

IN THE LAND CLAIMS COURT OF SOUTH AFRICA

Held at **RANDBURG** on 22 May 2008
before **MEER J**

CASE NO: LCC16/2007

In the matter between:

AFRIBLAZE LEISURE (PTY) LTD
SUPERSTRIKE INVESTMENTS 123 (PTY) LTD
LEOPARD RANCH (PTY) LTD
COSICO PROPERTY
NKONKA BUSH LODGE
MELKRIVIER(PTY) LTD
HENDRIK VAN HEERDEN
KGAMA ECO RANCH (PTY) LTD
WILLO WISP COTTAGE (PTY) LTD
CAROL ANNE VAN DER MERWE
GEORGE CLAUDE MEYER
WATERBERG LAND CLAIMS ASSOCIATION

FIRST APPLICANT
SECOND APPLICANT
THIRD APPLICANT
FOURTH APPLICANT
FIFTH APPLICANT
SIXTH APPLICANT
SEVENTH APPLICANT
EIGHT APPLICANT
NINTH APPLICANT
TENTH APPLICANT
ELEVENTH APPLICANT
TWELTH APPLICANT

and

**THE COMMISSION ON RESTITUTION
OF LAND RIGHTS
THE REGIONAL LAND CLAIMS
COMMISSIONER FOR THE
LIMPOPO PROVINCE
HENDRIK MOTSEGOA LESIBA
(ON BEHALF OF THE MATABANE COMMUNITY)
THE MINISTER OF LAND AFFAIRS**

FIRST RESPONDENT

SECOND RESPONDENT

THIRD RESPONDENT
FOURTH RESPONDENT

JUDGMENT

- [1] The Applicants seek an order directing the 1st and 2nd Respondents to issue a certificate in terms of the provisions of Section 14 of the Restitution of Land Rights Act No 22 1994 (“the Restitution Act”), to the effect that the land claim lodged on various farms in the district of Waterberg,

Limpopo, by the 3rd Respondent, cannot be resolved, and must be referred to be heard by the Land Claims Court. The 1st 2nd and 3rd Respondents oppose the application.

[2] The time line pertaining to the 3rd Respondent's claim is relevant to a consideration of this application. The 3rd Respondent's claim was lodged on 18 March 1998. The claim was published only 8 years later in terms of section 11(1) of the Restitution Act in the Government Gazette of 3rd March 2006.

[3] In response thereto the Applicants submitted full representations in terms of section 11A of the Restitution Act on 9 October 2006. In essence Applicants contended that the 3rd Respondent never held rights in land as is contemplated by the Restitution Act, in the claimed land, and therefore could not have been dispossessed of any rights of land.

[4] The Applicants also denied that the 3rd Respondent had held the claimed land as a community as contemplated by the Restitution Act. The Applicants' representations were met with, as they describe, "total silence" on the part of the 1st and 2nd Respondents and the Applicants launched this application in February 2007.

[5] Thereafter the 2nd Respondent requested until 30 April 2007 to finalise further investigations into the claim. By 15 May 2007 when further research reports into the claim had still not been filed a notice to deliver an answering affidavit was served on the State Attorney who represents the 1st and 2nd Respondents, followed by a notice of bar on 31st July 2007.

[6] An answering affidavit filed on behalf of 1st and 2nd Respondents on 7 August 2007 stated that the claims are at a stage of negotiations and mediation and not at a stage to be referred to Court in terms of Section 14 of the Restitution Act.. A report called for by the Court from 2nd Respondent and filed on 19 May 2007 reiterates the intention to negotiate with landowners and states once more that the matter is not yet ripe for hearing by the Court as contemplated at section 14 (1) (d) of the Restitution Act.

[7] The Applicants contend that the disputes between the claimants and the landowners cannot be resolved. Both parties are adamant in their respective views as to the validity of the claims and no amount of mediation or negotiation is going to make a difference, say the Applicants.

[8] It is clear that the point of departure between the Applicants and the Respondents, more specifically the Applicants and the 3rd Respondent, pertains to a dispute in law, about the validity of the claim. There are also various factual disputes. It is also clear that the investigation of the claim has been completed by the 2nd Respondent in terms of Section 14. One assumes that in investigating the claim the 1st Respondent exercised the general functions ascribed to it under Section 6 of the Restitution Act.

[9] The 1st and 2nd Respondents submit that the purpose and reason for attempting to settle the dispute through mediation under Section 13 of the Restitution Act, is that the 2nd Respondent is obliged when referring a claim to Court to report in terms of section 14 (2) (b) on the failure of any party to accede to mediation. It is also contended that the 2nd Respondent cannot formulate an opinion under Section 14 (1) (d) if he has not triggered the mediation provision at Section 13 (1) (d). I do not agree. Respondents' argument in this regard presupposes that section 13 (1) (d) places an obligation on the Land Claims Commission to mediate. It does not. It gives a discretion to the Chief Land Claims Commissioner to direct parties to go to mediation if at any stage during the investigation it becomes evident that there is any other issue which might usefully be resolved through mediation. In my view the 2nd Respondent has not identified an issue which might usefully be resolved as is required in terms of section 13 (1) (d). The inspection in loco suggested on behalf of the 1st and 2nd Respondents, is not in my view an issue as contemplated at section 13 (1)(d), which became evident during the course of the Commission's investigation as being resolvable through mediation.

[10] It is common cause as aforementioned, that both parties are adamant about their respective stances on the validity of the claim and that the Applicants see no point in mediation. It is also clear that the point of departure between the parties pertain to a dispute which in essence is legal in nature. This, and

one party's reluctance to submit to the mediation process suggests that the dispute is one which falls appropriately to be determined after legal argument before the Court and may indeed not lend itself to mediation. The fact that nine months have lapsed since the 1st and 2nd Respondents stated that the claim was at a stage of negotiation and mediation, and no mediation has either ensued or resolved the dispute, reinforces my view. It is also so that a dispute can best be mediated if parties are willing participants to a mediation which is not the case here.

[11] Applicants as landowners affected by a land claim have a constitutional right to the resolution of the legal dispute in a court of law. The 3rd Respondent similarly has a right to have its claim adjudicated efficiently and expeditiously. The lack of progress towards that end by the 1st and 2nd Respondents ten years after the claim was lodged, two years after it was gazetted and nine months after it raised the prospect of mediation, flies in the face of such constitutional rights. It could never have been the intention of the legislature that land claims could remain unresolved and unreferred to Court ten years after lodgement, given the limited life span envisaged for the Court and also, I assume for the Commission.

[12] In light of all of the above I am of the view that the Applicants are entitled to the order they seek. Referral of the claim to this Court will ensure that they it is adjudicated upon in the interests of the parties. It goes without saying that a referral to Court is not a bar to negotiations and indeed attempts at mediation.

[13] Turning to the question of costs, it is so that this Court has set out its approach to costs at some length in *Hlatshwayo v Hein* 1997 (4) All SA 630 LCC at 639 paragraphs 15 to 26. In essence the principle is that the general rule that costs follow the event, has to yield to considerations of equity and fairness because *inter alia* of the public interest nature of litigation in the Land Claims Court and the large number of indigent litigants who bring cases to it. See also *Mahlangu v De Jager* 2000(3) SA 145 LCC at 161 G to 162 B.

[14] I am satisfied that considerations of equity and fairness justify a departure from the general practice not to award costs, in this matter. From the foregoing, it is clear that this application was necessitated because of the 1st and 2nd Respondents' failure to deal expeditiously and efficiently with Third Respondent's claim under the Restitution Act. 1st and 2nd Respondents must, in fairness, under the circumstances bear the costs of the application. In making an order I express my concern that land owners who are adversely affected by the lodging of land claims against their land, and who consequently are unable to develop or sell their land, are often forced to incur the costs of applications such as the present in order to get the relevant Regional Land Claims Commissioners to deal with their claims efficiently in terms of the Restitution Act. This is a

situation which, in the interests of justice, requires the urgent attention of the Land Claims Commission. I grant the following order.

- 1) The 1st and 2nd Respondents are directed to issue a certificate in terms of the provisions of section 14 of the Restitution of Lands Right Act, Act 22 of 1994 in respect of the claim lodged by the 3rd Respondent on behalf of the Matabane Community.
- 2) The 1st and 2nd Respondents are ordered to refer the claim by the 3rd Respondent, after issuing the certificate mentioned in 1 above, to the Land Claims Court for adjudication in terms of section 14 of the Restitution of Lands Right Act No 22 of 1994, within 30 days of the date of this order.
- 3) The 1st and 2nd respondents shall pay the costs of this application jointly severally.

JUDGE Y.S.MEER

Heard on: 22 May 2008

Handed Down on: 22 May 2008

For Applicants: *Mr Havenga instructed by Grutter & Grobbelaar, Pretoria*

For Respondents: *Mr Maloa instructed by Nkuzi Law Clinic, Limpopo*