IN THE LAND CLAIMS COURT OF SOUTH AFRICA
HELD IN PIETERMARITZBURG

CASE NUMBER: LCC19/09

In the matter between

MAHOMED DESAI	Applicant
and	
REGISTRAR OF DEEDS, PIETERMARITZBURG	First Respondent
MPOFANA MUNICIPALITY	Second Respondent
TWIN CITIES TRADING 317 (PTY) LTD	Third Respondent
REGIONAL LAND CLAIMS COMMISSIONER KWA-ZULU-NATAL	Fourth Respondent

JUDGMENT

NCUBE AJ

Introduction

[1] This is an application for an interim interdict. The applicant seeks to interdict a transfer or a registration of a certain property described as REMAINDER OF ERF 123 MOOI RIVER from the second to the third respondent pending the adjudication of a land claim which the applicant lodged with the fourth respondent. The applicant also seeks to interdict the second and third respondents from selling, exchanging, donating, letting, subdividing, rezoning or developing the land which is the subject matter of this application pending finalization of the applicant's land restitution claim. The application was brought on an urgent basis. The application was regarded as urgent because of an imminent transfer of property from the second to the third respondent. I accordingly condoned non-compliance with the court rules pertaining to service and time limits. A *Rule nisi* was issued calling upon all four respondents to show cause by the return date as to why the relief sought by the applicant should not be granted.

[2] The application was opposed by the second and third respondents. The fourth respondent filed a notice to abide by the order of the court. There was no response from the first respondent and I assume the first respondent has also decided to abide by the order of the court.

Parties

[3] The applicant is Mahomed Desai, the son and the sole surviving direct descendant of the late Ismail Hassanjee Desai who passed away in 1947. The first respondent is the Registrar of Deeds, Pietermaritzburg. The second respondent is the Mpofana Municipality. The third respondent is a company known as Twin Cities Trading 317 (Pty) Limited. The fourth respondent is the Regional Land Claims Commissioner: KwaZulu-Natal.

Facts

[4] Ismail Hassanjee Desai, the father of the applicant, was the owner of an immovable property known as Remainder of Lot 123 Mooi River Township. This property was held under Deed of Transfer No. 5142/1937. In this judgment I shall refer to the applicant's father as ("Mr. Desai") and to the applicant as ("the applicant"). Mr. Desai passed away in 1947. When he passed away, the property in question fell into his deceased estate.

[5] According to the Deed of transfer T3642/1977, attached to applicant's papers as annexure "C", Mr. Desai had a Will dated the 20th of August 1937. According to that Will, one Hava Bibi Sulema was appointed an administratrix in the Estate of Mr. Desai. On the 15th of March 1977 the Remainder of Lot 123 together with other properties of Mr. Desai were sold and transferred from Mr. Desai's estate to the Community Development Board established under section 2(1) of the Community Development Act[1]. I shall refer herein to the Community Development Board as ("the Board")

1 Act 3 of 1996.

[6] On the 22nd of May 1998, the applicant lodged a claim for a restitution of rights in land with the Regional Land Claims Commissioner Kwa Zulu –Natal. According to the claim form attached to the applicant's papers, the claim lodged was for the restitution of two properties which were Lot 123 and portion of Lot 124. The applicant's restitution claim is still outstanding. It has not been gazetted. The Deed of Transfer indicates that Mr. Desai's properties were sold to the Board at a purchase price of R 60,000.00

[7] On 13 April 1982, the Board transferred the property acquired from Mr. Desai's estate to the Town Council of the Borough of Mooi River (the second respondent) under Deed of Transfer No T 7201/1982.

[8] On 30 May 2008, the Town Council of the Borough of Mooi River (now known as the Mpofana Municipality Council) held a meeting where the sale of the Remainder of Erf 123 at an amount of R165, 000-00 was approved. The identity of the purchaser was not disclosed. On 25 July 2008, a Notice of Public sale of Erf 123 Mooi River to "Mr. L. Wait Spar Development" was placed on the Natal Witness Newspaper by the Municipal Manager Mr. M.A. Madlala. On seeing the said notice, the applicant approached his attorneys who immediately wrote to the Municipality explaining that there was a pending restitution claim on Erf 123 Mooi River.

[9] The applicant subsequently established, through his attorneys, that the purchaser was the third respondent, who purchased the land for purposes of developing it into a Spar Shopping Centre. The applicant bases his application on section 6 (3) of the Restitution of Land Rights Act[2] ("the Act").

Section 6 (3)

2 Act 22 of 1994.

[10] Section 6 (3) of the Act provides:

"Where the regional Land Claims Commissioner having jurisdiction or an interested party has reason to believe that the sale, exchange, donation, lease, subdivision, rezoning or development of land which may be the subject of any order of the Court, or in respect of which a person or community is entitled to claim restitution of a right in land will defeat the achievement of the objects of this Act, he or she may-

a) after a claim has been lodged in respect of such land, and

b) after the owner of the land has been notified of such claim and referred to the provisions of this subsection,

on reasonable notice to interested parties, apply to the Court for an interdict prohibiting the sale, exchange, donation, lease, subdivision, rezoning, or development of the land, and the Court may, subject to such terms and conditions and for such period as it may determine grant such an interdict or make any other order it deems fit".

Issues

[11] The respondents have raised the following issues:

a) the applicant is not entitled to claim restitution of a right in land.

b) the sale in question will not defeat the achievement of the object of the Act.

c) the sale of land to the Community Development Board was not as a result of past racially discriminatory laws or practices.

d) just and equitable

compensation was paid.

e) no valid claim was lodged by the applicant.

Entitlement to restitution.

[12] Section 2 (1) of the Act provides:

"A person shall be entitled to restitution of a right in land *if-*

a) *he or she is a person dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices, 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 practices, or*

c) *he or she is the direct descendant of a person referred to in paragraph (a) who has died without lodging a claim and has no ascendant who-*

i) *is a direct descendant of a person referred to in paragraph (a) and*

(ii) *has lodged a claim for a restitution of a right in land or*

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 is lodged no later than 31 December 1998."*

Subsection 2 of the Act, in turn, provides:

"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."

[13] The second and third respondents concede that the applicant is a direct descendant of a person referred to in paragraph (a) of section 2 (1), and that he is therefore entitled to lodge a claim in terms of section 2 (1)(c) of the Act. What is in issue is whether the dispossession took place as a result of past racially discriminatory laws or practices. The applicant maintains that the dispossession was as a result of past discriminatory laws or practices. In support of this contention the applicant, in his founding affidavit states:

> "During 1971 the State commenced proceedings for the forced sale of four immovable properties registered in the name of my deceased father, to the Community Development Board. These proceedings took place in terms of the provisions of the Community Development Act, Act 3 of 1996 read within the context of the Group Areas Act, and the framework of racially discriminatory legislation and practices which prevailed at the time[3]."

[14] The applicant does not in his founding affidavit state the circumstances under which the sale of land to the Board took place. Mr. Crampton, Counsel for the applicant maintains that the Community Development Act was a discriminatory law because that Act was found by the Supreme Court of Appeal in the case of **Abrams v Allie NO And Others**[4] to be a sister Act of the Group Areas Act. In my view, it is not sufficient to say just because the Community Development Act was found to be the sister Act of the Group Areas Act, therefore it must have been a racially discriminatory legislation. In motion proceedings, the

3 Paragraph 7 of the Founding Affidavit.
4 2004 (4) SA 534 (SCA)

applicant is expected to make out a case in his founding affidavit. Each case is decided on its own merits. It was encumbent on the applicant to state the events preceding the acquisition of land by the Board. In **Abrams** case,[5] there was sufficient evidence to prove that the sale was a forced one. In that case, copies of correspondence exchanged between the parties prior to the sale were attached to the papers. In the present case, there is none. It is just not clear as to how the Board acquired the property in question.

It cannot be assumed that all sales which took place in terms of the Community Development Act were forced sales, some of them might have been voluntary sales. In the light of the above, the applicant, in my view, has failed to establish a *prima facie* right which is a first requirement in an application for an interim interdict. There was an onus on the applicant to prove that there was a dispossession and that such dispossession was as a result of past racially discriminatory laws or practices. Since the applicant failed to prove this requirement, there is no need to discuss the remaining requirements of an interim interdict.

Will the development of land defeat the achievement of the object of the Act ?

[15] The applicant maintains that the development of land will frustrate his claim since restitution will no longer be feasible once the land has been developed and the shopping centre has been established on that land. On the other hand, Mr. De Wet, Counsel for the respondents, maintains that the development will not defeat the achievement of the object of the Act as the applicant may be given monetary compensation or alternative state-owned land if restitution of the claimed land is no longer feasible. According to the long title, the object of the Act is:

"To provide for the restitution of rights in land to persons or communities dispossessed of such rights after 19 June 1913 as a result of past racially discriminatory laws or practices, to establish a Commission on Restitution of Land Rights and a Land Claims Court, and to provide for matters connected there with."

5 Supra.

[16] The long title does not refer to monetary compensation as being one of the objects of the Act. It appears that the primary object of the Act is restitution of rights in land. However "restitution of a right in land" is defined as meaning:

> "(a) *the restoration of a right in land, or*
> (b) *equitable redress*"

Restoration of a right in land is defined as:

> "the return of a right in land or a portion of land dispossessed after 19 June 1913 as a result of past racially discriminatory laws or practices;".

Equitable redress is in turn defined as:

> "any equitable redress, other than the restoration of a right in land, arising from the dispossession of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices, including-
> *(a) the granting of an appropriate right in alternative state-owned land,*
> *(b) the payment of compensation."*

[17] What emerges from these definitions is that where a person has proved that he is entitled to restitution of a right in land, but restoration of that particular land is no longer feasible, such a person may be given compensation or he may be granted an appropriate right in alternative state owned land. In that way, the object of the Act will be achieved. In the present case, therefore, it goes without saying that the sale and subsequent development of land in question will not defeat the achievement of the object of the Act. However, a person who has lodged a claim cannot be expected to sit and do nothing when there is a sale or development which tends to frustrate his claim.

Was just and equitable compensation paid for the applicant's father's land

[18] In his founding affidavit, the applicant does not allege that the compensation paid to his father's deceased estate was not just and equitable. According to the Deed

of Transfer, the sale of land from the applicant's father's deceased estate, to the Board took place on the 15th of March 1977 upon payment of a purchase price of R 60, 000.00. The applicant does not say why the amount of R 60,000.00 was not just and equitable under those circumstances. For this reason, on his papers alone, the applicant has failed to show that R 60,000.00 paid as purchase price in 1977, was not just and equitable redress.

Did the applicant lodge a valid claim?

[19] The applicant lodged a restitution claim on 22 May 1998. In paragraph 1.2 of the claim form, the applicant was required to describe the property in respect of which he was claiming a right to restitution. The applicant described the property as being Lot 123 and portion of Lot 124. The land which is the subject matter of the present development is the Remainder of Lot 123, not Lot 123. The applicant contends in his replying affidavit that although the claim form refers to a claim in respect of Lot 123, his intention was to claim the Remainder of Lot 123 and he suggests we look at the attached title deeds to ascertain the identity of the property he is claiming[6]. As I have mentioned earlier on in this judgment, in motion proceedings, the applicant must make out a case in his founding affidavit[7]. In the papers submitted by the applicant, he lodged a claim for a restitution of a right in land in respect of Lot 123. Although in his founding affidavit he mentions the Remainder of Lot 123, that is not the property he mentioned in his claim form. The matter is to be decided only on the papers and it serves no purpose for the applicant to tell me in his replying affidavit what his original intention was. His original intention is not reflected on the papers placed before me.

[20] The applicant based his case on two causes of action. The first being a common law remedy of an interim interdict. The second cause of action was section 6 (3) of the Act. To succeed on the first cause of action, the applicant had to establish the following requirements:

(a) a *prima facie* right.
(b) apprehension of irreparable harm.
(c) balance of convenience.
(d) no other satisfactory remedy.

6 Sec prgraph 25 of the Replying Affidavit.
7 Mynhardt v Mynhardt 1986 1 SA 456 (T)

As I have mentioned, the applicant failed to establish a *prima facie* right, it is therefore unnecessary to discuss the remaining requirements as all requirements are to be proved cumulatively.

[21] Requirements for a section 6 (3) interdict were laid down in **Ga-Magashula Community Trust v Marsfontein And Others**[8] where Moloto AJ (as he then was) held:

> "For the applicant to succeed on this ground it must cumulatively prove all the elements of s 6(3) which are:
>
> (a) That the applicant is an interested party.
>
> (b) that there is a community which is entitled to claim restitution of a right in the relevant land and has lodged a claim
>
> *(c) that there is development on the said land, and*
>
> *(d) that the applicant has reason to believe that this development*
>
> *Will defeat the achievement of the object of the Act"*

[22] The first and third requirements are not in dispute. On the second requirement, the applicant has failed to show that he is a person who is entitled to claim restitution of a right in the relevant land and has lodged a claim. He failed to show that the dispossession took place as a result of past racially discriminatory law or practice. In fact there is no evidence to show that there was any dispossession as the applicant could not prove that the sale to the Board was a forced sale. There is also a contradiction with regard to the description of the property claimed. As I have mentioned earlier on, the applicant failed to prove that the sale and subsequent development will defeat the achievement of the objects of the Act. In the circumstances, the applicant has failed to prove his case on both causes of action.

[23] Finally, I wish to express my dissatisfaction with the manner in which the applicant's claim was handled by the Regional Land Claims Commissioner,

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8 2001 (2) SA 945 (LCC)

KwaZulu-Natal. The claim has been investigated for more than ten (10) years without publication thereof.

[24] In the result, I make the following order:

22.1. The application is dismissed.
22.2. The *rule nisi* issued on 18 February 2009 is discharged.
22.3. There is no order as to costs.

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M.T MCUBE

ACTING JUDGE OF THE LAND CLAIMS COURT

FOR THE APPLICANT: ADV CRAMPTON
INSTRUCTED BY : KATE CROUCH ATTORNEYS
PIETERMARITZBURG

FOR THE SECOND AND THIRD RESPONDENTS ADV. DE WET
INSTRUCTED BY : VENN NEMETH & HART ATTORNEYS
PIETERMARITZBURG