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REPUBLIC OF SOUTH AFRICA



IN THE LAND CLAIMS COURT OF SOUTH AFRICA

RANDBURG

CASE NO: LCC240/2015

Before: **Poswa-Lerotholi, AJ**

Heard on:

Delivered on: 27 September 2017

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES / NO
- (2) OF INTEREST TO OTHER JUDGES: YES / NO
- (3) REVISED: YES / NO

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DATE

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SIGNATURE

In the matter between

DEW CRISP PROPERTIES (PTY) LTD

Applicant

And

**THE REGIONAL LAND CLAIMS COMMISSIONER
GAUTENG PROVINCE**

First Respondent

MESHACK MDUDUZI SHABANGU

Second Respondent

Judgment

Introduction

- [1] This is an application to review and set aside of the decision of the Regional Land Claims Commissioner, Gauteng Province to publish Notice No. 186 of 2015 (“the notice”). The notice was published in terms of section 11(1) the Restitution of Land Claims Act 22 of 1994 (“Restitution Act”) in the Government Gazette dated 6 March 2015.

The Parties

- [2] The applicant is Dew Crisp Properties (Pty) Ltd and the owner of the farm Portion 127 of the Farm Rietfontein 21 (“the farm”). The first respondent is the Regional Land Claims Commissioner, Gauteng Province (“the Regional Commissioner”), which filed a notice to abide by the decision of this court. The second respondent is Meshack Meduduzi Shabangu who is a claimant in terms of the Restitution Act.

Factual Background

- [3] During 20 October 1998, the second respondent instituted a claim for the restoration of land incorrectly described as Guest SA (Pty) Ltd, Spring Valley Foods and Green World Farmers Estate. in terms of the Restitution Act. It was later established that the aforementioned description was incorrect and in 2014 an amendment to reflect the

correct Deeds Registrar description of the land was duly made.

[4] On 8 December 2014, Ms L S Phologane, the Project Officer: Operations, in the office of the regional land claims commission addressed a memorandum in terms of Rule 3 of the Rules Regarding the Procedure of the Commission read together with section 2(1)(a) -(e) and 11(1)(a) -(c) of the Restitution Act to the Regional Commissioner.

[5] . The purpose of the memorandum was to request the Regional Commissioner to-

“... condone the improperly lodged claim by Mr Mduduzi Meshack Shabangu on Portion 127 (Remaining Extent) Of Rietfontein 21 IR; in terms of section 11(2) of the Restitution of Land Rights, no. 22 of 1994 as amended;

... to note that the land claimant is claiming on behalf of the direct descendants of the originally dispossessed person, the late Johannes Butana Shabangu; and

...to approve the gazetting of these claims and sign the attached Gazette Notice.”

[6] The memorandum addresses two of the aspects of the applicants alleged cause for complaint in this application.

6.1 First, there is an acknowledgement that the initial description of the property in the claim form lodged by the second respondent

was incorrect and that the said error was rectified subsequent to a site inspection conducted on 24 January 2014 by the Regional Commissioner's office. The results of the global position system (GPS) coordinates, pointed the correct location of the property to be that of the applicant.

6.2 Second, it emerged during the implementation of the restitution award that the second respondent's claim and other unnamed persons were erroneously included in the Benoni Urban Group land claim. The Regional Land Claims Commissioner is currently engaged in the process of reconciliation of the names of beneficiaries of the Benoni Urban Group land claim.

6.3 The memorandum concludes that *prima facie*, the claim meets the requirements and criteria set out in sections 2 and 11 of the Restitution Act and recommends that the Regional Commissioner -

6.3.1 approve the condonation of the land claim lodged by the second respondent on portion 127 (remaining extent) of the farm Rietfontein 21 IR in terms of section 11(2) of the Restitution Act;

6.3.2 accepts the land claim by direct descendants of the dispossessed, as *prima facie* valid and for further investigation in terms of section 11 read with rule 3/5 of the Rules of the Restitution Act;

6.3.3 approves for the gazette of this claim in terms of the Restitution Act as amended and the Regional Commissioner signs the attached Gazette Notice.

[7] The memorandum was approved as is by the various stratum within the Regional Commissioner's office including the Regional Commissioner himself. Following the said approval, the impugned notice was published on 16 March 2015.

[8] This application arises out of the publication of the notice, by the Regional Commissioner in terms of section 1(1) of the Restitution Act. The notice *inter alia*, informed the public that the Regional Commissioner has received a claim for the second respondent and indicated the steps to be followed in investigating the claim. Furthermore, all interested parties were advised to submit representations in terms of section 11A of the Restitution Act within 21 days from the date of publication of the notice.

[9] On 5 May 2015, the applicant made representations in terms of section 11A of the Restitution Act to the Regional Commissioner for the withdrawal of the notice. The reasons advanced for the withdrawal were threefold.

9.1 First, the second respondent Mr Shabangu had previously submitted a claim for land as part of the Benoni Urban Group for which a settlement of R50 000.00 was reached.

9.2 Second, the Notice is at variance with the claim instituted by the second respondent, in which he described the land as -

“Van Zyl’s Inc Trust Account, @Century Account no. [...], Guest SA (Pty) Ltd, Spring Valley Foods and Green World Farmers Estate.

Whereas, the landowner of portion 21 of the farm known as Rietfontein 21 is Dew Crisp Properties (Pty) Ltd and not Guest SA (Pty) Ltd.

9.3 Lastly, on second respondent’s own version, his father, the late Johannes Butana Shabangu who was a former employee on the farm, was not removed from the property due to discriminatory laws and practices, but was constructively dismissed.

[10] The applicant asserts that the decision by the first respondent to publish the restitution claim of the second respondent constitutes administrative action within the meaning of the Promotion of Administrative Justice Act 3 of 2000 (“PAJA”).

[11] The second respondent denies that he was ever part of the Benoni Urban Group. Furthermore, he denies that he was ever a beneficiary of any land claim associated with the said group. According to the second respondent, it is the first respondent’s ineptitude that caused the confusion and has ultimately led to this application.

[12] However, the second respondent affirms that he explained the discrepancy adequately in his answering affidavit in the circumstances, the applicant should not have persisted with this application.

[13] The second respondent maintains that the notice was issued appropriately.

[14] I am satisfied that the memorandum dealt adequately with that at least two of the issues raised by the applicant. The only issue that is not addressed in the memorandum is that of the merits of the land claim itself. The question therefore that arises is whether the empowering provision requires the Regional Commissioner to have considered the merits of the land claim prior to publishing the notice.

The Land Claim Procedure

[15] In *Gamevest (Pty) Ltd v Regional Land Claims Commissioner* 2003 (1) SA 373 (SCA), Olivier JA stated that the claim procedure for the restitution of land rights is divided into four phases, viz:

15.1 the lodgement of the claim;¹

15.2 the “acceptance” of the claim by publication thereof in the Government Gazette;²

¹ section 10 of the Restitution Act

² section 11(1) of the Restitution Act

15.3 the investigation of the claim;³ and

15.4 the referral of the claim.⁴

[16] Section 11(1) prescribes the procedure to be followed once a claim is lodged. There are certain pre-requisites, which must be met before a claim is processed. The Regional Land Claims Commissioner having jurisdiction must be satisfied that-

“(a) the claim has been lodged in the prescribed manner;

(b) the claim is not precluded by the provisions of section 2;
and

(c) the claim is not frivolous or vexatious.”

[17] Section 2(1) of the Restitution Act lists the different categories of persons entitled to restitution, this includes persons directly affected by the dispossession, including their direct descendants: deceased estates; as well as communities or sections of communities.

[18] The procedure for the handling of claims is set out in section 11. Section 11A refers to circumstances under which a claim may be withdrawn or amended. In terms of section 11A of the Act, a regional commissioner may reconsider his or her decision to “accept” a claim and may withdraw the notice published in the *Gazette* on the strength of representations

³ section 11(6), (7), (8) of the Restitution Act

⁴ section 14 of the Restitution Act

made for the withdrawal or amendment of that notice.

[19] The applicant invoked section 11A and made representations to the Commissioner for the withdrawal of the notice. Section 11A reads as follows-

(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.

[20] If the relevant Regional Land Claims Commissioner who receives the claim is satisfied that it is in the prescribed form, and that the claim is not precluded by the provisions of section 2 and that it is not frivolous or vexatious, he or she is required to cause notice of the claim to be published and to be made known in the district in which the land is situated per section 11, after which the commission proceeds to investigate the claim and to perform its ordinary functions.

[21] The Regional Commissioner is granted the discretion to deal with claims, which do not meet the above criteria. The failure to file a claim in the prescribed manner may be condoned,⁵ whilst a frivolous or vexatious claim may be dismissed.⁶ Section 11(4) is peremptory, if the Regional Commissioner decides that the criteria set out above have not been met, he or she shall advise the claimant accordingly, and the reasons for

⁵ section 11(3) of the Restitution Act

⁶ section 11(4) of the Restitution Act

such decision.

- [22] The courts have spelt out the functions of the of the Land Claims Commission in *Mahlangu NO v Minister of Land Affairs and others* 2005 (1) SA 451 (SCA) at paragraph [1] this Court set out in broad terms a description of the institutions created by the Act to manage the restitution process:

" . . . The principal institutions that are created to manage the process are the Commission on Restitution of Land Rights (the commission) and the Land Claims Court (the LCC). The function of the commission, broadly speaking, is to receive and to investigate claims for restitution and to attempt to resolve them through mediation and negotiation. If a claim cannot be resolved by those means it must be referred by the commission to the LCC for the LCC to exercise its wide powers of adjudication. The LCC may, amongst other things, order the restitution of land or a right in land to the claimant, or order the State to grant the claimant an appropriate right in alternative State-owned land, or order the State to pay compensation to the claimant, or order the State to include the claimant as a beneficiary of a State support programme for housing or the allocation and development of rural land, or it may grant the claimant alternative relief (s 35)."

- [23] The general scheme of the Act grants the Regional Commissioner a

facilitative and investigative role while the adjudicative powers are the preserve of the courts.⁷

[24] In *Farjas (Pty) Ltd v Regional Land Claims Commissioner, KwaZulu-Natal* 1998 (2) SA 900 page 923 at paragraph 40, Dodson J stated that the nature of the section 11(1) inquiry constitutes a preliminary stage where the Regional Land Claims Commissioner must be satisfied that the claim fulfils the pre-requisites for the Commission to undertake a full-scale investigation in terms of section 12 of the Act. The court explained that the word 'satisfied' within the context of the provision merely means that claimant must show that they have an arguable case, even if it is a weak case.⁸

[25] In *Phillips v Minister of Rural Development* [2014] 4 All SA 100 (LCC) paras [31]– [32] this Court held that the Commission did not adjudicate or decide on the merits of a claim. This is the function of the court. Secondly, it is trite that a Regional Land Claims Commissioner does not have the power to adjudicate or take decisions on the merits of a claim (see *Farjas (Pty) Ltd and another v Regional Land Claims Commissioner, KwaZulu-Natal* 1998 (2) SA 900 (LCC) at paragraph 41. See also *Gamevest (Pty) Ltd v Regional Land Claims Commissioner, Northern Province and Mpumalanga and others* 2003 (1) SA 373 (SCA) paras [28] – [29] and *Mahlangu NO v Minister of Land Affairs and others* [2004] ZASCA

⁷ *Farjas* at para [42]

⁸ *Farjas* at p923 para [42]

74; 2005 (1) SA 451 (SCA) para [13]

[26] In terms of section 11(1) of the Restitution Act the Regional Land Claims Commissioner must cause the notice to be published in the *Government Gazette* if he is satisfied, *inter alia*, that the claim is not precluded by the provision of section 2. He engages in administrative action when taking that decision- see *Gamevest (Pty) Ltd v Regional Land Claims Commissioner, Northern Province and Mpumalanga and others*, 2003 (1) SA 373 (SCA) at 380A-C.

Judicial Review of Administrative Action

[27] Section 6 of PAJA makes provision for judicial review of administrative action. Section 6(1) permits any person to institute proceedings in a court or a tribunal for the judicial review of administrative action.

[28] Section 6(2) enumerates in detail certain circumstances in which this court is empowered to review administrative action. Relevant to this matter are the provisions of section 6(2)(a) on the principle of legality, section 6(2)(c) on procedural fairness, and section 6(2)(f) pertaining to an action not authorised by the empowering provision. The said provisions overlap somewhat, in the sense that the charge is that the Director-General acted beyond his power and also failed to follow the procedure prescribed in the Restitution Act relating to the claims process.

[29] At issue in this matter is whether the administrator acted *ultra vires*. Such analysis gives rise to an inquiry into compliance with the principle of legality. The principle of legality requires that “power should have a source in law” and “is applicable whenever public power is exercised.

Public power can be validly exercised only if it is clearly sourced in law”.

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[30] In *Roux v Health Professions Council of SA and another* [2012] 1 All SA 49 (SCA) at para 32 Mhlantla JA stated that-

“The principle of legality dictates that administrative authorities such as the HPCSA cannot act other than in accordance with their statutory powers. The decision of the pro forma complainant to include the misdiagnosis charge was not “sourced in law” and has offended against the principle of legality. The decision has to be reviewed and nullified for want of statutory power. It follows that the misdiagnosis charge has to be set aside.”

[31] The Restitution Act requires a regional commissioner to be satisfied that the threshold is passed and if he or she is not so satisfied, the Act maps out the course he or she must take in relation to the land claim. That is what the regional commissioner did in this case.

[32] None of the procedural steps which might culminate in a hearing before the Land Claims Court is clothed with absolute finality. The phase before the publication of the notice is investigative and not adjudicative. There is thereafter a further investigative stage in which interested and affected parties are entitled to participate.

⁹ *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and another* 2007 (1) SA 343 (CC) at para 68

[33] The step that the applicant seeks to review is the second phase of the claims process, at this preliminary stage the Regional Commissioner does not have all the evidence to hand, a further investigation is to be conducted, and therefore the threshold is very low. All that the Regional Commissioner needs to satisfy himself is that there is a *prima facie* case. As observed by Dodson J in *Farjas*, in relation to section 11(1)(b) of the Restitution Act.

*“To require applicants to prove their cases before the regional land claims Commissioner would be to exceed the constitutional and statutory mandates conferred on the commission. In broad terms the Act attributes an investigative and facilitative role to the Commission, on the one hand and an adjudicatory function to the Court on the other.”*¹⁰

[34] The applicant’s complaint stems from a misinterpretation of the powers of the Commission during what is essentially a preliminary assessment of the claim, a meaning ascribed to the words ‘*the claim is not precluded by...*’

[35] Section 12 sets out the Commission’s powers to investigate the claim and importantly in subsec (3), it provides that:

‘If a claimant is not able to provide all the information necessary for the adequate submission or investigation of a claim, the regional land claims commissioner concerned shall direct an

¹⁰ *Farjas* at para 41

officer contemplated in section 8 to take all reasonable steps to have this information made available.'

[36] The Restitution Act places the duty of sourcing information on the Commission, not the claimant. Significantly, the investigation is conducted after the notice has been issued. It is only during the phase of conducting further investigations that the Commission makes a determination on the merits of the claim, not at the preliminary stage as the applicants suggests.

[37] In interpreting the application of the Restitution Act it is imperative that due consideration is given to the nature of the land claimants which may be prejudiced by taking an approach that is overly complicated and sophisticated at the preliminary stage. Although I do not have the full benefit of the Regional Commissioner's thinking with regard to the sufficiency of evidence, the memorandum gives an insight that-

37.1 the second respondent is a direct descendant of the originally dispossessed person claiming on behalf of other direct descendants who shall be verified during the further investigation.

37.2 it is clear that *prima facie*, the claim meets the requirements and criteria set out in sections 2 and 11 of the Restitution Act.

[38] The determination of the substance of the second respondent's claim, as to whether he was dispossessed due to discriminatory laws and

practices will be conducted during further investigations by to be conducted by the Regional Commissioner.

[39] I find that the Regional Commissioner duly applied his mind before issuing the notice and was required to do no more than rely on the information before him.

[40] There was an application by the second respondent for the condonation for the late filing of the answering affidavit. The applicant did not persist in their initial opposition to the application and the condonation is accordingly granted.

[41] The second respondent also filed a rather obliquely pleaded conditional counter-application. Due to the order granted it is not necessary to deal with the said conditional counter-application.

[42] In the circumstances, I make the following final order-

1. The application for review is dismissed;
2. There is no order as to costs.

S POSWA-LEROTHOLI

Acting Judge of the Land Claims Court