IN THE LAND CLAIMS COURT OF SOUTH AFRICA

Held at **RANDBURG** on 9 July 2012 **CASE NUMBER**: **LCC175/10**
Before **Mpshe AJ**
Decided on: 19 October 2012

In the case between:

THE DHLOMO- DHLOMO COMMUNITY	Plaintiff

and

THE MINISTER OF AGRICULTURE AND LAND AFFAIRS	1st Defendant
THE COMMISION ON RESTITUTION OF LAND RIGHTS	2nd Defendant
THE REGIONAL LAND CLAIMS COMMISSIONER - MPUMALANGA	3rd Defendant
ALOE FALLA GOLF ESTATE (PTY) LTD	4th Defendant

JUDGEMENT

MPSHE AJ:

Introduction

[1] This is an action pertaining to a land restitution claim regarding portion 5, 7, 8, 28, 30, 31, 49 and the remaining extent of the farm Avontuur 725 JT Badplaas (the property) in the Mpumalanga province. This matter is before court by way of a referral in terms of Section 14 of the Restitution of Land Rights Act 22 of 1994 (the Restitution Act).

Background

[2] The Ndumane Community, represented by Kenneth Job Masia, lodged a claim for restitution of rights in land in terms of section 2 of the Restitution Act. The claim was investigated by the third Defendant and found to be valid and complying with the relevant sections of the Restitution Act.

[3] At a certain point the third Defendant decided to 'consolidate' the claim of the Ndumane Community together with claim by Josiah Majiane Ngcongwane and several other claimant communities and individual claimants. The reason for this 'consolidation' was not stated in the referral report or explained in evidence during the trial, nor was there any reference to relevant empowering authority.

[4] After the 'consolidation' the third Defendant decided to refer to the claimants collectively as the Dhlomo Dhlomo Community. The claimants then formed a trust called the Ndwandwa Community Trust in order for the trust to receive the proceeds of the restitution process on behalf of the claimants.

[5] When the investigation by the third Defendant was completed a notice of the claim was published in the Government Gazette on 3 February 2006.

[6] Meanwhile, and prior to publication of the notice as aforesaid, the fourth Defendant had undertaken a process of acquiring the land for the purpose of developing a golf estate. The land was acquired as separate smallholdings zoned agricultural and thereafter consolidated. The fourth Defendant applied for a rezoning of the land use and obtained approval for a township development, which will include the golf estate and several businesses.

[7] After the claim was published the third Defendant learnt of the proposed golf estate and dispatched his officials to conduct an in-depth investigation regarding the proposed development and its viability. Third Defendant introduced representatives of the claimants to the fourth Defendant's Managing Director, Mr Robinson Winter, with the aim that the parties discuss a possible joint venture.

[8] Mr Winter was requested to propose several models as to how the community and the fourth Defendant could form a joint venture together and proceed with the development. The parties agreed on one of the models presented by the fourth Defendant and have subsequently concluded a joint venture to continue with the development of the land.

[9] It is common cause that the land in question cannot be productively cultivated for crops or used for grazing livestock. Its best use is for leisure, as it is currently zoned.

[10] The third Defendant then commissioned a valuator to appraise the land so that an offer could be made to acquire the land on behalf of the claimants. Fincon Valuators appraised the land and prepared a report dated 12 December 2006 in which it is stated that the land is valued at R49 980 000 (forty nine million nine-hundred and eighty thousand rand)

[11] An offer was made to fourth Defendant by third Defendant to purchase the land for the sum of R 48 980 000. Mr Winter, on behalf of the fourth Defendant, accepted the offer on the same day that it was made, i.e., on 13 August 2007.

[12] A sale was however, not concluded as a result of the offer and acceptance. It appears that the first Defendant was of the view that the price was too high and instructed the third Defendant to negotiate a lesser amount.[1] The officials conducted a due diligence on the proposed development which convinced them that the development was viable and sound especially since at that time there were sales in respect of phase 1 of the development totalling approximately R 54 000 000.

[13] Officials of the third Defendant then recommended that an offer to purchase in the amount of R 54 857 000 be made, but such offer was never made. A substantially reduced offer in the amount of R 41 000 000 was made on 15 May 2009 and accepted on the same day by the fourth Defendant. Yet again the sale did not materialise, because the first Defendant did not approve it.

[14] The publication of the claim meant that the fourth Defendant did not proceed with the development while the claim was lingering. It also meant that the fourth Defendant began

[1] Section 15A of the Rules Regarding the Procedure of Commission, GN R703, GG 2251 3/8/01

experiencing financial difficulties because of first Defendant's procrastination. A mandamus application was made in order to compel the third defendant to refer this matter to court.

[15] In the referral report it is conceded that the claim is valid and that the claimants are entitled to restitution. The third Defendant however avers that due to "price and circumstances" the land should not be restored but the claimants be awarded equitable redress in the form of monetary compensation. The claimants and the fourth Defendant join issue with the third defendant and insist that the land should be acquired on behalf of the claimants.

[16] The main dispute is whether this Court should order restoration of the fourth Defendant's property to the claimants and whether it should therefore make an order in terms of section 35(1) (a) of the Restitution Act, that the first Defendant should be ordered to acquire the fourth Defendant's property. Included in this question is the question whether it is feasible to restore the fourth Defendant's property to the claimants.

The Law on Restoration

[17] A right to restitution of rights in land was created by section 8(3)(b) of the Constitution of the Republic of South Africa Act, 200 of 1993 (the Interim Constitution) which provided that every person or community dispossessed of land before the commencement of the Constitution under any law that would have been inconsistent with Section 8 (2) had that sub-section been in operation at the time of the dispossession would be entitled to claim restitution of such rights subject to and in accordance with sections 121, 122 and 123 of the Interim Constitution. Section 121 of the interim constitution provided that an Act of parliament should provide for matters relating to the said restitution of land rights. The right to restitution of land rights was entrenched in the Final Constitution of the Republic of South Africa 108 of 1996[2].

[18] The Restitution of land rights Act 22 of 1994 (the Act) provides for restitution of rights in land in section 2 of the Act.

[2] Gamevest (Pty) Ltd v The Regional land Claims Commissioner for Northern Province & Mpumalanga and 4 Others 2002 (12) BCLR 1260 (SCA)

[19] The scheme and purpose of the Act is to restore rights in land to those communities and individuals who were dispossessed of their rights in land[3].

[20] The court in considering the feasibility or otherwise of physical restoration has to be guided by the provisions of section 33 (a) to (f)[4].

Facts Relevant to Restoration

[21] I deem it necessary to outline the status of the property pre and post publication of the claim for reasons that will became apparent later on. I do this through the evidence of the managing director of the fourth Respondent Mr. Winter.

[22] Winter is an astute entrepreneur with vast experience in project management. He has experience and expertise in farming around ailing institutions and is production driven. He has vast experience in financial management having worked for a bank.

[23] The property consisting of consolidated portions was purchased by fourth defendant during the period 2002 – 2003. The property at the time of purchasing or consolidation was mainly agricultural. Fourth defendant bought the properties to establish a golf estate. It was to convert the property from agricultural to industrial and leisure.

[24] Upon enquiry fourth Defendant was informed that there were no existing claims over the portions purchased save an investigation of a claim. A feasibility study was then embarked upon towards the development of a golf estate. The feasibility study yielded positive business potential.

[25] Prior to the publication of the claim on 3 February 2006 the land use had changed from agricultural to leisure and business. The following was as at 3 February 2006 in place on the property;

[3] Richtersveld Community and Others v Alexkor Ltd and Another 2003 (6) BCLR 583 (SCA); Mphela and Others v Haakdoornbult Boedery CC and Others 2008 (4) SA 488 (CC)
[4] Khosis Community, Lohatla, and Others v Minister of Defence and Others 2004 (5) SA 494 (SCA) at paragraph 30

[25.1] An (ROD) Record of Decision to rezone the property from agricultural land to a golf estate was obtained.

[25.2] Approval for road constructions were obtained from the Department of roads.

[25.3] Water licences had been obtained.

[25.4] Rezoning from agricultural to resort was granted.

[25.5] The EIA (Environmental Impact Assessment) process had been finalized and approved.

[25.6] The golf course was designed.

[25.7] Bridges were designed.

[25.8] All stands\plots totalling 840 had been pegged and surveyed.

[25.9] A portion of the property referred to as phase 1 had been sold to investors to the value of approximately R54 million and a total of R5.4 million was held in trust.

[25.10] A golf estate model was designed with a website in place. In order to achieve all the above a mortgage bond over the property to the value of R3 500 000 million was secured with ABSA Bank.

[26] The end product of the development was to include a golf driving range, a shopping complex, a golf estate, 18 lodges and laundry services.

[27] All these developments had to stop upon publication of the claim. As expected fourth Defendant complied with section 11(7) (aA) of the Act on the 15 May 2006. Fourth

Defendant was allowed only to continue with the building of the show house and the perimeter wall.

[28] Fourth Defendant started negotiations with second Defendant. A number of meetings were held between fourth and second Defendants. Second Defendant facilitated meetings between fourth Defendant and the claimants.

[29] Officials of the second Defendant would be present at these meetings. The sole purpose of these meetings was to encourage fourth defendant and claimants to come to an agreement towards working together in the development project. Ultimately a joint venture ("JV") agreement was produced after a number of presentations on the development were done by fourth Defendant to both the second Defendant and claimants.

[30] Claimants received no compensation at the time of dispossession.

[31] The first, second and third defendants oppose the physical restoration of the claimed property.

Basis for Opposing Physical Restoration

[32] First, second and third defendants opposition to the physical restoration is to be found in the referral report hereto[5]. It is stated as follows:

> "32.1 Page 11 paragraph 13
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> > 'As a result of the circumstances of this case and the price that the landowners is asking for the land in question the claimants community can only be awarded equitable redress instead of the restoration of their rights in land. (my underlining)'
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> 32.2 Page 15 paragraph 24.6
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> > 'The claimant community is eligible for restoration. Initially the commissioner was of the view that the claimant community was entitled to restitution in the form of restoration of their rights in land. As a result thereof the commission obtained valuations of the portions of the affected farm in order to determine the financial compensation payable to the present owners. However on consideration of the valuation report and other factors, the commission is of the view that restitution in the form of equitable redress is appropriate under the circumstances. (my underlining)'

[5] Referral Report pages 8-24 of pleadings

32.3 Page 22 paragraph 42

> 'In the circumstances of this case it is not feasible to grant the claimant community restoration of their rights in land. The financial resources of the department are stretched to the limit. The available resources have to be spent on purchasing land that would be optimally utilised by the restored community. The primary aim is to restore land to enable the communities to have a sustained development. The claimant community is a rural community which needs sustainable agrarian development. A golf course and first world business will not bring them any immediate poverty relief, instead it will cause problems. The pressing needs of the claimant community are the grazing and cultivation land.' (my underlining)

32.4 Page 14 paragraph 23

> 'The Dhlomo-dhlomo communal property association members have opted for physical restoration, and it is the finding of the office of the Regional Land Claims Commission, based on the investigation so far conducted and land already restored that 'just and equitable' compensation excluding physical restoration is the best way of resolving the claim. (my underlining)"

[33] I have clustered 32.1, 32.2 and 32.3 under financial issues and 32.4 as an overcompensation issue. In addition to 32.1 – 32.3 the evidence of Mr. Winter[6] and that of Mr. S. Singh[7] is relevant.

[34] It is by now trite that the purpose of the Act is to address the hurt and injustices of the past by providing redress to the affected communities. Defendants contend that resources of the state must be taken into consideration when considering redress to the affected claimants and that a balance needs to be struck.[8] I agree with this contention.

[35] The issue of employment provision, construction of shopping complex, skills transfer for sustenance, though still in a conceptual and potential stage cannot be ignored.

[36] The primary object of the Act is restitution of land[9]. The actual reason(s) for opposition by the defendants is not easy to understand. In evidence the defendants through cross-examination of witnesses alluded to financial resources of the state. However, the

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[6] Transcript line 3-19 page 339
[7] Transcript page 13 lines 9-12
[8] Supra at 4
[9] Richtersveld Community and Others v Alexkor Ltd and Another 2003 (6) BCLR 583 (SCA), 2002 (6) SA 104 (SCA)

evidence of Mr. Singh the Director: Quality Assurance is to effect that restoration should not be granted because of the "pie in the sky" and that the state is prepared to spend on 'actual' and not 'potentials'. On his evidence Mr Singh referred to the policy of the defendants. I find nothing militating against physical restoration.

[37] Mr. Singh conceded that he is not aware of what happened on the subject property after the recommended non-restoration of the land. He conceded after being appraised of the developments, that the "pie in the sky" concept cannot be sustained anymore. Neither does he know possible benefits the claimants may receive if the property is restored. Defendants through their counsel echoed the state's concern with regard to the expertise, skills and knowledge of the claimants. This in my mind, needs to be taken care of by the state in order to protect interests of the claimants. However, all of these issues/concerns were appropriately addressed by witnesses Masina and Winter.

[38] It is clear in my mind, that the issue of budget and/or financial resources of the state were never intended to be a reason in itself for opposing physical restoration.

[39] The Defendants argue that physical restoration of the property would lead to overcompensation. The argument is that land in extent of 22790. 5994 ha valued at R156 839 455.00 has already been restored to the claimants. That restoration of a golf estate would amount to overcompensation.

[40] The Defendants submit that the claimants will be overcompensated should the property be restored. This is premised on the fact that some properties have already been restored to the claimant community.

[41] It needs to be remembered that the already restored property and the currently claimed property were initially claimants' property and claimants have the right to claim all back. The fact that the state has already spent substantial amounts of money on the previously restored properties cannot be used as a bar against claimants.

[42] The case *Mphela and Others v Haadornbult Boerdery CC & Others*[10] is relevant. Although the *Mphela* case is different from this case, the issue of overcompensation was addressed. The fact that the Mphela family occupied the property Pylkop which they purchased from compensation received at time of dispossession was regarded irrelevant by the court and certain portions of the claimed land were restored to the Mphela family. This was over and above the ownership of the farm Pylkop[11].

[43] In *casu* the claimant community received no compensation at the time of dispossession. The constitutional court in the *Mphela*[12] decision states:

> "In deciding whether or not to order restoration of land, said the Supreme Court of Appeal, a court is obliged in terms of section 33 (eA) of the Act to take into account the amount of compensation or any other consideration received in respect of the dispossession"

[44] I find no reason(s) for me to make a finding that the claimants will receive more than what they had lost as a result of the racial and discriminating laws and practices of the past.

[45] The overwhelming evidence favours physical restoration. Mr. Sam Tumba Masina testified on behalf of the claimant community. He testified as to the reason(s) to have physical restoration of the land and the benefits to be derived by the claimant community.

[46] Mr. Masina further testified that since 2006 the state has done nothing regarding this claim save to arrange a meeting with the fourth Defendant's managing director Mr. Winter and the claimants; that the issue of financial compensation was never discussed with the claimants to date; that the issue of financial compensation was disclosed to him during these proceedings. This witness was cross-examined at length but could not be shaken regarding the wishes of the community. He testified further that there was a riot by the youth of that community as a result of the land not being restored as well as the lack of benefits and services to the community.

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[10] 2008 (4) SA 488 (CC)
[11] Supra note 10 page 503 paragraph 39
[12] Supra note 10 page 495 paragraph 15

[47] The claimant community is made up of 2000 households. The state is offering an amount of R4 965 000.00 to claimants by way of financial compensation as equitable redress.

[48] The current value emanating from due diligence conducted by the defendants is R41 million. The offer to claimants is R4 965 000.00. This scenario calls for the application of equity. In the *In re Former Highlands Residents: Sonny & Others v the Department of Land Affairs*[13] the court dealing with requirements of equity and justice states:

> "The precepts of equity and justice may elucidate legislative intent, because the Legislature is presumed not to have contemplated an unjust or inequitable result. In cases where it is evident that the Legislature did not intend to prescribe for a particular factual situation, but to leave it to the Court to work out a solution as the circumstances of every particular case may require, justice and equity will guide the Court in making an appropriate order..." (my underlining)

[49] I am awake to the reason(s) put forward by claimants for physical restoration. The benefits including, poverty alleviation that the restored property will bring to the claimant community. I cannot find support for the proposition that the financial compensation is an equitable redress. A simple calculation indicates that each household will be entitled to a once-off payment of R2 482.50. Whilst with restored land the benefits would be greater on a long term basis.

[50] The court in considering its decision is to have regard to the guidelines as provided in Section 33 of the act. I have taken the guidelines into consideration particularly 33 (cA) 33 (eB) and 33(c).

[51] In *In re Kroospoort Community*[14] the Court states:

> "The test which emerges from this analysis is that the Court should ask: is the restoration of the rights in land in question to the claimant possible and practical, regard being had to
>
> (1) the nature of the land and the surrounding environment at the time of the dispossession;
> (2) the nature of the claimant's use at the time of the dispossession;
> (3) the changes which have taken place on the land itself and in the surrounding area since the dispossession;
> (4) any physical or inherent defects in the land;
> (5) official land use planning measures relating to the area;

[13] 2000 (2) SA 351 (LCC) page 362 paragraph 22
[14] 2000 (2) SA 124 (LCC) at paragraph 92

(6) the general nature of the claimant's intended use of the land concerned. However, this does not mean that an enquiry into the social and economic viability of the claimant's intended use is required."

[52] Having considered all the above I came to a conclusion that in order to satisfy equity and justice physical restoration is unavoidable.

I therefore make the following order:

a. The Dhlomo – Dhlomo community is entitled to the restoration of the land made up of portions 5, 7, 8, 28, 30, 31, 49 and the remaining extent of the farm Avontuur 725 JT situated in the Mpumalanga Province.
b. The state is to acquire the said property described in (a) *supra*.
c. The property is to be transferred to the Ndwandwa Community Trust.
d. The second and\or third defendant is to appoint a legal adviser for the claimants towards finalisation of the joint venture with the fourth defendant and the safeguard of the interests of the claimant community.
e. First, second and third defendants to pay the costs of the plaintiff on a party to party scale.

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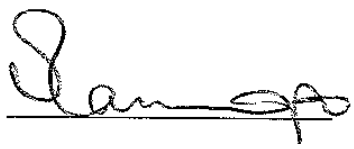
JUDGE M MPSHE

Land Claims Court



ADV. MALEBO KOTU-RAMMOPO

ASSESOR

For the Claimants
Adv P Nonyane

For the First, Second and Third Defendant
Adv V S Notshe SC

For the Fourth Defendant
Adv HS Havenga SC