IN THE LAND CLAIMS COURT OF SOUTH AFRICA

Held at **CAPE TOWN** **CASE NUMBER**: **LCC26/10**
Before **Mpshe AJ**
Heard on: **19 – 23 March 2012**

Decided on: **7 December 2012**

In the case between:

THE REGIONAL LAND CLAIMS COMMISSIONER	1st Applicant
SEDICK SADIEN	2nd Applicant
EBRAHIM SADIEN	3rd Applicant

and

JAZZ SPIRIT 12 (PTY) LTD	1st Respondent
YAMIV (PTY) LTD	2nd Respondent
HEIN R. BADENHORST	3rd Respondent
THE REGISTRAR OF DEEDS	4th Respondent

JUDGEMENT

MPSHE AJ

Introduction

[1] This is a claim by Mogamat Rashaad Sadien for restitution of rights in land in the land described as Remainder Erf 2274Constantia in the Western Cape Province (the property).

[2] This is a claim for physical restoration of the property. He claims in his capacity as a direct descendant of Omar Sadien, his father. It does not appear that he claims on behalf of all other descendants.

[3] The claim is based on the alleged dispossession of the property under the Group Areas Act 77 of 1957. The property at the time of dispossession was co-owned by five brothers in

undivided shares. It is alleged that the property was forcibly sold and that just and equitable compensation was not paid.

[4] The claim is opposed by first to third respondents who contend that the property was not dispossessed in terms of the Restitution of Land Rights Act 22 of 1994 but was sold on auction due to financial distress.

Parties

[5] First applicant is the **Regional Land Claims Commissioner: Western Cape**, with offices in Cape Town.

Second applicant is **Sedick Sadien** he is the son to the deceased claimant Mogamat Rashaad Sadien, who had lodged a claim with first applicant.

Third applicant **Ebrahim Sadien** is the son of the deceased claimant Magmoed Sadien. Magmoed Sadien is the late son of the late Ismael Sadien. Third applicant is thus the grandson of the late Ismael Sadien, a co-owner of the property.

First respondent is **Jazz Spirit 12 (Pty) Ltd**, a company duly registered according to the company laws of South Africa with offices in Constantia, Western Cape. First respondent not formed after the purchasing of the property by J.A.J Badenhorst.

Second respondent is **Yamiv (Pty) Ltd** a company duly registered according to the to the company laws of South Africa. With its previous address at Sillery Farm, Silley Lane Constantia. Second respondent bought the property in 1981.

Third respondent is **HEIN J. BADENHORST**, an adult male businessman, of No. 1 Evergreen Avenue, Constantia. The third respondent was at all material times a director of the first respondent.

Fourth respondent is **THE REGISTRAR OF DEEDS**, a juristic person capable of being sued and cited in terms of the Deeds Registries Act 47 of 1937 with offices at Plein Street, Cape Town, and which is, *inter alia*, responsible for the sub-division of immovable property,

in *casu* the subdivision of the subject property (known as remainder of erf 2274 Constantia). The fourth respondent is cited herein because of its interest in the present application.

Background

[6] In 1902 Dawood (recorded as Doet or Dout) Sadien bought at least 3 portions of land from the subdivided Sillery Estate, one of which (erf 2274) became his family's home and source of livelihood. The family farmed on this property until they were allegedly dispossessed of the land. In 1921, after building and donating a mosque to the local Muslim community, Doet died, leaving his wife (Fatima) a usufruct of the remainder of the family farm, which she continued to run. In 1956, Fatima (Doet's widow) died, and the farm was purchased on auction by five of the Sadien brothers (Mogamet Toyer, Abdurahman, Omar, Imam Doet and Ismail). Ismail died after the purchase but before the transfer, and the land was transferred in March 1958 into the names of the four surviving brothers and deceased Estate of the fifth brother Ismail. In 1961, some five years after the Group Areas Inquiry, and simultaneously to the consideration of radical new powers for the Group Areas Board, vast tracts of Cape Town were declared White areas by proclamation 34 of 1961, gazetted on Friday 10th of February.

[7] The claim form was completed by Mogamot Rashaad Sadien substituted by second applicant Sedick Sadien. The property before dispossession was co-owned by the five Sadien brothers. The property was later a subject of a forced sale.

[8] The property was sold on auction to J.A.J Badenhorst, grandfather to third respondent on 21st March 1962 for the amount of R13 550.00.

[9] A brief status of the subject property before and after dispossession is necessary. Prior to dispossession the property was a market garden on a farm in Constantia. It was basically agricultural. The claimants used the property and earned their living through fruit and vegetables business. Claimants made use of water from a river stream that ran through the property. The said stream is no longer in use as same has been shut down by the local authorities. This then renders the vegetable and fruit business impossible due to lack of water. Evidence of the applicants is to the effect that the family made a living from the land which was fertile and well watered. The family ran a farm stall and a hawking business. They also

grew seeds for a nursery. The family lived and enjoyed proceeds from the property. They basically were able to lead a competitive lifestyle befitting that period in time.

[10] On the 30 June 2005 the current owners obtained a Record of Decision. This basically grants the owner (respondents) permission to develop the property. This entailed the sale, rezoning, intention to sub-divide and develop the property as contemplated in section 11 (7) (aA) of the Act. The Record of Decision was obtained in terms of the Environmental Conservation Act 73 of 1989 granting permission for a change of land use from public open space to residential purposes.

[11] The property owners have obtained permission to rezone the property from public open space to sub-divisional area. The decision was obtained from the Department of Environmental Affairs and Development Planning (DEA and DP) in terms of section 44 of the Land Use Planning Ordinance 15 of 1985 (LUPO).

[12] On approval by the DEA and DP in terms of section 44 LUPO to sub-divide the subject properties; the subject property has overcome change over a long period of time. It is currently a residential area and is unsuitable for market gardening and production of seeds. It is clear that for the subject property to revert to its former status much will have to be done.

[13] There is currently an official land use planning for the subject property in the form of a residential estate. I have not come across evidence from the applicants, given the change in the property, as to their intended use upon restoration. There is only evidence to the effect that claimants want the land to be restored.

Claims Lodged

[14] A total of four claims were lodged. This claim is C371 lodged on 29th December 1998 by Ismail Coenrad the grandson to Ismail Sadien. Claim S851 lodged by Mogmoed Sadien on behalf of the dispossessed co-owner Doet Sadien. Claim S38 lodged by Mogamat Rashaad Sadien on the 14th of December 1995. Claim S287 completed by Magmoed Sadien on the 13th of September 1996.

[15] Only one of the above claims namely S38 was duly processed and gazetted on 1st April 1999 under notice 499 of 1999. It therefore means that only one claim is before this court.

Facts not in Issue

By formal admission

[16] The following issues are common cause:

[16.1] that the Sadien brothers purchased the property on 21 November 1956 in equal shares for £11 000 from the estate of the late Doet Sadien;

[16.2] that Ismail Sadien (one of the five Sadien brothers) passed away before registration of the transfer of ownership of the property on 6 March 1958 in favour of the Sadien brothers, with the result that his share was transferred in the name of Estate Late Ismail Sadien;

[16.3] that the ownership of the property was transferred in favour of the four living brothers and the estate late Ismail Sadien.

[16.4] that the Group Areas Act (and its successors) and the Community Development Act (and its successors) were both Acts that have in the past discriminated on the basis of race as contemplated in terms of section 2(1) of the Restitution Act;

[16.5] that in terms of proclamation No. 34 of 10 February 1961 promulgated in terms of section 20 of the Group Areas Act (77 of 1957) the area in which the property is situated was declared an area for ownership and occupation of members of the White group;

[16.6] that the Sadien brothers (including the estate late Ismail Sadien) were the registered owners as at date of the said 1961 proclamation;

[16.7] that the Sadien brothers on 14 March 1962 attempted to sell the property by way of a public auction and that the auctioneers accepted Mr. Jacob Adriaan

Jacobus Badenhorst's bid for R 12 700.00, the latter, who on the basis of his race group qualified to hold ownership of the property;

[16.8] that the Sadien brothers rejected the bid and further negotiations between the parties ensued and which culminated in an agreement *inter* parties in terms of which J A J Badenhorst purchased the property for R 13 550.00 on 21 March 1962.

[16.9] that the Sadien family lived and enjoyed their livelihood on the property.

Facts in Issue

[17] The issues which this Court is required to decide are:

[17.1] whether the Sadien Brothers were dispossessed of their rights in the property as a result of past racially discriminatory laws or practices when it was purchased by a Mr J A J Badenhorst on 21 March 1962**; and if so,**

[17.2] whether they were paid just and equitable compensation as contemplated in section 25(3) of the Constitution or any other consideration which is just and equitable; **and if not**,

[17.3] whether the second respondent's notice to the first applicant should be accepted as a notice complying with the provisions of section 11 (7) (aA) of the Restitution Act. Section 11 (7) (aA) provides:

> "(7) Once a notice has been published in respect of any land –
>
> > (aA) no person may sell, exchange, donate, lease, subdivide, rezone or develop the land in question without having given the regional land claims commissioner one month's written notice of his or her intention to do so, and, where such notice was not given in respect of –
> >
> > > (i) any sale, exchange, donation, lease, subdivision or rezoning of land and the Court is satisfied that such sale, exchange, donation,

lease, subdivision or rezoning was not done in good faith, the Court may set aside such sale, exchange, donation, lease, subdivision or rezoning or grant any other order it deems fit;

(ii) any development of land and the Court is satisfied that such development was not done in good faith, the court may grant any order it deems fit;"

SPECIAL PLEA

[18] Mr. Van der Westhuizen for the respondents submits that the claim for restoration of the property is a debt in terms of the prescription Act 68 of 1969, and that the claim has therefore prescribed, section 11 provides:

"The periods of prescription of debts shall be the following:

....

(*d*) save where an Act of Parliament provides otherwise, three years in respect of any other debt."

[19] It is indeed so that the word "debt" includes right in land for purposes of the Prescription Act 68 of 1969.

[20] In the case of *Barnett and Others v Minister of Land Affairs and Others*[1], Brand AJ said the following:

"In my view it is fair to say that the government was aware of the identities of the defendants and of the facts upon which its claims against them rely, more than three years before the present action was instituted. I am also prepared to accept that the vindicatory relief which the government seeks to enforce constitutes a 'debt' as contemplated by the Prescription Act. Though the Act does not define the term 'debt', it has been held that, for purposes of the Act, the term has a wide and general meaning and that it includes an obligation to do something or refrain from doing something (see e g Electricity Supply Commission v Stewarts and Lloyds of SA (Pty) Ltd 1981 (3) SA 340 (A) at 344-G and Desai NO v Desai and Others 1996 (1) SA 141 (A) at 146H-J). Thus understood, I can see no reason why it would not include a claim for

[1] 2007 (6) SA 313 (SCA) at page 320 paragraph 19

> the enforcement of an owner's rights to property (see also e g Evins v Shield Insurance Co Ltd 1979 (3) SA 1136 (W) at 1141F-G)."

[21] The dictionary meaning of the word "debt" is said to be "something owed or due which one person is under an obligation to pay or render to another..."[2]

I further accept that the Prescription Act is binding on the state.

[22] Mr. Jacobs for the applicants submitted that the Prescription Act cannot be grafted onto the Restitution Act. He argued that the provisions of the Prescription Act are inconsistent with the Restitution Act. In support hereof he referred to section 16(1) of the Prescription Act. Section 16(1) reads:

> Subject to the provisions of subsection (2) (*b*), the provisions of this chapter shall, save in so far as they are inconsistent with the provisions of any Act of Parliament which prescribes a specified period within which a claim is to be made or an action is to be instituted in respect of a debt or imposes conditions on the institution of an action for the recovery of a debt, apply to any debt arising after the commencement of this Act.

[23] Mr. Jacobs submits that the Prescription Act is not applicable in the present case due to it, Prescription Act, being inconsistent with the Restitution of Land Rights Act 22 of 1994.

[24] It is necessary to embark on an enquiry as to the consistency or otherwise, of section 11 to the Prescription Act read with the provisions of section 2 (1) (a) and 2 (1) (e) to the Restitution Act.

Section 2 (1) (a) states that

> "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 <u>after 19 June 1913</u> ...."

Section 2 (1) (e) provides that

> "the claim for such restitution is lodged not later than <u>31 December 1998</u>". (my emphasis)

[2] New Shorter Oxford English Dictionary

[25] I am of the opinion that the provisions of the Prescription Act particularly Chapter III thereof are of a general nature. This is ascertainable from the wording in particular of section 11 (d) which states that the period of prescription shall be as stated in the Act "save where an Act of Parliament provides otherwise ..."

[26] The logical interpretation thereof in my opinion is that if there be any Act of Parliament providing for prescription of a debt then the Prescription Act may not apply. This is further galvanised by the provisions of section 16(1) of the Prescription Act.

[27] However, on the other hand section 2 (1) (a) and section 2 (1) (e) provides specifically for restitution matters. It must have been the intention of the lawmaker to regulate debts arising through claims of rights in land. The cut-off date 31 December 1998 lays down a prescription period. If therefore Chapter III of the Prescription Act is said to be applicable in restitution cases, section 2 (1) (a) and 2 (1) (e) would be rendered futile.

[28] I am not aware of any provision in the Restitution Act that provides for the processing of a claim after lodgement to be finalised within a specific period. I come to the conclusion that the provisions of Chapter III to the Prescription Act are inconsistent and cannot apply to claims under the Restitution Act. This special plea stands to be dismissed.

Section 11 (7) (aA) Compliance

[29] Applicants submit that the subdivision, rezoning and development of remainder of erf 2274 Constantia falls to be set aside. The submission is premised on the provisions of section 11 (7) (aA) to the Act. The section provides as follows:

> "Once a notice has been published in respect of any land no person may sell, exchange, donate, lease, subdivide, rezone or develop the land in question without having given the regional land claims commissioner one month's written notice of his or her intention to do so, and, where such notice was not given in respect of –
>
> (i) any sale, exchange, donation, lease, subdivision or rezoning of land and the Court is satisfied that such sale, exchange, donation, lease, subdivision or rezoning was not done in good faith, the Court may set aside such sale, exchange, donation, lease, subdivision or rezoning or grant any other order it deems fit;
>
> (ii) any development of land and the Court is satisfied that such development was not done in good faith, the Court may grant any order it deems fit;" [my emphasis]

[30] In deciding on this issue I need to enquire into the absence or otherwise of the notice as required. Further if the notice was not given, I need to enquire whether such failure to give notice demonstrates lack of good faith.

[31] The interpretation and application of any section within an Act is a process that is fraught with various considerations. It is not enough to simply look at a section; one must consider the section in relation to the entire Act and the objects of that Act. The golden rule of interpretation is to be found in *Farrar's Estate v Commissioner for Inland Revenue*[3]

> "The governing rule of interpretation...is to endeavour to ascertain the intention of the lawmaker from a study of the provisions of the enactment in question"

[32] However, for Botha[4] the legislative function is a purposive activity; in terms of this approach, the purpose or object of the legislation (the legislative scheme) is the prevailing factor in interpretation. The context of the legislation, including social factors and political policy directions, are also taken into account to establish the purpose of the legislation. These arguments are given in light of the change in the status of South Africa from parliamentary sovereignty to Constitutional democracy. The Constitution and not parliament is now supreme thus the move away from the intention of the legislature to the purpose of the Act [my emphasis]

[33] Thus when interpreting and applying section 11 (7) (aA) this must be done in the context of the objects and purpose of the Restitution Act and the Constitution.

Interpretation of the Section

[34] In order to interpret this section it is necessary to understand it within the context of the Restitution Act. The constitutionality of section 11 (7) was challenged in *Transvaal Agricultural Union v the Minister of Land and Another*[5]. The Constitutional Court was

[3] 1926 TPD 501 at page 508
[4] Botha C. *Statutory Interpretation* (4th Ed) (Juta, Cape Town 2005) at 56
[5] 1997 (2) SA 621 (CC)

required to examine if this section met the Constitutional requirements of just administrative action; in doing so the court considered the object of the section and held:

> "The purpose of s 11 (7) and (8) of the Act is to maintain the status quo pending the determination of the claim for restitution, and to protect claimants against possible eviction or damage to improvements to the property while the claim is being processed. These could include residential accommodation and other improvements necessary for the claimants to continue living on the property.[6]

[35] The Constitutional Court found that the purpose of this section is to maintain the *status quo* and protect claimants pending the determination of their restitution claim. Thus the provisions of this section must be interpreted in view of the object of the entire section which is to maintain the *status quo* and protect the claimants.

[36] From the provisions of the section the following is apparent: firstly, this section only comes into operation once a notice has been published[7]. Prior to such happening this section cannot be relied on.

[37] Secondly, the section is restrictive in that it prevents a person from performing any of the following acts: selling, donating, leasing, subdividing, rezoning or developing the land in question without giving written notice to the regional land claims commissioner. Two possible interpretations may emerge from this; on the one hand it could be argued that the land owner need only give the notice after which he may perform the act. On the other hand it is submitted that the regional land claims commissioner should have the power to authorise the proposed act. Van Der Merwe[8] is a proponent of the former construction arguing that the section does not prohibit the activities it merely requires notification of an intention to do so. On the other hand it may be argued that if the regional land claims commissioner could do nothing as long as the notification was given that may defeat the object of the Act. However, this is a question that has yet to come before the courts and the reason for this is linked to the application of the section which will be discussed below.

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[6] *Supra* note 6 at paragraph 34
[7] This refers to a notice in terms of section 11 (1) of Act 22 of 1994
[8] Van Der Merwe C.F. 2003. "Consequences of Gazetting a Land Claim" *The South African Valuer,* December:14-19 at 18-19

[38] Thirdly, the role of the Court if this section is invoked; from a reading of the entire section, the Court is only required to review any of the listed activities if they take place without a notice being given. Thus as was mentioned above it could be argued that the regional land claims commissioner should be allowed to authorise the activity because once a notice is given the Court will not come into play despite the fact that the activity may have not occurred in good faith. On the other hand the commissioner may, after notice is given, rely on the other remedies such as an interdict to prevent the land owner from defeating the purpose of the Act.

Application of the section

[39] The application of this section is linked to the role this Court plays in terms of this section. The section will generally be invoked if a land owner or any other person performs one of the listed activities without giving the regional land claims commissioner notice. In *Allie NO & Another v the Department of Land Affairs and 3 Others*[9] section 11 (7) (aA) was invoked by the applicant hoping that a sale of property subject to a land claim would be set aside. Meer AJ canvassed the issue in the following manner:

> "The issue that I am required to determine with regard to the sale of the subject property by the second to the third respondent is whether the Court may set aside the sale in terms of section 11 (7) (aA) (i) on the grounds that it was not done in good faith. It was common cause that the subject property was sold to the third respondent contrary to second respondent's stated policy not to sell properties subject to land claims. It was also common cause that as far back as 1993 the Department of Housing received a letter from the Regional Land Claims Commissioner to the effect that a claim for restitution of land rights had been registered by the claimant against the subject property in terms of Section 10 of the Restitution Act and that steps had been taken to have the claim published in the in the Government Gazette as required by the Act. Thereafter the claim was referred to the Housing Board task team. The above notwithstanding, the subject property was sold to the third respondent in November 1997 as part of a low cost housing sale policy at the price of R95,28 per square metre. The subject property fell into what was called Phase 2 of Walmer Estate"[10]

[40] After determining that the subject property had been sold contrary to the provisions of section 11 (7) (aA), Meer AJ was faced with another question. Does the sale stand to be set aside on the basis of *mala fides?* with regard to this she held that:

> "The property was mistakenly sold contrary to the decision, in the absence of the kind of mala fides referred to in Leach. The commentary on mala fides by Burns accordingly has no application to the different circumstances of the present case. Nor, in my view, do these

[9] (LCC 13/200) [2002] ZALCC 50
[10] *Supra* note 10 at paragraph 73-74

> sections of Baxter and Wiechers as referred to support an argument construing second respondent's negligence in selling the property as mala fides. As is aptly argued by Wiechers, mala fides presumes consciousness of wrongfulness, a conscience which was clearly absent in the sale of the subject property. Therefore the negligence on the part of the second respondent notwithstanding, I am unable to find that the sale was not in good faith and stands to be set aside for that reason."[11]

[41] In *Crystal Holding (Pty) Ltd & Others v The Regional Land Claims Commissioner*[12] the section was mentioned in passing. The respondents tried to invoke it to justify their obligation to interfere in an agreement entered into with the applicant, the court held as follows:

> "It could not therefore be true and correct to say when the applicants entered into the Shareholders Agreements, the notice was still valid and that they had thereby acted in violation of the provisions of sections 11 (7)(a) and (aA)."

[42] The conclusion in the *Crystal Holdings (Pty) Ltd* case is reached because the Court was of the view that the restitution process was complete because the land had been transferred to the claimants, therefore, it was found that the Restitution Act did not apply and section 11 (7) (aA) could not be relied on.

[43] If a person fails to give notice as required and embarks on the prohibited activities, that entitles the claimant or any interested party to approach court to set aside any of the said activities.

[44] The manner in which the first applicant handled this matter is discomforting. On the 23rd September 2009 the first applicant wrote a letter to one of the directors of first respondent one John Viveiros. This letter calls upon the first respondent to stop the development forthwith as the same are in contravention of section 11(7) of the Act. It cannot be true that the knowledge about the development reached first applicant only during the year 2009. First applicant was served with a notice as early as 29 November 2002 and further received notification of the intended development on the 11 May 2005 to which nothing was done by the first applicant.

[45] Startling again is the memorandum of the first applicant dated 16 November 2009. This memorandum suggests that the whereabouts of first respondent are unknown.

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[11] *Supra* note 10 at paragraph 82-83
[12] [2008] 1 All SA 243 (N)

[46] This is confusing given the fact that the very Legal Officer seeking to assist in locating the first respondent has actually as far back as 23 September 2009 instructed first respondent to stop the development. It appears to have been the right hand not knowing what the left hand is doing.

[47] Under the *bona fide* belief that section 11 (7) (aA) has been complied with, third respondent representing first respondent sent a letter dated 26 November 2009 to first applicant informing first applicant of commencement of the development on the property.

[48] The first applicant reacted to the notice seven years later. The first applicant had the authority to deal with the intended development in accordance with section 6(3) of the Act as far back as 2002.

[49] It is our law that both rights of the owner and claimant(s) are to be respected.

[50] Mr. Jacob for applicants argues that the alleged notice of the 29 November 2002 is invalid because it was not done by the owner of the property. There is no merit in this line of argument, section 11 (7) (aA) states "no person may sell ..." [my emphasis]

[51] The purpose of section 11 (7) (aA) plays a role. In other words what is it that the legislature intends to achieve with this provision. I have indicated earlier that, in my opinion, the purpose is to alert the Commission about activities conducted or to be conducted on the subject property. The Act does not prescribe as to how the notice is to be written. As long as a notice is served, no matter how deficient, it shall be accepted as a notice.

[52] In *Unlawful Occupiers, School Site v City of Johannesburg*[13]Brand JA stated that:

> "It is clear from the authorities that even when the formalities required by statute are peremptory it is not every deviation from the literal prescription that is fatal. Even in that event, the question remains whether, in spite of the defects, the object of the statutory provision had been achieved." [my emphasis]

Brand JA was relying on the dictum of Olivier J.A in *Weenen Transitional Local Council v van Dyk*[14] which held as follows:

[13] 2005 (4) S. A. 199 (SCA) at 209G-paragraph 22

> "it seems to me that the correct approach to the objection that the appellant had failed to comply with the requirements of s 166 of the ordinance is to follow a common-sense approach by asking the question whether the steps taken by the local authority were effective to bring about the exigibility of the claim measured against the intention of the legislature as ascertained from the language, scope and purpose of the enactment as a whole and the statutory requirement in particular (see Nkisimane and Others v Santam Insurance Co Ltd 1978 (2) SA 430 (A) at 434A – B). Legalistic debates as to whether the enactment is peremptory (imperative, absolute, mandatory, a categorical imperative) or merely directory; whether 'shall' should be read as 'may'; whether strict as opposed to substantial compliance is required, whether delegated legislation dealing with formal requirements are of legislative or administrative nature, etc. may be interesting, but seldom essential to the outcome of a real case before the courts. They tell us what the outcome of the court's interpretation of the particular enactment is; they cannot tell us how to interpret. These debates have a posterior, not a priori significance. The approach described above, identified as '... a trend in interpretation away from the strict legalistic to the substantive' by Van Dijkhorst J in Ex parte Mothuloe (Law Society, Transvaal, Intervening) 1996 (4) SA"

In paragraph 23 Brand JA clarified the reason for this approach and went on to say:

> "...the purpose of s 4(2) is to afford the respondents in an application under PIE an additional opportunity, apart from the opportunity they have already had under the Rules of Court, to put all the circumstances they allege to be relevant before the court (see Cape Killarney Property Investments at 1229E - F). The two subsections of s 4(5) that had not been complied with were (a) and (c). The object of these two subsections is, in my view, to inform the respondents of the basis upon which the eviction order is sought so as to enable them to meet that case. The question is therefore whether, despite its defects, the s 4(2) notice had, in all the circumstances, achieved that purpose. With reference to the appellants who all opposed the application and who were at all times represented by counsel and attorneys, the s 4(2) notice had obviously attained the Legislature's goal. However, there were also respondents who did not oppose and who might not have had the benefit of legal representation. It is with regard to these respondents that the question arises whether the s 4(2) notice had, despite its deficiencies achieved its purpose."

[53] In the light of the above, I find that proper notice was given in compliance with section 11 (7) (aA) of the Act.

Dispossession

[54] A claim for restitution of a right in land under section 2 of the Restitution Act may succeed only if:

(a) the claimant is a person or community or part of a community;

(b) that had a right in land;

[14] 2002 (4) SA 653 (SCA) at paragraph [13]

(c) which was dispossessed;

(d) after 19 June 1913;

(e) as a result of past racially discriminatory laws or practices;

(f) where the claim for restitution was lodged not later than 31 December 1998; and

(g) no just and equitable compensation was received for the dispossession.[my emphasis]

The above requirements were outlined in the *Department of Land Affairs v Goedgelegen Tropical Fruits*[15].

[55] Section 25 (7) of the Constitution of the Republic of South Africa provides:

> "A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled to the extent provided by an Act of Parliament, either to restitution of the property or to equitable redress".

[56] In analysing the purpose of the Restitution of Land Rights Act 22 of 1994 (the Act) the Constitutional Court states in *Alexkor Ltd v Richtersveld Community*[16]

> "In our view, although it is clear that a primary purpose of the Act was to undo some of the damage wreaked by decades of spatial apartheid, and that this constitutes an important purpose relevant to the interpretation of the Act, the Act has a broader scope. In particular, its purpose is to provide redress to these individuals and communities who were dispossessed of their land rights by the government because of the government's racially discriminatory policies in respect of those very land rights."

[57] In the *Department of Land Affairs* case it was held at paragraph 53 that [17]:

> "It is by now trite that not only the empowering provision of the Constitution but also of the Restitution Act must be understood purposively because it is remedial legislation umbilically linked to the Constitution. Therefore, in construing "as a result of past racially discriminatory

[15] 2007 (6) SA 199 (CC)
[16] 2004 (5) S A 460 (CC) at page 492 paragraph 98

[17] *Supra* note 17 at page 218-219 paragraph 53

> laws or practices" in its setting of section 2 (1) of the Restitution Act, we are obliged to scrutinise its purpose. As we do so, we must seek to promote the spirit, purpot and objects of the Bill of Rights. We must prefer a generous construction over a merely textual or legalistic one in order to afford claimants the fullest possible protection of their constitutional guarantees. In searching for the purpose, it is legitimate to seek to identity the mischief sought to be remedied. In part, that is why it is helpful, where appropriate, to pay due attention to the social and historical background of the legislation. We must understand the provision within the context of the grid, if any, of related provisions and of the statute as a whole including its underlying values. Although the text is often the starting point of any statutory construction, the meaning it bears must pay due regard to context. This is so even when the ordinary meaning of the provision to be construed is clear and unambiguous." [my emphasis]

[58] The requirement "as a result of past racially discriminatory laws or practices" is the only one in dispute. It is common cause that:

(i) the Group Areas Act (and its successors) and the Community Development Act (and its successors) were both Acts that have in the past discriminated on the basis of race as contemplated in terms of section 2(1) of the Restitution Act;

(ii) that in terms of proclamation number 34 of 10 February 1961 promulgated in terms of section 20 of the Group Areas Act (77 of 1957) the area in which the property is situated was declared an area for ownership and occupation by members of the White group;

(iii) that the Sadien brothers were the registered owners as at date of the said 10 February 1961 proclamation; and

(iv) that the Sadien brothers in view of their race group were disqualified from forever continuing to remain the owners of the property and that if they were to sell the property, they could only do so to a "white" person or alternatively face possible expropriation in terms of the discriminatory laws as and when the State deemed fit so to do.

[59] In LAWSA volume 10 the purpose of the Group Areas legislation is described as follows:

> "the ultimate object of the Group Areas Legislation was the establishment and allocation of group areas in which only members of specified racial groups would be entitled to own and occupy land in their respective areas".

[60] Discrimination between the groups and members of the different groups is an inevitable consequence of the application of the Act. Proclamation of a group area entails consequences for owners of fixed property in that the commercial value of the property would be affected. This court is to determine the reasons for the loss of the property by the Sadien family. Was the dispossession as a result of the racially discriminatory laws or practices of the time?

[61] The Constitutional Court, in Department of Land Affairs[18] states the following regarding meaning of "as a result of"

> "I conclude that the term "as a result of" in the context of the Restitution Act is intended to be less restrictive and should be interpreted to mean no more than 'as a consequence of' and not 'solely as a consequence of'. It is fair to add that, on this construction, the consequence should not be remote, which means that there should be a reasonable connection between the discriminatory laws and practices of the State, on the one hand, and the dispossession, on the other. For that determination, a context-sensitive appraisal of all relevant factors should be embarked upon".

[62] The applicants submit that the dispossession was occasioned by the racially discriminatory practices then in the form of the Group Areas Act 77 of 1957 (as amended) and the Proclamation of number 34 of 1961 dated 10 February 1961.

[63] The Respondent's defence is that the dispossession was not as a result of discriminatory laws or practices but financial distress on the part of the claimants. The argument is that the property was sold by the Sadien brothers at an auction in order to pay the registered bond to the mortgagee.

[64] Conrad Henre Hablutzel an auctioneer and valuer in the employ of J. J. Hofmeyr and Son testified. I hasten to state that he was a credible witness. His evidence is to the effect that according to ledgers in his possession and custody pertaining to the Sadien family loan accounts, he disputes the presence of any financial distress on the Sadien family. However, he conceded that shortly after the 1961 proclamation, the family fell in arrears but managed to make good the debt.

[18] *supra* note 17 at page 224 paragraph 69

[65] I am of the opinion that Mr. Hablutzel was best suited to testify about the presence or otherwise of the alleged financial distress. It may be argued that the witness merely interpreted ledger entries done by his grandfather some fifty years ago. It may be so but this does not make him a non-credible witness. Note that even if the family had financial distress- they would have been forced to sell because the Group Areas Act gave them no choice.

[66] Dawood Sadien testified that he grew up on the property from age fourteen. He is the son to Omar Sadien. I found him to be a credible witness. He also dispelled the allegations that the Sadien family had financial distress. His evidence is further corroborated by Prof. Nicoleen Natrus, an economist and lecturer at the University of Cape Town.

[67] On the issue of financial distress it was suggested under cross examination that the widow of the late Ismail Sadien did not have money to take transfer of the share in the deceased's estate. In reply Prof. Natrus said[19]

> "Well I have a long discussion about that, that given that 1951 said that it was a controlled area right, they could only get a coloured person buying into that and given that 1956 people knew that it was going to be a white area right, you could say she wasn't able to sell it, but that's got nothing to do with financial distress, it's got everything to do with the Group Areas Act..."

This is a neutral independent witness who, in my mind was quite credible.

[68] The respondents on the other hand tendered no evidence to support the financial distress defence. The only argument advanced is that the Sadien family had a shortfall of R 1 871.02 at the close of their account and the said shortfall was paid two years later after the sale of the property. It is argued that this should indicate presence of financial distress, nothing really turns on this.

[69] I conclude that, based on the evidence before me, there was no financial distress experienced by the Sadien family.

[19] Transcript page 982 lines 20-25

[70] On the 10 February 1961 Proclamation Number 34 was promulgated in accordance with section 20 of the Group Areas Act 77 of 1957. Paragraph A (a) of the proclamation states:

> "(a) that the areas defined in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15 and 16 of the schedule hereto shall, as from the date of publication hereof, be areas for occupation and ownership by members of the White group ..."

[71] It is common cause that the subject property falls under paragraph 16 to the schedule. The property then became a controlled area.

[72] On the 21st of March 1962 the property was sold on auction by the Sadien brothers. It was bought by Jacob Adriaan Jacobus Badenhorst, the grandfather to the third respondent for the amount of R 13 550.00. The said property was subsequently transferred and registered in the name of Jacob Adriaan Jacobus Badenhorst.

[73] Mr. Van der Westhuizen for the respondents submits that there was no racially discriminatory law or practice in operation at the time of the auction sale. Further that, if the court finds otherwise then a submission is made that section 23 of the Group Areas Act 77 of 1957 read with A (h) of the 10 February 1961 proclamation would apply. The effect here being that the claimants or the Sadien family were under no pressure to vacate or sell the property as they did. That no notification or any activity was taken by the then authorities to enforce the Group Areas provisions. Section 23 (1) of the Group Areas Act 77 of 1957 provides:

> "As from the date specified in the relevant proclamation under sub-paragraph (ii) of paragraph (a) of sub-section (1) of section *twenty*, and notwithstanding anything contained in any special or other statutory provision relating to the occupation of land premises, no disqualified person shall occupy and no person shall allow a disqualified person to occupy any land or premises in any group area to which the proclamation relates, except under the authority or a permit." [my emphasis]

Paragraph A (h) to the 1961 proclamation provides:

> "that the provisions of section twenty three of the said Act shall, on the expiration of a period of seven years as from the date of publication hereof, apply in the areas defined in paragraphs 10 and 16 of the Schedule hereto." [my emphasis]

It is indeed so that the claimants or the Sadien family had the right to occupy the premises until the 10th February 1968. However, the fact that the family voluntarily left the property earlier does not warrant a conclusion that there was no dispossession.

Causal Connection

[74] The Constitutional Court in the *Department of Land Affairs*[20] states:

> "In enacting the Restitution Act, the Legislature must have been aware that apartheid laws on land were labyrinthine and mutually supportive and in turn spawned racist practices, and *vice versa*. Therefore, often the cause of historical dispossession of land rights will not lie in an isolated moment in time or a single act. The requisite causal connection must be gathered from all the facts as long as the connection comments itself to common sense and is reasonable rather than remote or far-fetched." [my emphasis]

[75] The effect the proclamation had on the property was that of compliance by the registered owner.

[76] It was common then that authorities would visit controlled areas and measure premises and inform the community that they will be moved to other places soon. This is common knowledge to all affected in the past and I take judicial cognisance thereof. Events of Sharpeville and Langa in the 1960's were indication and signal enough to communities in affected areas as to what the then apartheid government was capable of doing[21].

[77] It is significant to note that in 1962 the property was advertised for auctioning for all to see. At the bottom of the advert words "Proclaimed White Area" were visible.

[78] Evidence by Prof. N. Natrus is to the effect that the value of the property dropped from R 22 000.00 in 1958 to R 13 550.00 in 1962. She ascribes the drop to the Group Areas Act as people were forced to sell their properties.

[79] It is recorded that the Sadien family was told to go because the area is going to be a white area and they will lose everything if they do not go. The shops and butchery in the

[20] *Supra* note 17 at page 223E paragraph 66
[21] Evidence of Spatial Historian S.M Titlestad, Transcript page 117

neighbourhood of the property were demolished. It was all over that Group Area had now arrived[22].

[80] Evidence by second applicant Sedick Sadien, son to one of the five Sadien brothers Abduragman Sadien confirms the happenings of that time. He is now 77 years of age. He was born and lived on the Sillery property. His unchallenged evidence is that his father told him that the farm was being sold because it is now Group Areas time. That the area was now a white area. That everything like shops and flats were demolished.

[92] It was not always a requirement that before affected persons could leave the controlled area; the State was expected to take action to move people or even to advise them to move. The mere passing of a proclamation in most cases caused panic and coupled with the presence of government officials, evoked fear in people's minds.

[81] The Constitutional Court in the *Department of Land Affairs*[23] matter stated:

> "In my view, the causal connection under s. 2 of the Restitution Act should not be understood to require that the State or a public functionary should itself perform the dispossession of rights in land. It is sufficient if the termination of rights in land is permitted, aided and supported by racially discriminatory laws or practices of the State or other functionaries exercising public power. The question is not whether the dispossession is effected by the State or a public functionary, but rather whether the dispossession was as a consequence of laws or practices put in place by the State or other public functionary." [my emphasis]

[82] Attached to the Deed of Transfer is a Group Areas Act certificate certifying that the property is within a white group area. This certificate is issued in compliance with section 30 (1) of the Group Areas Act 77 of 1957.

[83] Another certificate regarding this property was issued on the 26 February 1963 in terms of section 17 (3) of the Group Areas Development Act 69 of 1955 as amended. This certificate was issued before the registration and transfer of the property in the name of Jacob Adriaan Jacobus Badenhorst.

[22] Report of Oral Historian C. Cornell, page 1998 volume 5 of the Record
[23] *Supra* note 17 at page 225 I – J paragraph [76].

[84] I come to the conclusion that the sale and dispossession of the property was as a result of the racially discriminatory laws and practices.

Just and Equitable Compensation

[85] A claimant who has received compensation at the time of dispossession will not be entitled to restitution of a right in land. Section 2 (2) of the Act provides:

> "No person shall be entitled to restitution of a right of 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."

[86] It is common cause that the market value of the property at the time of dispossession in 1962 was R 22 000.00.Further that an amount of R 13 550.00 was paid as a purchase price at the time of dispossession. The purchase price paid cannot be regarded an equitable compensation as contemplated in section 2 (2) of the Act[24].

Restoration

[87] Regarding restoration of the property as it is presently an evaluation of the property will have to be conducted. It was suggested that the property may be worth an amount in the region of R 80 million to R 140 million. I am aware of the strain on the finances of the department[25]. However, the claimants have always opted for alternative state land. The Commission informed the current owners that the claim was for alternative state land. The same Commission even informed the claimants that "we do not regard the restoration of the land as feasible"[26]

[24] *Abrams v Allie NO* [2004] 2 All SA 99 (SCA)
[25] *Baphiring Community v Uys and Others* 2010 (3) SA 130 LCC; *Nkomazi Municipality v Ngomane of Lugedlane Community and others* [2010] 3 All Sa 563 (LCC)
[26] Letter dated 11 May 2005 (submitted in terms of Rule 47), Bundle at page 90

[88] In addition a letter dated 12 March 2003 from the Commission indicates that the nature of the claim is for alternative state land. The issue of alternative land was never changed save at the hearing of this matter. One of the claimants Magmoed Sadien wrote a letter to the Commission which reads:

> "Dear Mrs. Jansen
>
> LAND CLAIM – ERF 2274 CONSTANTIA
>
> I refer to the letter of Mr. D. M. Jacobs of your office, dated 11 May 2005.
>
> I herewith confirm that the claim is for alternative state land to the same value. I also want to request that no development take place on Erf 2274 until this land claim has been settled.
>
> Regarding my claim against the farm stall (claim ref. No. S721) your officials have told me that they would investigate the possibility that alternative state land can be offered to the current owner in exchange for the relevant piece of land. I would appreciate if that can be done.
>
> Yours faithfully
>
> Mr. Magmoed Sadien
> (13 June 2005) "

[89] I come to the conclusion that restoration in the form of alternative state land or equal redress by means of financial compensation would be appropriate.

Entitlement to a Right in Land

[90] The subject property was co-owned by the five Sadien brothers each entitled to a one-fifth undivided portion. Only one descendant (Mogamat Rashaad Sadien) lodged a restitution claim representing his forebear.

[91] The right in land claimed given the interpretation of the statute[27] would have to be awarded to the descendant who lodged a claim[28]. This implies that the second applicant

[27] Section 2 (1) (C) (i) and (ii)

before Court would be entitled to a one-fifth undivided share of the subject property. The other descendants who have not lodged claims stand to benefit nothing.

[92] The question to be answered as to what then happens to the remaining four-fifths of the subject property. Does this revert to the state or get retained by the current land owner?

[93] The Sadien family lived a communal life on the subject property they co-owned. The statute (the 'Act') does not provide for a situation of descendants who have not lodged claims.

> "The Court must exercise its powers to order restitution within the confines of the Restitution Act, duly interpreted by using all relevant norms of interpretation (the presumptions and other intra-textual and extra-textual aids). Where the language of a statute leaves a gap to be filled, the Court must fill that gap. In doing so, it must reconstruct the thinking contained in the statute, consider the practical implications and come up with a solution which conforms with the purpose of the statute and with the spirit, purport and objects of the Bill of Rights, while also serving the requirements of justice and equity.
>
> The purpose of statutory interpretation is to give meaning to legislative text. The Constitutional Court, in interpreting the fundamental rights enshrined in chap 3 of the constitution, adopted '. . . an approach which, whilst paying due regard to the language which has been used, is "generous" and "purposive" and gives expression to the underlying values of the Constitution'. This Court has, in the past, followed the same approach in interpreting the Restitution Act.

Per Gildenhuys J in *In Re Former Highlands Residents: Sonny and Others v The Department of Land Affairs*[29].

[94] In achieving the "generous and purposive" interpretation Dodson J[30] suggests as follows:

> "The purposive approach as elucidated in the decisions of the Constitutional Court and this Court requires that one must:
>
> (i) in general terms, ascertain the meaning of the provision to be interpreted by an analysis of its purpose and, in doing so,

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[28] Section 2 (1) (C) (i) and (ii)
[29] 2000 (2) SA 351 (LCC) at page 355-356 paragraphs 10 and 11
[30] *Minister of Land Affairs and another v Slamdien and others* [1999] 1 All SA 608 (LCC)

(ii) have regard to the context of the provision in the sense of its historical origins;

(iii) have regard to its context in the sense of the statute as a whole, the subject matter and broad objects of the statute and the values which underlie it;

(iv) have regard to its immediate context in the sense of the particular part of the statute in which the provision appears or those provisions with which it is interrelated;

(v) have regard to the precise wording of the provision; and

(vi) where a constitutional right is concerned, as is the case here, adopt a generous rather than a legalistic perspective aimed at securing for individuals the full benefit of the protection which the right confers"

[95] It is trite that the purpose of the restitution provision in the Constitution and the Restitution Act is to remedy the injustice perpetrated by dispossession of the right in land. The claim of the descendants is not to make good the injustice suffered by the claimants but rather the injustice suffered by their parents. The fact that certain descendants did not lodge claims, in my mind, should not be interpreted as meaning that their forebears did not suffer injustice at the time of the dispossession. I am inclined to accept that the facts *in casu* justify the restoration of rights in land even to those who did not lodge claims when they qualified to but did not do so. It is the injustice caused by the dispossession that has to be addressed.

[96] I have already indicated above that the descendants who did not lodge claims shared the subject property at the time of the dispossession. They were (the descendants who did not claim) not exempt from the injustice and hurt occasioned by the dispossession. I am in agreement with Gildenhuys J[31]

> "In my view, the purpose of the Constitution and of the Restitution Act will not be fully achieved if restitution is reduced by holding back portions which would have gone to descendants who failed to lodge claims. Such partial restitution would leave some of the injustice unremedied."

[97] It is desirable, given the fact that the whole Sadien family led a communal life on the property that the land is restored to all the descendants. However, only one descendant has submitted a land claim and logically restoration is to be in his interests. I am of the opinion that the land to be restored be shared or enjoyed accordingly by all including those descendants who have not lodged a claim.

[31] *Supra* note 32 at page 361 paragraph 21 G-H

[98] In terms of section 32 (3) (b) of the Restitution Act this Court may conduct any part of any proceedings on an inquisitorial basis. Applying this inquisitorial power the court enquired as to the availability of state owned land. The court was informed that three pieces of state owned land were vacant in the province of the Western Cape and these are:

I. Erf 142 Constantia
II. Erf 3110 Constantia
III. Erf 1783 Constantia

The Department of Rural Development and Land Reform has confirmed the availability of the same. The Department also indicated that if a judgement was given regarding the restoration of any of the three properties to the claimant they would abide with such judgment.

[99] ERF 1783 CONSTANTIA was chosen taking into consideration the size of the dispossessed land. This was the closest in extent.

[100] I took the liberty of ascertaining the attitude of the second applicant to the enjoyment of the property with the rest of the Sadien family. Counsel for the applicants Mr Krige indicated that it will be in accordance with the wishes of the family.

Costs

[101] The trend generally is that costs follow the event. However, in matters before the Land Claims Courts the general rule may not always apply.

[102] In this case an unusual picture regarding litigants emerges. Generally in restitution claims the state is the defendant / respondent and claimants (private individuals) are plaintiffs or applicants. The unusual part is that the state (RLCC) is one of the applicants herein. The effect being that the current landowners are the only respondents. The existence of a *lis* between the claimants and the state is skewed. The restitution claim is not against the respondents but the state who is also an applicant herein in the form of the Land Claims Commission.

[103] The claimants have achieved success in this matter not against the respondents but against the state. Generally I would have to make an order of costs against the state in favour of the claimants. This I cannot do. The claimants are funded by the state[32]. I am inclined to make no order as to costs.

In the circumstances I am satisfied that the following order is appropriate

Order

a) A portion of the property ERF 1783 CONSTANTIA in the Western Cape Province measuring ten (10) hectares in extent shall be transferred to the second Applicant.

b) The Department of Rural Development and Land Reform to designate the said property in favour of the second Applicant.

c) The interdict order granted on the 23rd of February 2010 is hereby uplifted.

d) There is no order as to costs.

_____

ACTING JUDGE M J MPSHE

I concur

For the applicant

Adv Jacobs S C & Adv J Krige instructed by State Attorney, *Cape Town.*

For the respondents

[32] *Florence v Broadcount Investments* (Pty) Ltd (LCC 148/2008) [2012] ZALCC 11 (5 June 2012)

Adv J A van der Westhuizen S C *Adv L van Huysteen* & instructed by Johann du Plessis Attorneys, *Somerset West*