IN THE LAND CLAIMS COURT OF SOUTH AFRICA

CASE NUMBER: LCC23/07

RANDBURG
Before: Bam JP

Decided: 12 March 2010

In the matter between

MAZIZINI COMMUNITY	Applicants
And	
EMFULENI RESORTS (PTY) LTD	First Respondent
SUN INTERNATIONAL (CISKEI) LIMITED	Second Respondent
MINISTER OF RURAL DEVELOPMENT & LAND LAND REFORM	Third Respondent
LAND COLLOQUIALLY KNOWN AS FISH RIVER SUN COMPLEX	

JUDGMENT

BAM JP

[1] This matter was initially brought before this court as an application for a referral at the instance of the ‘ Emfuleni Resorts’ and ‘Sun International (Ciskei)’ companies who respectively operated and owned land being under claim by the ‘ Mazizini Community’.

[2] The claim to the land by the Mazizini Community in 1998 as well as the referral application by the two companies in 2007 were in terms of different sections[1] of the Restitution of Land Rights Act No 22 of 1994 as amended ('the Act').

[3] The Act provides for the restitution of rights in land to persons or communities dispossessed of such rights after 19 June 1913 as a result of past racial discriminatory laws or practices.

[4] The procedure for lodging a restitution claim is, in the first instance, controlled and directed by the Commission on restitution of Land rights generally represented by the regional land commissioner. Upon the completion of an investigation in respect of a specific claim the commission is enjoined to resolve any disputes arising among interested parties through negotiations or mediation in order to achieve settlement of the claim. Should such negotiations or mediation fail then the regional land claims commissioner must refer the matter to the Court if the parties agree in writing and the regional commissioner certifies that resolution is not possible and is of the opinion the claim is ready for hearing by the court.

[5] In the present matter the dispute that arose among the parties was ultimately not so much in respect of the validity of the claim but rather on the form of redress to which the Mazizini Community was entitled.

[6] A brief skirmish had then ensued among the parties as to whether the mere difference as to the form of redress amounted to the kind of 'dispute' contemplated in justifying a referral and hence the initial application, on the part of the two companies, to compel the regional commissioner to refer the claim to this court in terms of s.14 of 'the Act'.

[7] Ultimately the application for the referral was un-opposed and fell away and the Mazizini Community was granted leave to pursue their original claim for restitution. It is in respect of this claim that the present proceedings are concerned and, consequently, the claimant community now appears as applicant and the companies as first and second respondents. The

[1] Sections 14 & 35 of the Act respectively

roles are thus reversed from their original enrolment in the referral applications and the only basis for the companys' opposition to the land claim is the form of redress to be accorded to the applicant community.

[8] In terms of s.35 of 'the Act' the court is vested with a discretion to decide upon the appropriate from of relief and it is not confined or restricted to any specific one upon the proof of a valid claim. The 'Act' provides for at least four possible alternatives and, in addition, allows 'the grant to the claimant of any alternative relief'. It reads as follows:

> "[35] **Court Orders**
>
> (i) The Court may order-
>
> (a) the restoration of land, a portion of the land or any right in land in respect of which the claim or any other claim is made to the claimant or award any land, a portion or a right in land to the claimant in full or in partial settlement of the claim and, where necessary, the prior acquisition or expropriation of the land, portion of land, a portion of land or right in the land; …
>
> (b) the State to grant the claimant an appropriate right in alternative state-owned land and, where necessary, order State to designate it;
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> (c) the State to pay the claimant compensation;
>
> (d)) the State to include the claimant as a beneficiary of State support programme for housing or the allocation and development of rural land;
>
> (e) the grant to the claimant of any alternative relief ."

[9] Some guidance is provided in section 33 of the act of the factors to be taken into account by the court in considering its decision in any particular matter not all of which apply to the situation in this case. The factors that do apply will be considered later in this judgment.

[10] Notwithstanding the variety of options available to the court in the exercise of its discretion, the primacy of restitution has been recognised in the case law and in the constitution.[2] In the early case of *Khosis Community Lohatla v Minister of Defence* the SCA stated the following:

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[2] *Khosi Community Lohatla v Minister of Defense* 2004 [5] S A 494 @505
Mphela and Others v Engelbrecht & Others 2005 [2] All SA 135 (LCC) @ 184
Mphela v Haardoornbult Boerdery CC 2000 [4] S A 488 @ 501 Par [32]
Section 25 (7) The Constitution Act 108 of 1996

> "[30] In considering its decision in this regard a court has to take in account the factors listed in section.33. All of them are not necessarily applicable in any given case. However, in a case such as the present the general approach ought to be that the dispossessed community is entitled to restoration of the land unless restoration is trumped by public interest considerations.
>
> [31] Undeniably, the umbilical cord that joins any particular community and its ancestral land is strong and it has a highly emotional element that has to be respected. That does not, however, mean that all public interest considerations should be ignored. Land is finite and there are millions out there who also wish to have their share. All claims and aspirations cannot be satisfied. A balance must be struck and the limited resources of the country must be considered." *ibid* @ p 505

[11] On the other hand and also in the same case, the primacy of restitution was suitably qualified as follows:

> "[5] According to the jurisprudence of the LCC. There is no substantive right to any particular form of restitution, whether restoration, alternative land, compensation or some other form of relief. A claimant has no specific right to a particular form of relief, even in respect of property originally dispossessed. The interim and final Constitutions and the Act merely provide for a right or 'claim' 'enforce' restitution. A substantive right to a particular form of restitution only comes into existence when a court makes a restitution order."

[12] It is common cause that the land under claim is prime land which comprises the Fish River Sun complex with a hotel and golf resort along the Fish River as it flows down meandering into the Indian Ocean in the Eastern Cape.

[13] The second applicant acquired the property from the erstwhile government of the Ciskei in about 1987 for about R 20 million and then developed the property at considerable expense including constructing and furnishing of a hotel, a golf resort and casino complex. At the time the referral application was filed in 2007 the complex employed some 82 persons and was the only significant employment provider in the surrounding area.

[14] The claim by the applicant is effectively for transfer of the property (restitution) while the respondents strongly contend that the appropriate remedy, given the totality of the circumstances in this case, is payment of compensation to the community, alternatively the granting of alternative land.

[15] In its papers of response, the respondents state their reasons why transfer is inappropriate as follows:

> 12.3.1 The nature of rights relied upon by the community; and
>
> 12.3.2 the fact that the community will patently not be in a position to develop the property in an manner which would render it economically viable in the interest of the broader community
>
> 12.3.3 The cost to the State in having to expropriate the land and Sun International's rights in the land.

[16] The applicant community contested the allegation that it was manifestly not in a position to maintain and to develop the property in a manner which would render it economically viable in the interests of the broader community. As the parties prepared for trial this is the issue concentrated upon to the extent that, by agreement, the evidence led and tested in cross examination was focused on the capacity and resources the applicant could muster to ensure viability and development.

[17] Before delving into the evidence, it is important to record that the respondents had, in their papers and in discussions, stated that an important factor to be considered was that the 'Emfuleni Resorts Company' had conceived a project to substantially develop and improve the land during 2002/2003. The proposed development was costed at some R55 million and would provide a number of additional jobs contain a number of other indirect benefits to the community in the surrounding area. The proposed project has not been commenced as a result

of the claims lodged by the applicants for it was premised on ownership of the land continuing being in the hands of Sun International.

[18] Altogether three (3) witnesses were called on behalf of the applicants. They were Mr Fumene Matiwane a member of the claimant community, Ms Linda Faleni the Regional Land Claims Commissioner, interposed on behalf of the commission, and Mr Ayanda Ngqandu an officer of the Regional Land Claims Commission responsible for the development of restored land.

[19] Mr Matiwane is himself a member of the Mazizini Community who has helped in lodging the claim and had previously also been in the employ of 'Sun International' serving as a shop steward. He had participated in the various discussions with the parties involved in attempts to reach settlement and confirms that the negotiations had broken down only in respect of the Mazizini Community's insistence on actual physical transfer to it of the subject land while the respondent companies maintained that monetary compensation or another form of redress was appropriate.

[20] Mr Matiwane further gave the assurance that the 'Mazizini Community' would not allow the businesses and projects being pursued by the respondents to be destroyed and for the land to deteriorate and become mere grazing land once again. Upon being pressed, in cross examination, regarding from whence would come the requisite substantial capital expenditure to render the resort viable he stated the community relied upon the pledges the land claims commission had given and also upon possible canvassed joint venture partnerships and not excluding the respondents themselves. He readily conceded that the community itself did not presently possess the financial or managerial resources and capacity without such assistance. He was not able to vouch for the concrete feasibility or the actual successes of any envisaged projects and expressed the view that such would only take shape once ownership (transfer) of the land had been transferred.

[21] The evidence of the Regional Land Claims Commissioner was next to be led by Mr Mbenenge and was clearly in order to support the applicants' case for restitution. In terms of

s14 (2)(d) of 'the Act' any claim referred to the Court shall be accompanied by a document setting out the Commissions recommendation as to the most appropriate manner in which the claim can be resolved. In the instant case the Commissioner's recommendation was unequivocally for restitution of the claimed land to the applicant. She motivated her recommendation on the ground, *inter alia,* that the primacy of restitution was the bedrock of the restitution program as propounded in the Act. It was, furthermore, obligatory upon the state to provide grants and subsidize development on restituted land.

[22] The protracted debate which then ensued, in cross examination by Mr Buchanan, centered on the financial capability on the part of the applicant, the state and other possible partnerships, not only to maintain existing developments on the land but ultimately to attain higher levels in the future. It was counsel's submission that her recommendation had not been based on ' due diligence investigations' as to feasibility or viability of projects or schemes subsequent to restitution, particularly bearing in mind the Court would not countenance an intolerable or unreasonable burden on public funds. We will revert in more detail to this debate later in the judgment.

[23] Further reinforcement and support for transfer of the subject land to the applicant community was presented by Mr Ayanda Ngqandu of the Regional Land Claims Commission. He was allocated to a section tasked with assisting beneficiaries of restituted land in planning and implementing development and the sustaining and improving of established projects.

[24] The import of Mr Ngqandu's evidence was to demonstrate a serious commitment on the part of the state and its agencies to leave no stone unturned in ensuring that beneficiaries acquired the necessary resources, training and managerial skills to maintain sustainable development of commercial projects. The witness cited examples of successful projects that had been launched in the region such as the Mkhambathi nature reserve irrigation scheme, schools and tourism chalets at Chata and hospitality facilities and hotel at Dwesacweba in the Wild Coast. In all the commission was involved in twenty nine projects in the region.

[25] An important aspect of Mr Ngqandu's evidence is that he stressed that that the private sector and co-operate world were being actively invited to participate in the various development schemes and from joint ventures or partnerships with communities. Such an invitation and proposal had also been extended to the respondents 'Sun International' and 'Emfuleni Resorts' in the present matter.

[26] Upon being cross-examined by Mr Buchanan, Mr Ngqandu conceded that no thorough or vigorous studies and analyses or research had as yet been conducted to quantify the substantial additional capital expenditure that would be needed in sustaining and developing the specific land owned by the respondents. Such an exercise, he opined, could only materialize once the issue pertaining to the transfer of the land had been finally decided.

[27] The respondents did not lead any evidence to show that the applicant community would patently not be able to develop the property (as was their *raison d'êtere* for opposing its transfer). Instead the line of cross examination and the arguments seem to boil down to postulating that the respondents were in a better position to command and attract massive capital investments and expertise than were the Mazizini community if the land was left in their hands. This implies that there would hardly be any instances in which it was appropriate to transfer commercially viable land to communities who, in spite of the support of government, would not command resources of their own to match. In such cases, communities dispossessed of property as a result of discriminatory laws and practices, would invariably be confined to receiving 'just and equitable redress' other than restoration. Such a situation is not contemplated in 'the Act' and would not contribute towards an equitable redistribution of land rights.

[28] As mentioned above this court is vested with discretion to decide upon the appropriate from of relief upon proof of a valid claim. In the exercise of that discretion, the court is guided by the factors set out in section 33 of 'the Act' which is peremptory. However, not all of its provisions are necessarily applicable to this case. In several cases the courts have emphasized the primacy of restitution and especially the views of the claimants since, as beneficiaries, they play a critical role and their approval of the manner and form of restitution is indispensable.

[29] In *Mphela v Haakdoombult Boerdery*[3] the Constitutional Court summed up this recognition of the primacy of restoration of land in these words of Mpati AJ:

> "It seems to me, therefore, that where land which was subject of a dispossession as a result of past discriminatory laws is claimed, and the claim is not buy section 2(2) of the Act, the starting point is that the whole of the land should be restored, save where restoration is not possible due to compelling public interest considerations."

[30] That, of course, is not the end of the matter and the court must, in the present case and in terms of section 33 consider the desirability of remedying past violations of human rights, the requirement of equity and justice, the feasibility of such restoration, the current use of the land and the history of the acquisition and use of the land.

[31] Some of these considerations were canvassed in the papers, in the evidence and in arguments in varying degrees of intensity ranging from lukewarm to vigorous. It was hardly contested that restoration, in this case, would have the effect of remedying past human rights violations, meet the requirements of equity and justice, avoid major social disruption and be consistent with the spirit and objects of the Constitution.

[32] However, the question of feasibility (section 33 Ca) became interwoven with the assertion that the applicant was manifestly incapable to develop the property and was hotly contested. It spilled over to a consideration of current use of the land and the history of the acquisition and the use of the land (section 33Eb). There was mild contestation as to whether there were compelling public interest considerations such as trumped the primacy of restoration and the assertion that restoration, if granted, would constitute an unreasonable burden on public funds remained an assertion and was denied and no evidence was tendered.

[33] It was the respondents' further submission that a juxtaposition of the current use of the land against the nature of the rights of the claimants on dispossession clearly indicates that transfer of the ownership of the land is a disproportionate and, therefore, inappropriate form of

[3] *Mphela v Haakdoombult Boerdery* CC 2008 [4] S A 488

relief. To this argument, Mr Notshe, for the claimant community retorted that the grazing rights which the claimants previously enjoyed were, in themselves, commercial activity and that the 'bellowing of cattle to Africans was like the jingling of the coins in the pocket of a European.'

[34] In my view it is a false comparison, not sanctioned by section 33 e B of 'the Act', to contrast the state of a subsistence peasant economy with that of a modern business enterprise and to proclaim the discrepancy to constitute infeasibility of restoration. The mere vastness of the gap in terms of scale, volume, and sophistication of economic operations, decades apart, could not have been contemplated as a bar to restoration. In a slightly different context the Constitutional Court has stated the following:

> "[56] The dangers of looking at indigenous law through a common law prism are obvious. The two systems of law developed in different situations, under different cultures and in response to different conditions."[4]

[35] There was no evidence or submissions to the effect that the restoration would not be physically, logistically or economically feasible such as was found, for instance, in the section 34 application case of *Nkomazi Municipality*[5] in which there was the reality that restoration of land could require expropriation of town people of their houses, appropriation of schools, churches, parks which would cause major social disruption.

[36] It was finally not contested that restoration in this case, would have the effect of remedying past human rights violations and meet the requirements of equity and justice. I am satisfied that these aims will be achieved through restoration.

[37] I am well aware of the many instances where the beneficiaries of restored land have failed dismally to sustain, let alone develop, commercial projects on the land. No doubt appropriate lessons have been drawn from that reality and measures have been put in place by the State and also in terms of 42C of the Act to make available grants and subsidies for the

[4] *Alexkor v Richtersveld Community & Others* 2003 [12]BCLR 1301 (CC) @ p1318
[5] Unreported LCC74/06

purposes of assisting in development, management and training of claimants settled on restored land.

[38] Mr Buchanan has submitted that the enormous cost to the State and the fact that its funds are not unlimited are factors to be taken into consideration. I agree. However, the courts are not in a position to deny claimants their primary right to restitution merely because they cannot determine what is affordable to the State and what is not in a given case. Nor are they in a position to determine in advance what projects will be viable and those that will not be viable before granting restoration.

[39] In *re Kranspoort Community* [6]this court warned that the various tests suggested for feasibility did not mean that an enquiry into the social and economic viability of the claimants' intended use is required.

> "However, this does not mean that an enquiry into the social and economic viability of the claimant's intended use is required. To require this would give rise to problems. Courts are not equipped to assess social and economic viability. The effect of requiring such an enquiry may also be greatly to narrow the prospects of restoration awards being made generally and this would be contrary to the overall purpose of the legislation which has as one of its major focuses the actual restoration of rights in land."[7]

[40] In the circumstances I am satisfied that the following order is appropriate:

Order

(i) The Mazizini Community is entitled to the restoration of the land which comprises the Fish River Sun Complex being presently a hotel and golf resort which borders the Eastern Bank of the Fish River in the Eastern Cape and the Indian Ocean in terms of 'the Act' in settlement of the claim.

[6] 2002 [2] S A 124 (LCC)
[7] Id at para 92 quoted in *Mphela* per Mpati AJ (as he then was)

(ii) The claimant community is hereby granted leave through its representatives to obtain transfer of ownership of the above property to itself or to such other entity as its constitution allows.

(iii) The third respondent is to include the claimant community as a beneficiary of a State support programme for development.

(iv) There is no order as to costs.

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F C BAM JP

PRESIDING JUDGE

I agree

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N MKAZA

ASSESSOR