakhane was the registered holder of this property.
>
> .....
>
> Mr L.D. Thompson retired in 1981 and on good authority I am given to understand he has since passed away.
>
> .....
> I can see no alternative procedure for the setting aside of this determination except by application to the Supreme Court.
>
> ....."

[9] During 1990, the plaintiff applied to the Natal Provincial Division of the Supreme Court for an order to set the certificate aside. The respondents in the application were Mr Sikhakhane, the Government of the Republic of South Africa and the Registrar of Deeds at Pietermaritzburg. Mr Sikhakhane opposed the application. Extensive affidavits were filed. The matter came before McLaren J. During argument before him, McLaren J expressed a strong *prima facie* view that he intended dismissing the application due to the inordinately long time which elapsed from the date of the original determination (made on the 13th June 1979) until the review proceedings were initiated (during 1990). For that reason, the plaintiff did not proceed with the review application.[6]

[10] During November 1994 Dr Khumalo lodged a claim for relief in terms of the Abolition of Racially Based Land Measures Act[7]. The Land Claims Commission took over the claim as a claim which, under section 41(2) of the Restitution Act, must be deemed to be a claim for restitution lodged under section 10 of the Restitution Act[8]. The investigation of the claim was decentralised to the office of the Regional Land Claims Commissioner, KwaZulu-Natal during 1995. On 20 May 1997 the Commissioner rejected the claim. The following reasons were given:

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6 The attorneys for the plaintiff managed to obtain copies of the affidavits filed in the review application, which were made available to the court. The information that the review application was aborted, and the reason therefor, appears from a legal opinion given to the plaintiff by adv PA Koen on 23 February 1995. The opinion forms part of the record of this case.

7 Act 108 of 1991.

8 A restitution claim was accepted by the Commission under similar circumstances in the case of *Blaauwberg Municipality v Bekker and Others* [1998] All SA 88 (LCC). See par [5] of the judgment.

> "We have assessed your claim and have to advise you that you do not appear to have been dispossessed of land rights in terms of a racially discriminatory law. Your claim accordingly falls outside the ambit of the Restitution of Land Rights Act 22 of 1994, and the Commission is therefor unable to further deal with your claim in terms of the Act."

[11] After the rejection of the claim, Dr Khumalo, through his attorney, asked the Commission to reconsider the matter. Pursuant to that request, the Commission accepted the claim for publication in the Government Gazette under section 11(1) of the Restitution Act. The Legal Officer of the Commission wrote to Dr Khumalo's attorney on 21 April 1998 as follows:

> "We wish to advise that we have reconsidered your client's claim in the light of your representations to us on your client's behalf. We hereby notify you of the acceptance of your client's claim to be gazetted in terms of the requirements of Section 11(1) of the Restitution of Land Rights Act 22 of 1994 as amended. We have done so on the basis that the transfer of the property in question from your client's father's Estate to a third party was arguably effected as a result of what is undoubtedly a past racially discriminatory law, namely the Black Administration Act No 33 of 1927, alternatively as a result of a past racially discriminatory practice, in terms of the criteria in section 2(1)(a) of the Restitution Act.
>
> Further to the telephone conversation between your Mr Patrick Zwane and our Ms Pakkies this morning we also wish to inform you of the provisions of Chapter 3A of the Restitution Act which was inserted by section 29 of Act 63 of 1997. This amendment to the Act provides that any person who is entitled to claim restitution of a right in land may apply (directly) to the Land Claims Court for restitution of such right."

Following the suggestion by the Commission, Dr Khumalo and the plaintiff decided to approach this court directly under chapter IIIA of the Restitution Act, and commenced these proceedings.

[12] On 28 October 2002, at a conference convened under rule 30 of the Rules of this Court, I made an order in terms of rule 57(1) that the issue of whether the plaintiff meets the threshold requirements for restitution under section 2(1) of the Restitution Act, be adjudicated separately from the other issues, the other issues to stand over for subsequent adjudication.

[13] Section 2(1) of the Restitution Act reads as follows:

> "A person shall be entitled to restitution of a right in land if -
>
> (a) ..... ; 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 pratices; or
> (c) ..... ; or
> (d) ..... ; and
> (e) the claim for such restitution is lodged not later than 31 December 1998."

The defendants took the position that neither subsection (b) nor subsection (e) had been complied with.

[14] I now turn to the issue of whether the requirements of section 2(1)(b) have been met. I will commence by determining whether there was a dispossession at all, and if I find that there was, I will decide whether it is the result of a racially discriminatory law or practice.

[15] According to the New Shorter Oxford English Dictionary[9], "dispossess" means:

> "Put out of possession; strip of possessions; oust; dislodge; deprive; expel or banish *from*; drive *out of*"

Black's Law Dictionary[10] defines "dispossession" as follows:

> "Deprivation of, or eviction from, possession of property; ouster"

It was suggested on behalf of the defendants that the Commissioner Thompson's decision, even if it might be wrong, is not an act of dispossession. It is no more than a finding of existing facts. The certificate under which the property was transferred, only gave effect to what the Commissioner found to be an existing right. If the decision was wrong or the certificate irregularly issued, any remedy which the plaintiff might have lies elsewhere, not in the Restitution Act. I do not agree. The certificate deprived the estate of its ownership of the property, and that is a dispossession. Even if Mr Sikhakhane had an enforeceable contractual right to transfer of the property (which, in the absence of a written deed of sale, does not seem to be the case), the unilateral divestment of the estate remains an act of dispossession. The fact that the plaintiff might have a remedy elsewhere is no bar against relief in terms of the Restitution Act.[11]

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9 1993 ed (Brown ed) Vol 1, p700.

10 7th edition (Garner ed), p 458.

11 Compare *Alexkor Ltd and Another v Richtersveld Community and Others* 2003 (12) BCLR (CC) 1301, par [100].

[16] Mr Seneke, who appeared for the defendants, submitted that even if the estate was dispossessed of its property, the dispossession was not the result of past racially discriminatory laws or practices. He suggested that the Native Land Act of 1913 constituted "a pillar in the racial zoning of the country" at the time, and only such "type of laws" constitute racially discriminatory laws as envisaged in section 2(1)(b). Racially discriminatory practices, he submitted, are confined to practices which discriminate in respect of the exercise of land rights. On the above reasoning, so Mr Seneke argued, the Black Administration Act is not a racially discriminatory law, because it provided for "the administration of Black people's affairs in their allocated black areas". It did not deal with "racial zoning". Nor was the decision of Commissioner Thompson, according to Mr Seneke's submissions, a racially discriminatory practise, because the "discriminatory component" was not directed at the exercise of land rights, but at a dispute between parties of the same racial group over land in the area of that racial group.

[17] This narrow interpretation of "racially discriminating laws and practices" has been rejected by the Supreme Court of Appeal in *Richtersveld Community v Alexkor Ltd and Another*[12] and by the Constitutional Court in *Alexkor Limited and Another v The Richtersveld Community and Others*[13]. In the *Richtersveld* case, the Richtersveld Community got dispossessed of their land because the Government at the time did not recognise their indigenous law ownership of certain land and considered the land to be crown land. The Constitutional Court held as follows[14]:

> "In this case, the racial discrimination lay in the failure to recognise and accord protection to indigenous law ownership while, on the other hand, according protection to registered title. The inevitable impact of this differential treatment was racial discrimination against the Richtersveld Community which caused it to be dispossessed of its land rights."

[18] In the matter of *In re Kranspoort Community*[15] the Land Claims Court had to decide

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12 [2003] 2 All SA 27; 2003 (6) SA 104 (SCA).

13 2003 (12) BCLR 1301 (CC).

14 Par [99] of the judgment.

15 2000 (2) SA 124 [LCC].

whether certain removals were the result of racially discriminatory laws or practices. Dodson J described the removals as follows[16]:

> There was in fact no resort to civil process to secure the removals, something which, in my view, would never have been contemplated by the church or the State in respect of a large group of white persons which it wished to evict. When the removals were carried out, many people were arrested. Children were separated from their parents. They stayed on at the mission without parents until the end of the school term. In the case of the witness Serumula, who was then a boy aged 16 or 17, at the end of the school term he had to harness the family's mules alone and take his younger siblings, nephews and nieces by cart a distance of at least 60-70 kilometres by night to join his uncle in Witlig. They left at night because they were under threat of arrest if they were still at Kranspoort at midnight. Again, I simply cannot see white children whose evictions might have been sought for any reason being treated in this way."

Dodson J then concluded[17]:

> "All these circumstances to me point to the type of forced removal which falls squarely into what was contemplated by the concept of a 'dispossession as a result of racially discriminatory laws or practices' and which the Restitution Act was intended to remedy."

Fundamental to these findings are the differences in the treatment of black as compared to white persons.[18]

[19] Section 8(7) of the Black Administration Act applies to land "in the occupation of a Native who is not the registered holder". It entitles the Commissioner to "enquire into and determine who is the person entitled to be registered as the holder of such land". A certificate by the Commissioner naming the person "entitled to be registered as the holder of the land" is sufficient to deprive the registered owner of his ownership, but only if the registered owner is a "Native".The enquiry process under the Black Administration Act was an administrative process,
with some judicial features. There is provision for an appeal, but to a board of three persons to be appointed by the Governor-General: again an administrative body. Section 8(9) provides that a decision of such board of appeal shall be final.

[20] In the present case, the estate of the late Mr JM Khumalo had been reported to the Master

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16 At 164H -165B of the judgment.

17 At 165D of the judgment.

18 See also *Ndebele-Ndzundza Community: In re Farm Kafferskraal* [2003] 1 All SA 608 (LCC) para [20] and [21] of the judgment.

of the Supreme Court, when Commissioner Thompson held his enquiry during June 1979. The final liquidation and distribution account was lodged during 1970, and it shows that the property was awarded to Dr Khumalo in terms of the will. That would have been easy for the Commissioner to check. According to the note which he kept of the proceedings, he knew that Mr JM Khumalo had passed away. It is apparent that the Commissioner accepted the version of Mr Sikhakhane without notice to the estate or to the heir of the property. It would not have been possible for the Commissioner to give such notice, because both the previous executors had already passed away at the time when the enquiry was held. The present executor had not yet been appointed. The heir, Dr Khumalo, was in exile. A court of the law would not, in such circumstances, have given an order that would deprive the estate and Dr Khumalo of the property. Furthermore, even on Mr Sikhakhane's version of the facts, as recorded by the Commissioner, he is not entitled to claim ownership of the land. There is no averment that he himself bought the land, or that it was donated to him; the notes of the Commissioner do not refer to any written contract being in existence or having been produced.

[21] The provisions of the Black Administration Act which allows a Commissioner to authorise the transfer of land owned by a Native to a person claiming the land, are racially discriminatory, in the sense that it fail to give proper protection to rights of ownership held by black people. The process which led to the Commissioner giving the certificate is a racially discriminatory practice, because such a certificate could not have been given if the owner of the property was not a black person. The enforcement of contracts for the transfer of land should be achieved through court orders. Allowing an administrative official to issue certificates for the transfer of land where "natives" are involved affords them lesser protection of their property rights and is discriminatory against them. Even if the reason why the Commissioner gave the certificate is not a racist reason, its effect is still racially discriminatory, albeit indirectly so.[19] That is because a court of law would not have ordered the transfer of the land to Mr Sikhakhane unless the claim was brought in terms of a valid contract, and unless the estate was properly cited.

[22] I now turn to the issue of whether there was compliance with section 2(1)(e) of the

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[19] Indirect discrimination can constitute a racially discriminatory practice. See *Richtersveld Community and Others v Alexkor Ltd and Another* 2003 (6) SA 104 (SCA).

Restitution Act. Mr Seneke argued that because the claim vests in the estate, it must be lodged by the estate. In this case, the claim form was signed by Dr Khumalo, the heir to whom the property was awarded in the liquidation and distribution account. That, Mr Seneke argued, does not constitute proper compliance with subsection (e). Unfortunately the record before me does not contain a copy of the claim form.

[23] In the case of *In re Moodley NO*[20] , a restitution claim was instituted in this Court on behalf of a deceased estate. The claim form lodged with the Commission was signed by three heirs in the estate, not by the executor. The judge held as follows:

> "The right to restitution of property dispossessed as a result of past racially discriminatory laws or practices is a constitutional right contained in the Bill of Rights. The standing of a claimant for the assertion of such a right must be considered in a manner which will promote the spirit, purport and objects of the Bill of Rights. An injunction that takes the form of a limitation which might altogether bar the right to restitution must be strictly interpreted so as not to deny to a person a right which the Constitution had intended to give. That requires a broad interpretation of the standing of a claimant. If the injunction was complied with to such an extent that the objects of the right to restitution contained in the Constitution and explicated in the Restitution Act were achieved, it would be substantial compliance, sufficient to satisfy the injunction."[21]

The judge then concluded:

> "I do not think that the signing of a restitution claim form by a person not directly entitled to a right of restitution at the time is necessarily fatal to the claim. If it is clear (albeit from external sources) that the claim was lodged for the gain of persons ultimately entitled to the benefit thereof, that would be substantial compliance with s 2(1)(e) of the Restitution Act."[22]

[24] When I drew the attention of Mr Seneke to this judgment, he submitted that the judgment was wrong and should not be followed. The composition of the court in that case was two judges and an assessor. I am bound by the decision. It was also followed in subsequent cases[23]. In my view, the claim form signed and lodged by Dr Khumalo constitutes sufficient compliance with the provisions of section 2(1)(e) of the Restitution Act.

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20 2002 (3) SA 846 (LCC).

21 At 849 E-G of the judgment.

22 At 851 B-C of the judgment.

23 See, for example, *In re Goudnen concerning The Properties formerly known as The Farm Cato Manor No 812,* LCC 87/1999, 25 April 2003, available from www.law.wits.ac.za

[25] For the reasons set out above, I make the following order:

(a) It is declared that the plaintiff complied with the requirements for restitution as set out in section 2(1) of the Restitution of Land Rights Act; and

(b) the costs relating to these proceedings are reserved for decision at the end of the case.

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JUDGE A GILDENHUYS

I agree

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M WIECHERS
ASSESSOR*

C (Assessor appointed in terms of section 28(5) of the Restitution of Land Rights Act, Act 22 of 1994).

For the applicant:
Wits Law Clinic, Braamfontein.

For the respondents:
State Attorney, Johannesburg.