

**IN THE LAND CLAIMS COURT OF SOUTH AFRICA**

**HELD IN RANDBURG**

**CASE NUMBER: LCC: 173/2008**

Decided on: 29 January 2013

In the matter between:

**HENDRIK CHRISTOFFELO MARTHIENUS VAN BILJON**

Applicant

and

**THE MINISTER OF RURAL DEVELOPMENT**

First Respondent

**AND LAND REFORM**

**REGIONAL LAND CLAIMS COMMISSIONER:**

Second Respondent

**NORTH WEST AND GAUTENG**

**BAPO BA MOGALE COMMUNITY**

Third Respondent

**BAKWENA BA MOGOPA COMMUNITY**

Fourth Respondent

**JOHANNES JACOBUS RATHMAN**

Fifth Respondent

**AND OTHER OPPISNG LAND OWNERS**

Concerning

**THE FARM HARTEBEESPORT B410 JQ**

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**JUDGMENT**

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**SIDLOVA AJ:**

## *Introduction*

[1] This is an interlocutory application brought in terms of Land Claims Court Rule 57(1) (c) for an order that the issues relating to a claim in terms of the Restitution of Land Rights Act<sup>1</sup> (the Act) in respect of portion 1288 of the farm Hartebeespoort B410 JQ owned by the applicant, should be heard separately from claims over other portions of land subject to the claim which are opposed by the respective landowners. The Minister of Rural Development and Land Reform is cited as the 1<sup>st</sup> Respondent; the Regional Land Claims Commissioner for Gauteng & the North West Province as the 2<sup>nd</sup> Respondents, the claimant communities as the 3<sup>rd</sup> & 4<sup>th</sup> Respondents and the landowners who have opposed the claim as the 5<sup>th</sup> Respondent.

## *Background Facts*

[2] On 14 November 2008 the Regional Land Claims Commissioner for Gauteng and the North West Province (the RLCC) referred to the Land Claims Court a claim lodged by two individuals representing the Bapo Ga Mogale and the Bakwena Ba Mogopa respectively (the claimant communities) in respect of land situated in the magisterial district of Britz in the North West Province.<sup>2</sup> The land claims were published in notices in the *Government Gazette* on 30<sup>th</sup> July 2004.<sup>3</sup> The applicant is but one of hundreds of owners of portions of land affected by these notices.<sup>4</sup>

## *Issues Raised*

[3] The applicant says in his founding affidavit that he was not served with the referral report. Indeed he is not listed as an interested party,<sup>5</sup> nor is there any evidence of service of the referral report on him.<sup>6</sup> The only landowners who are listed as interested parties are

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<sup>1</sup> Act 22 of 1994.

<sup>2</sup> The claim was referred in terms of s 14(1) of the Act and Land Claims Court Rule 38. It is not clear whether the referral is in terms of sub-section (b) or (d) – paragraph 8 of the Referral Report refers to s 14(1)(d), whereas the certificate at page 27 of the report refers to s 14(1)(b).

<sup>3</sup> General Notices Numbers 1504 – 1507 GG 26602 of 30 July 2004.

<sup>4</sup> Copies of the notices are annexed to the Referral Report – pages 137 – 191 of the report. The portion of land owned by the applicant is listed on page 171 of the referral report.

<sup>5</sup> See Annexure JJ 1 at page 132 of the report.

<sup>6</sup> See Annexure KK 7 - pages 192 – 215 of the report.

certain landowners (the opposing landowners) on whose behalf an objection to the claims was lodged in terms of section 11A of the Act. These landowners delivered a response to the Referral Report which concluded with a prayer that the claims should be dismissed, alternatively an order that the claimant communities are entitled only to equitable redress and not to further restoration of land.<sup>7</sup>

[4] The applicant submits in his founding affidavit that he should be entitled to have the claim over his portion of land adjudicated separately from the claims of the opposing landowners because they dispute the validity of the claims, whereas he does not dispute the validity of the claim over his property. All he wants the court to decide is whether the claimant communities are entitled to restitution or whether they should receive equitable redress instead of restitution. In the event that the court decides that restitution is appropriate, he will request the Court to order the Department to acquire his property for the community by way of expropriation.

[5] There are two questions which arise: First, whether the claim over the applicant's land has been referred to the Court by the RLCC. Secondly, if so, whether an order of separation of issues in terms of section 57(1) (c) is appropriate.

[6] The manner in which these claims have been referred to this court is completely unsatisfactory. The claims affect hundreds of portions of land. There are three categories of landowners, firstly, those who have reached settlement agreements and land has been acquired from them, secondly those that are opposing the claim, and thirdly those like the applicants who are not opposing the claim but have not reached to an agreement of settlement. The Court has no information as to the status of the claims over the portions of land which do not fall into the first two categories, except for information provided by the applicant in respect of his land. It is not clear whether the referral to this Court includes the claims which fall into this third category. If it does not then the applicant is not joined as an interested party and the application for separation of issues can obviously not be granted.

[7] If the claim over the applicant's portion of land is included in the referral, then the question arises whether separation of issues in terms of s 57(1) is appropriate relief. Generally this form of relief is appropriate where, as between the parties to the action, the matter can be handled most efficiently by determining certain issues of fact or law before

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<sup>7</sup> The RLCC states in the Referral Report that the claims against many of the portions of land have been settled and that more than 3 000 hectares of land had at that stage been transferred to the claimant communities.

others, usually because a determination of such issues may render it unnecessary to resolve the remaining issues. This is not what the applicant wants. He wants the land claim over his property to be adjudicated separately from the claims over other properties.

[8] A more appropriate form of relief may be separation of trials. The Land Claims Court rules do not make specific provision for separation of trials, but rule 28(2) provides that where the rules are silent on any matter, the Uniform Rules and the procedure in civil actions and applications followed by the High Court having jurisdiction in the area where the land concerned is situated, apply. Rule 10(5) of the Uniform Rules of the High Court confers the discretion on a court to order separation of trials in respect of causes of action or parties.<sup>8</sup>

[9] The applicant clearly requires some form of relief, because he alleges that he is being seriously prejudiced by the existence of the land claim. He says that he cannot sell his property because no-one is interested in purchasing land which is subject to a claim. He operates a crocodile farm on the property and says he is not able to raise funding from banks to develop the business because no bank will grant a loan in respect of property subject to a land claim. He alleges that he has tried to negotiate the sale of his property for the benefit of the claimant communities with the Land Claims Commission, but has been unsuccessful. This matter was first on the unopposed roll in December 2010, but was postponed then because of queries raised by the presiding Judge. It was set down again after further attempts at negotiating a settlement failed and a supplementary affidavit was filed with the permission of the Court.

[10] The Court is unable to assist the applicant because of the uncertainty as to whether the applicant's claim has been referred to the Court. The only party that can enlighten the Court as to the status of the claim is the Regional Land Claims Commissioner. I have accordingly decided to issue a rule nisi calling upon the Regional Land Claims Commissioner to show cause why he or she should not be ordered to either refer the claim in respect of the applicant's land to this Court or, alternatively, if it is contended that the claim has been referred to the Court under case number LCC 173/2008, why a separation of trials should not be ordered. I am of the opinion that I can make the orders referred to under the claim for alternative relief. This Court is a court of equity and must, where necessary, be constructive with regard to the relief it grants.

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<sup>8</sup> The factors relevant to the exercise of such discretion are thoroughly canvassed in *De Polo & Others v Dreyer & Others* 1990 (2) SA 290 (W).

## **Order**

1. This matter is postponed to 28<sup>th</sup> March 2013.
2. The Second Respondent is ordered to show cause on 28<sup>th</sup> March 2013 why it should not be ordered to refer the claim in respect of the applicant's land to this Court in terms of section 14(1)(b) of the Restitution of Land Rights Act 22 of 1994 by a date to be set by the Court.
3. Alternatively to paragraph 2 of this order, if the Second Respondent contends that the claim in respect of the applicant's land has already been referred to the Court under case number LCC 173/2008, the second Respondent is ordered to show cause why an order of separation of trials should not be made in terms of rule 10(5) of the Uniform Rules of Court.
4. All issues of costs are reserved.

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**Y SIDLOVA**

**ACTING JUDGE: LAND CLAIMS COURT**

**For the applicant:** Advocate HS Havenga

**Instructed by:** P Moolman of Pieter Moolman Attorneys

