IN THE LAND CLAIMS COURT OF SOUTH AFRICA
[HELD AT BURGERSFORT]

CASE NO: **LCC 115/2010**

In the matter between:

BLUE HORISON INVESTMENTS 10 (PTY) LIMITED	First Applicant
CRANBROOK PROPERTY PROJECTS (PTY) LTD	Second Applicant

And

THE REGIONAL LAND CLAIMS COMMISSIONER MPUMALANGA	First Respondent
KGOSHI KOOS BOY MANOK	Second Respondent
MANOK FAMILY TRUST	Third Respondent
MANOK COMMUNITY TRUST	Fourth Respondent
GREATER TUBATSE LOCAL MUNICIPALITY	Fifth Respondent
MINISTER OF RURAL DEVELOPMENT AND LAND REFORM	Sixth Respondent
COMMISSION ON RESTITUTION OF LAND RIGHTS	Seventh Respondent
REGIONAL LAND CLAIMS COMMISSIONER, LIMPOPO	Eight Respondent
MEC FOR AGRICULTURE, RURAL DEVELOPMENT AND LAND ADMINISTRATION OF THE MPUMALANGA GOVERNMENT	Ninenth Respondent

MASTER OF THE NORTH GAUTENG HIGH COURT, PRETORIA	Tenth Respondent
REGISTRAR OF DEEDS:PRETORIA	Eleventh Respondent
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Twelfth Respondent
RHINO MINERALS (PTY) LTD	Thirtienth Respondent
ANGLO OPERATIONS LTD	Fourteenth Respondent
TRANSNET LTD	Fifthteenth Respondent
ASA METALS (PTY) LTD	Sixteenth Respondent
RISIMA HOUSING FINANCE CORPORATION (PTY) LTD	Seventeenth Respondent

JUDGMENT

SARDIWALLA AJ:

Introduction

[1] This is a review application of the decision by the Regional Land Claims Commission for the Northern Province, Mpumalanga (Commissioner) regarding a land claim in terms of the Restitution of Land Rights Act[1](the Act). The decisionunder review was that Jacobus Manok and his descendants were dispossessed of any rights in the land situate on the farm Aapiesdoorndraai 298KT, Lydenburg, Mpumalanga (the property).

[1]22 of 1994.

Parties

[2] The first and second applicants are juristic persons who acquired the propertyfor development.

[3] The first Respondent, Commissioner, who opposed this application, is the functionary whose decision is challenged. The further respondents are representatives of the claimant community, localmunicipality, organs of state who are sited for their potential interest and land owners who may have an interest in the matter.

Factual background

[4] The Manok land claim was lodged in 1998 with the Commissioner for the Northern Province and Mpumalanga. The Claimants were the descendants of Jacobus Manok and the claims were in respect of the various portions of the farm Aapiesdoorndraai 298KT, a property situated in Lydenburg. The Commissioner investigated and researched the history of the property and concluded that neither "Manok nor his descendants were dispossessed of any rights in [the property] as a result of past and racial laws or practices".[2]

[5] The representative of the Claimants, Kgoshi Mafemane Hendrik Manok, was informed of this decision by the Commissioner on the 14 June 2000 that:

> "Your land claim has been precluded in terms of the Restitution of Land Rights Act. It should be noted, however that the former commission of land allocation made

[2] Supporting affidavit Hoffmann Prinsloo at para 30.

> certain recommendations to the previous government concerning the allocation of various portions of the farm Aapiesdoorndraai 298KT to your community. If this decision has not been implemented to date especially as a result of any pending land claim on the farm the matter should be taken up with the Department of Land Affairs as a matter of urgency."[3]

[6] On 3 June 2005 the applicants addressed a letter to the Commissioner enquiring whether the commission has any record of a restitution claim against the property Aapiesdoorndraai 298KT. In the reply on 3 June 2005 the Commissioner stated that;

> "no record for restitution of land that has been lodged against the following property: Province Mpumalanga Magisterial District, property Aapiesdoorndraai 298KT – there is no record lodged against the above mentioned farm."[4]

[7] On the strength of the Commissioner's preclusion and subsequent confirmation that there existed no claim against the property, the applicants engaged with local communities, obtained consent from the local authority and complied with environmental requirements for the rehabilitation of uninhabitable and inhospitable mining areas which were to be used for development of residential and industrial erfen within the town of Burgersfort. This was in consultation with and approval of the Greater Tubatse Local Municipality, the fifth respondent.Moreover, the Manok community participated in the community consultative process on the development and gave approval/consent for to the project and economic empowerment opportunities. These discussions and negotiations included the Manok community and its representative, Kgoshi Mafemane Hendrik Manok.

[3] Id para 94.
[4] Id para 73.

[8] Kgoshi Manok died on 2 June 2008. The Manok community then took steps to resurrect the claim with the Commissioner. The latter advised the claimants and applicants on 23 February 2007 that:

> "[T]he lodged land claim by the Manokfamily over the whole farm described as Aapiesdoorndraai 298KT has been dismissed by the Regional Land Claims Commission but due to DLA MEC intervention the Regional Land Claims Commission did reverse such decisions and commenced a review process of this case in its totality".

[9] On 19 September 2008 the Commissioner, in terms of section 11(1) of the Act,[5] published a notice of the Manok land claim under notice number 1168 of 2008 thereby effectively declaring the Manok land claim as valid and in compliance with all the requirements of section 11.

[10] The applicants made representations, as envisaged in section 11 (A) of the Act,[6] to the office of the Commissioner for the withdrawal of the notice published in the Gazette and the Commissioner has failed to take the necessary steps envisaged in subsection (2).

[11] Section 11A provides:

> "(1) Any person affected by the publication of the notice of a claim in terms of section 11 (1) may make representations to the regional land claims commissioner having jurisdiction for the withdrawal or amendment of that notice.
> (2) Where during the investigation of a claim by the Commission the regional land claims commissioner having jurisdiction has reason to believe that any of the criteria

[5]See n 10 below.
[6]See n 11 below.

set out in paragraphs *(a)*, *(b)* and *(c)* of section 11 (1) have not been met, he or she shall publish in the *Gazette* and send by registered post to-

(a) the claimant;

(b) the owner; and

(c) where applicable, a person who has made representations in terms of subsection (1) and any other party, who to his or her knowledge, may have an interest in the claim,

a notice stating that at the expiry of the period mentioned in the notice, the notice of the claim published in terms of that section will be withdrawn unless cause to the contrary has been shown to his or her satisfaction.

(3) At the expiry of the period contemplated in subsection (2), the regional land claims commissioner shall, unless cause to the contrary has been shown to his or her satisfaction, withdraw the notice of claim and-

(a) advise the persons mentioned in that subsection by notice sent by registered post;

(b) cause notice of his or her decision to be published in the *Gazette*; and

(c) take other steps to make his or her decision known in the district in which the land in question is situated.

(4) The regional land claims commissioner having jurisdiction may, during the investigation of a claim by the Commission and after following the procedure set out in subsection (2), unless cause to the contrary has been shown to his or her satisfaction, amend the notice published in terms of section 11 (1), whereafter the provisions of paragraphs *(a)*, *(b)* and *(c)* of subsection (3) shall apply *mutatis mutandis*: Provided that the regional land claims commissioner may, without following the procedure set out in subsection (2), amend the notice to correct any obvious error in it, and cause notice of his or her decision to be published in the *Gazette*."

[12] Failure by the Commissioner to respondcompelled the applicants to launch these review proceedings and seek the following relief:

"1. Review and setting aside of the following decisions and/or actions of the Regional Land Claims Commissioner, Mpumalanga—

(a) the decision taken during or about the period May to June 2008 to reconsider and/or to accept and/or to reinstate the Manok Land Claim in respect of theFarm Aapiesdoorndraai 298 KT (Reference KRP No 843) previously dismissed by him on or about 14th June 2000;

(b) the publication in terms of the provisions of section 11 (1) of [the Act] of a notice of the Manok Land Claim under Notice 1169 of 2008 of the Government Gazette No 31417 dated 19th September 2008; and

2. Alternatively to prayer 1 above, an order directing the Regional Land Claims Commissioner, Mpumalanga to withdraw without delay the said Notice . . . in terms of the provisions of section 11A . . . alternatively to amend without delay the said Notice . . . so as to reflect that the Manok Land Claim was lodged only against Portion 2 and Portion 3 of the Farm Aapiesdoorndraai 298 KT;

3. Further alternatively to prayer 1 and prayer 2 above, an order directing the Greater Tubatse Local Municipality to make an application to the Honorable Court in terms of the provisions of section 34 of [the Act] for an order that the land in question, namely those portion of the Farm Aapiesdoorndraai 298 KT and/or any subdivisions thereof already developed or to be developed in terms of the development projects already approved for the Motaganeng Project and/or the Greater Tubatse East Development Project, or any rights in it, shall not be restored to any claimant or prospective claimant;

4. Further alternatively to prayer 1, prayer 2 and prayer 3 above, an order directing the Regional Land Claims Commissioner, Mpumalanga—

(a) to certify in terms of the provisions of section 14 (1)(b) of[the Act] that it is not feasible to resolve any dispute arising from the Manok Land Claim by mediation and negotiation; and/or

(b) to refer the Manok Land Claim in respect of the Farm Aapiesdoorndraai 298 KT (Reference KRP No 843) to the Honorable Court in terms of the provisions of section 14 of [the Act]."

[13] The applicants contend that the decisionisbad in law and wrong in fact. The basis for these contentions is first, that the Commissioner was *functus officio* after having already dismissed the Manok claim previously, on 14 June 2000, and thus having no power or jurisdiction to entertain that land claim, whether as part of a process of reconsideration and or review for which there is no legislative basis.

[14] Secondly, that the Commissioner and its officials were biased and or can reasonably be suspected of bias as contemplated in section 6 (2) (a) (iii)[7] of the Promotion of the Administrative Justice Act[8] (PAJA).

[15] Thirdly, that a mandatory, material and prescribed condition was not complied with as contemplated in section 6 (2) (b) of PAJA.[9] More specifically section 11 (1)[10]

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[7] Section 6(2) of PAJA, to the extent relevant, provides:

> "(1) Any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action.
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> (2) A court or tribunal has the power to judicially review an administrative action is—
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> (a) the administrator who took it—
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> (i) . . .
>
> (ii) . . .
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> (iii) was biased or reasonably suspected of bias;
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> (b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with.
>
> (c) the action or reasonably unfair;"

[8] 3of 2000.

[9] See n 7 above.

[10] Section 11(1) provides:

> "(1) If the regional land claims commissioner having jurisdiction is satisfied that-
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> *(a)* the claim has been lodged in the prescribed manner;
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> *(b)* the claim is not precluded by the provisions of section 2; and
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> *(c)* the claim is not frivolous or vexatious,
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> he or she shall cause notice of the claim to be published in the *Gazette* and shall take steps to make it known in the district in which the land in question is situated".

read with section 2 (1)[11] of the Act requires the Commissioner to be satisfied,*inter alia*, that the land claim in question is not precluded by section 2 of the Act and is not frivolous or vexatious before he can accept such land claim as valid and before a notice of claim is published in the Government Gazette.

[16] Fourthly, that the decision or action of the Commissioner was, as contemplated in section 6(2)(c) of PAJA[12] was procedurally unfair. That is so, it is argued, because having dismissed the Manok land claim for being precluded under the Act and with the knowledge that the developers had embarked upon various development projects, the Manok land claim was unlawfully resurrected to the prejudice of the developers, without affording those affected an opportunity to be heard on this matter.

[11]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
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> *(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
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> *(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-
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> (i) is a direct descendant of a person referred to in paragraph *(a)*; and
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> (ii) has lodged a claim for the restitution of a right in land; or
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> *(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
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> *(e)* the claim for such restitution is lodged not later than 31 December 1998."

[12]See n 7 above.

[17] The applicants further allege that the Commissioner took the decision for an ulterior purpose or motive and or because of irrelevant considerations. These allegations are unsubstantiated. I will place no weight on them.

[18] Initially, the Commissioner filed a notice of opposition to this applicationbut subsequently withdrew it and decided to abide by the decision of this Court. At the instance of this Court, the Commissioner filed heads of argument and conceded that the reviewing of his earlier decision of 14 June 2000 to refuse the acceptance of the claim was not permissible and bad in law. It was conceded further that there were no new facts which could have persuaded the Commissioner to review his earlier decision.

[19] The sixth, seventh, eighth, ninth and twelfth respondents do not oppose this application.

[20] The thirdrespondent, the Manok Family Trust,lodged a conditional counterclaim challengingthe *locus standi* of theapplicants and the status of the decision taken on 14 June 2000. They took the view that applicants were not the owners of the farm and therefore do not have the appropriate *locus standi* to bring this application. The facts of the matter clearly demonstrate that the applicants have a direct interest in the Commissioner's decisions arising from the phenomenal development rights that they have contractually acquired over the property. The resurrection of the claim has an impact at a crucial stage of the development which

impacts on the public interest of the communities in the area as well as benefit to the Manok Community.

[21] I now turn to the counter application by the Trust. This convoluted application seeks declaratory orders in the answering affidavit. It is a conditional counterclaim which involves the legality or otherwise of the decision or communication of the Commissioner in his preclusion letter of 14 June 2000.The Trust seeks a declarator that the Commissioner's letter of 14 June 2000 does not constitute a decision; alternatively if the decision is upheld it does not preclude a later decision to the contrary. Further alternatively, the Trust seeks an order, if the letter constitutes a final decision,reviewing and setting aside the decision.

[22] The manner in which these orders are sought and the facts supporting the nature of this relief are inadequate and undesirable.However, I will deal in detail with all theissues raised.

[23] I hasten to say that there can be no doubt, in the circumstances, that the applicants have the appropriate *locus standi* to bring this application.

Issues

[24] The following are the issues for determination:

(a) Whether the provisions of section 11 regarding the lodged claim were complied with;

(b) Whether the Commissioner's action in publishing the claim amounts to administrative action;

(c) Whether the Commissioner—

(i) was *functus officio*and consulted with those adversely affected upon reversal when he took the second decision on 19 September 2008;

(ii) was authorised; and

(c) Appropriate costs.

I now turn to the determination of the issues raised.

Were the provisions of section 11 regarding the lodged claim complied with?

[25] In *Farjas (Pty) Ltd and Another v Regional Land Claims Commissioner KwaZulu Natal*[13]the duties and functions of the Regional Land Claims Commissioner under section 11 were interrogated. Dodson J held[14] that the investigation into the merits of the restitution claim takes place only after a claim has been accepted in terms of section 11 (1). The Court remarked that the strength of the claim is not important at the acceptance stage provided that there is an arguable case.

[26] In *Gabriel Petrus Minaar N.O. v Regional Land Claims Commissioner Mpumalanga and Others*[15]the Court held that:

> "However I am firmly of the view that total exclusion of a claim was intended to occur only in patently bogus claims or claims without substance or claims which on

[13] 1998 (2)SA 900(LCC).
[14]Id at page 902.
[15]Case number LCC42/06 delivered on 6 December 2006, unreported.

purely mechanical or objective determinable reasoning fell outside the parameters of legislation."

[27] In *Mhlangu N.O. v The Minister of Land Affairs*[16] the Supreme Court of Appeal per Nugent JA reaffirms the *Farjas* case. It held:

> "The LCC pointed out in *Farjas (Pty) Ltd v Regional Land Claims Commissioner, KwaZulu-Natal* 1998 (2) SA 900 (LCC) paragraph [41] that it is not the function of aregional commissioner – and that applies also to the commission to adjudicate upon the merits of a claim for restitution. While s 11 (1) of the Act requires a regional commissioner to be satisfied that a claim 'is not precluded by the provisions of s 2'before the process is set in motion, Dodson J held that aclaimant need exhibit only 'an arguable case'. . . . In my view even that threshold might be too high but it is not necessary in this appeal to decide that question."

[28] In my view, the intention of the rule was to ensure that upon investigation the claim meets with the minimum requirements of section 2 for the claim to be accepted and further steps to be taken in determining restitution or compensation. It cannot be gainsaid that in this matter, the Commissioner had conducted this investigation, before making a decision regarding the preclusion of he claim.

Do the Commissioner's decisions constitute an administrative decision?

[29] The applicants argue that the decision of the Commissioner to publish a restitution claim constitutes "administrative action" in terms of PAJA. "[A]administrative action" is defined in section 1 of PAJA.[17]

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[16] 2005 (1) SA 451 (SCA) at para 455D-E.

[17] 'Administrative action' means any decision taken, or any failure to take a decision, by —

(a) an organ of state, when —

(i) exercising a power in terms of the Constitution or a provincial constitution or

[30] In argument it was conceded on behalf of the Commissioner that the decision in question constituted an "administrative action" and that such decision was a correct decision as no dispossession took place. In the view I take of the matter and regard being had to the steps referred to above, the concession by the Commissioner was correct. In *Gamevest (Pty) Ltd v Regional Land Claims Commissioner*[18]the Supreme Court of Appeal,per Olivier JA, held that—

> "the Regional Land Claims Commissioner must consider certain matters, and may proceed with the aforesaid publication only if he or she is satisfied that (a)the claim has been lodged in the prescribed manner; (b) the claim is not precluded by the provisions of s 2; and (c) the claim is not frivolous and or vexatious (s 11 (1) (a) (b) and) (c)). After giving consideration to these requirements, the Regional Land Claims Commissioner then has to take an administrative decision and perform an administrative action, viz, to refuse acceptance of the claim or to accept the claim."

(ii) exercising a public power or performing a public function in terms of any legislation; or

(b) a natural person or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of the empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect, but does not include —

(aa) the executive powers or functions of the National executive, including the powers or functions referred to in sections 79(1) and (4), 84(2)(a), (b), (c), (d), (f), (g), (h), (i) and (k), section 85 (2)(b), (c), (d) and (e), 91(2), (3),(4) and (5) ...of the Constitution;

(bb) the executive powers or functions of the Provincial Executive, including the powers or functions referred to in sections 121(1) and (2), 125(2)(d), (e), and (f), 126, 127(2), 132(2) 133(3)(b), 137,138,139 and 144(1) of the Constitution;

(cc) the executive powers or functions of a municipal council;"

(dd the legislative functions of Parliament, or provincial legislature or a municipal council;

(ee) judicial functions of a judicial officers of a court. . . and the judicial functions of a traditional leader under customary law or any other law;

(ff) a decision to institute or continue a prosecution;

(gg) a decision relating to any aspect regarding the appointment of a judicial officer, by the Judicial Service Commission;

(hh) any decision taken, or a failure to take a decision, in terms of any provisions of the [PAIA] ; or

(ii) any decision taken, or failure to take a decision, in terms of section."

[18]2003 (1) SA 373 (SCA) at 380 A-C.

[31] In my view, the decision making process in administrative actions should follow at the very least the following steps:

(a) A final application or request or claim must be addressed by a claimant or by a party to the authority which exercises the statutory public powers.

(b) The official must consider all the relevant information presented or otherwise reasonably available and placed before the administrator that makes the decision.

(c) Upon analysis of the information provided an evaluative process ensues by the person in authority considering all the information before him or her, identify which components of such information are relevant and or irrelevant, the powers enabling him to make such decisions and a process of value judgments on each component of the information is made with specific reference to the statute or other empowering provision in terms of which he/she has the authority act.

(d) A conclusion must have been reached by the authority, pursuant to the evaluative processes on how his or her statutory or public power should be exercised in the circumstances.

(e) The conclusion reached must be the basis of the statutory or public power that overarches the facts before him.

[32] Gildenhuys J in G*abriel Petrus Minaar N.O v The Regional Land Claims Commissioner*[19] reiterated that:

> "The requirement in section 11 (1) of the act that the Regional LandClaims Commissioner must be satisfied inter alia that the claim is not precluded by section 2 before he can publish does not mean the Claimant must prove that the claim is not so precluded."

[33] As I have said the Claimant therefore need not do anymore than present a substantiated claim that must on a purely objective determinable reasoningfall outside the parameters of the legislation for it to be precluded. This indeed constitutes an administrative action.

[34] It follows that the decisions by the Commissioner to dismiss the Manok land claim on or about the 14 June 2000 and to accept and publish the claim on the 19 September 2008 constituted administrative actions.

Whether the Commissioner was functus officio, consulted and was authorised

[35] Whether the second decision of 19 September 2008 effectively declaring the Manok land claim as valid and in compliance with all the requirements of section 11 was correct or not, brings into play another aspect of the common-law doctrine of *functus officio* in that our common-law does not support the principal of allowing administrators to revoke there own unfavourable decisions particularly were such a decision effects the rights and interests in other parties.

[19]Case No LCC 42/06 delivered on 8 December 2006, unreported, at para16.

[36] Pretorius[20] in his work on the origins of *functus officio* analysis this principle. He remarks that:

> "According to this doctrine a person who is vested with adjudicative or decision making powers may as a general rule exercise those powers only once in relation to the same matter. This rule applies with particular force but not only, in circumstances where the exercise of such adjudicative or decision making powers has the effect of determining a person's legal rights or of conferring rights benefits of a legally cognizable nature on a person. The result is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker.
>
> . . . .
>
> This doctrine is not however an absolute one. For example there may be instances where the instrument from which the decision-maker derives its authority expressly allows for interference with the decision or it may be necessary to clarify an ambiguity left in the order. Furthermore an administrator may alter or rescind a decision where it was induced by fraud or based on non-existent jurisdiction. The rights and expectations of the parties involved must however always be an important consideration in assessing whether a decision can be revoked or varied."

[37] Hoexter[21] supports the proposition that:

> "Our common law does not support a general exception allowing administrators to revoke unfair decisions with statutory authority still being required where a favorable decision is sought or to be varied or revoked thereby adversely affecting the rights of parties not only is statutory authority required but the informed consent of the affected parties is required."

[38] There is no evidence before this court that the decision of 14 June 2000 contained any ambiguity, or was induced by fraud nor decided upon by the Commissioner outside his jurisdiction that informed the basis of the reversal decision in 2008.

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[20] 'The origins of *functus officio* doctrine' SALJ 382 2005.
[21] Hoexter, *Administrative Law in South Africa* Juta, Cape Town at page 246 – 51.

[39] The Labour Court in *Retail and Allied Workers Union on behalf of Ngweletsana v P.T. Operational Services (Pty)Ltd and Others*[22] where the Court considered whether the decision of a Commission for Conciliation, Mediation and Arbitration (CCMA) Commissioner was functus officio and the way in which the Judge determined the doctrine. He took the view that once the CCMA has made a ruling, it cannot be revisited otherwise this would render the functions of the Labour Court as envisaged in section 58(1)*(G)* superfluous and that could not have been the intention of the legislature. The decision of the commissioner to revisit its decision to dismiss the rescission application thus offended against the common-law doctrine of *functus officio* and was unlawful.

[40] It follows that the Commissioner was functus officio when he purported to reverse the first decision and that the decision itself is unlawful,

[41] Insofar as the inherent need to consult with the parties affected by any reversal of decision the Court in *Majake v Commission for Gender Equality & Others*[23]upheld the applicant's submission that the plenary was *functus officio* when it decided to dismiss her. The doctrine of *functus officio* was predicated on the principle of administrative certainty consequently the applicant was entitled to be heard pursuant to the dictates of the *audi alteram partem* principle before the plenary abrogated its earlier decision to subject her to a disciplinary enquiry and instead unilaterally and

[22] (2010) 31 ILJ 1926 (LC).
[23](2009) 30 ILJ 2349 (GSJ).

summarily dismissed her. The plenary's decision was therefore a nullity due to lack of engagement with the applicants before it made a decision.

[42] Having made the decision to reject the claim the Commissioner on 14 June 2000, the Commissioner was indeed *functus officio.*

Was he authorised to so act?

[43] It is trite that a public official has only such powers as are conferred upon him by him or her by the enabling legislation and if they were to continue acting under having exercised those powers they would be acting lawfully. In the absence of such authorisation the performance of that act would be unlawful. On this approach a public officials powers are restricted to those conferred upon him by the enabling statute unless he is authorised by the statute to revisit his own earlier decisions he has no power to do so. The decision therefore made by the Commissioner on 14 June 2000 was not bad in law and based on factual information pursuant to an investigation and report.

[44] The Commissioner has the obligation to investigate the merits of the claim and after giving consideration to the requirements he has to take an administrative decision to accept or refuse the claim.[24]

[24] See *Gamevest* at [30].

[45] The decision by the Commissioner to gazette the claim in 2008 even if it is assumed that he had the authority to do so, in any event lacks compliance of the *audi alteram partem* rule which directs the Commissioner to consult with all affected parties prior to a decision being taken that directly affects them. There is no information whatsoever in the investigation or the publication resuscitating the claim that explains any inaccuracies both on fact and law in the process leading up to and the decision made by the Commissioner to preclude the Claim on 14 June 2000. It is significant that in the Commissioner's letter of 23 February 2007 the reasons for resuscitating the claim are that:

> "The lodged claim by the Manok community over the whole farm described as Aapiesdoorndraai 298KT has been dismissed by the Regional Land Claims Commissioner but due to DLA MEC intervention the Regional Land Claims Commissioner reversed such decision and commenced to review the process of this case in its totality."

This clearly indicates that there has not been any factual or legal basis on which the claim was revisited.

[46] I have considered the possibility of the second and fourth respondents may upon presentation of new facts or circumstances approach the Commission in terms of section 14 and seek, if a claim is proven compensatory rewards. However, I have no doubt that it will be against public interest and that of the claimants to restore the properties to the claimants.

Costs

[47] The applicants seek a punitive costs order against the Commissioner. They also seek an order dismissing the application with costs on an attorney and client scale including costs two Counsel. They also seek an order that the Commission share the responsibility of their costs. In my view they should not.

[48] The community claim to resuscitate was not necessarily frivolous, vexations or improper. The claimants whereof the view that they did not have a fair opportunity to state their case either to procure a favourable decision or to modify an unfavourable decision. This opportunity was given to the representative Kgoshi Manok who represented them for many years and agreed to the applicants' ownership, rehabilitation and development proposals. The present claimants raised issues with the Commission only after Manok's death and this has resulted in the resurrection of the claim, for reasons unknown to the Court.

[49] I am of the view that the matter does not warrant punitive costs against the Commissioner given its wide powers to receive representation in discharging his obligations and to assess the property rights of claimants. It is clear to me that the commission mismanaged its role in administrating the claim in an open and consultative manner resulting in contradictions and expectations in the community. It therefore must be liable for the costs of the ensuing litigation. There was obvious lack of reasoning and rational in arriving at the decision to publish and the unlawfulness of the publication enjoins me to depart from the usual practices of this Court not to make

cost order against the community but to order the Commissioner pay the applicants' costs.

[50] Insofar as the counter application by the third respondent is concerned, I am of the view that it has no basis and must be dismissed.

[51] In the result, the following order is made:

1. The decision of the first respondent, the Regional Land Claims Commissioner, Mpumalanga, to publish the notice in the government gazette on the 19 September 2008 that a claim has been lodged in terms of the Restitution of Land Rights Act by Kgoshi Mafemane Hendrik Manok on behalf of the Manok community and insofar as it relates to portions 2 and 3 of the farms Aapiesdoorndraai 298KT is reviewed and set aside**.**
2. The first Respondent, is directed to withdraw the notice published in the government gazette on 19 September 2008 in so far as it relates to portions 2 and 3 of the farm Aapiesdoorndraai 298KT.
3. The first Respondent, is ordered to pay the applicants' costs.
4. The costs of the counter claim to be paid by the third Respondent, Manok Family Trust.

SARDIWALLA AJ

DATE:30/01/2012

For the Applicant:

Counsel Advocate M M Oosthuizen SC

A M Heystek

Instructed by Attorneys Snyman De Jager

For the First Respondent:

Advocate S P Mathebula

State Attorney Pretoria

For the third Respondent:

Advocate A Vorster

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