IN THE LAND CLAIMS COURT OF SOUTH AFRICA

HELD AT RANDBURG

CASE NO: **LCC 181/2011**

19/4/2018

In the Ex parte application of:-

REGIONAL LAND CLAIMS COMMISSIONER: KWAZULU-NATAL Applicant

In re:

THE LOWER SOUTH COAST LAND CLAIMS GROUP First Applicant

PECKHAM PROPERTIES (PTY) LTD Second Applicant

and

COMMISSION ON RESTITUTION ON LAND RIGHTS First Respondent

REGIONAL LAND CLAIMS COMMISSIONER: KWAZULU-NATAL AND OTHERS Second Respondent & Others

(Re: MASAKHANE MPHAKATHI COMMUNITY)

Handed Down on: 19 April 2018

JUDGMENT

SPILG J

Background

1. This case has an unfortunate history of delay on the part of the Regional Land Claims Commissioner, KwaZulu-Natal (*'RLCC'*). Suffice it that by December 2011 Landowners who claimed that they were affected by a notice of a claim for restitution of land rights dated 14 November 2003 (Government Notice 3228/2003) in respect of properties situated in the Southbroom and Ramsgate areas brought a *mandamus* application against the Commission for the Restitution of a Land Rights ("the Commission") and the RLCC to take the necessary steps under section 11 (a) of the Restitution of Land Rights Act 22 of 1994 (the Restitution Act) to withdraw the Government Gazette notice (by de-gazetting the properties in question) or to refer the claim to this court for adjudication under section 14 (1) of the Restitution Act. An order by consent was granted by the court on 22 August 2012 in terms of which the RLCC was directed to refer the claim to this court and requiring it to serve the notice of referral together with the Commissioner's report and other relevant documents on all affected landowners as provided for in Rule 38 (3) (d).
2. The area affected by the referral is vast and affects some one hundred landowners.
3. The consent order was not complied with and on order was sought on 28 October 2013 to compel the Commission represented by the RLCC to

comply with that certain identified officials be held in contempt of court. The application was opposed by the Commission and the RLCC. On the date of hearing my brother Matojane J postponed that application sine die. The purpose of the postponement was to consider an application for substituted service filed by the RLCC. There apparently has been service of that referral on a vast number of landowner. However, the present application has been brought because the RLCC contends that five landowners cannot be located.

NATURE OF APPLICATION

4. The application brought by the RLCC for substituted service relates to the following registered owners;

    i. Alfonso Almazan Gomez and Teresa Sanchez Marcos;

    ii. Derrick Eustace Robert Adkins;

    iii. Executor/ Executrix of the Estate Late Petrus Hendrik van Rooyen;

    iv. SouthbroomDevelopment Co (Pty) Ltd; and

    v. Bevro Investments Natal (Pty) Ltd.

5. The provisions of Uniform Rule 4 (2) apply by reason of Rule 37 read with Rule 24 (3) of the Land Claims Court Rules. Rule 4 (2) provides; *"if it is not possible to effect service in any manner aforesaid, the court may, upon the application of the person wishing to cause service to be effected, give directions in regard thereto. Where such directions are sought in regard to service upon a person known or believed to be within the Republic but whose whereabouts therein cannot be ascertained, the provision of sub rule (2) of rule 5 shall, inter alia, apply"*.

6. Rule 5 (2) provides; *"Any person desiring to obtain such leave shall make application to the court setting forth concisely the nature and extent of his claim, the grounds upon which the court has jurisdiction to entertain the claim and also the manner of service which the court is asked to authorize. If such manner be other than personal service, the application shall further set forth the last-known whereabouts of the person to be served and the inquiries made to ascertain his present whereabouts. Upon such application the court may make such order as to the manner of service as to it seems meet and shall further order the time within which notice of intention to defend is to be given or any other step that is to be taken by the person to be served. Where service by publication is ordered, it may be in the form as may be in accordance with For 1 of the First Schedule, approved and signed by the registrar".* (Emphasis added)

7. In Engen Petroleum Limited v Multiwaste (Pty) Ltd & Others 2012 (5) SA 596 GSJ Boruchowitz J confirmed that; where an application for substituted service is brought before a high court: "at the very least, it is incumbent upon an applicant to demonstrate that all reasonable steps have been taken to establish the identity of the affected persons and their addresses to which the relevant notices are to be delivered".

8. It is clear from the authorities that the party seeking substituted service must also set out the enquiries which have been made to ascertain the other parties' present whereabouts and any information which may assist the court in deciding this issue and also the terms on which notice is to be given. See Erasmus' *Superior Court Practice* B1-32 in regard to Rule 5 (2) and Harms *Civil Procedure in the Superior Court* para B4.30. Moreover if a party is believed to be outside the borders of South Africa, then an edictal citation is also necessary, see Herbstein & van Winsen, *The Civil Practice of High Courts of South Africa* 5 ed vol 1 p 373.

9. in the present case the RLCC has only relied, in the case of individual landowners, on letters received from the tracing agents;

    a. In the case of Mr. Gomez and Ms Marcos the following is stated; *"protracted enquiries to positively identify and subsequently locate the current whereabouts of the subjects, have been to no avail. File closed…"*

    b. In the case of Adkins it is said that due to his age at the time of transfer,, he is probably dead (transfer was in 1931 and he was already retired)

    c. In the case of Estate Late van Rooyen, it is stated that van Rooyen passed away in January 1993 and the file was closed.

10. In respect of the two companies, the RLCC produced evidence demonstrating that both had been de-registered, the one in 1985 and the other in 2007 (Bevro Investments).

11. It is evident that in the case of the individuals and the deceased estate, the reports are hopelessly inadequate. The court has only been provided with a conclusion but no basis for being satisfied that in the case of the surviving individuals their whereabouts cannot be located either by enquiries on the property itself or by reference to the records of the authorities responsible for levying rates or utility charges on the property. Before a court ca deprive a person of the entitlement to receive personal notice, it is necessary for these avenues also to be explored.

12. In the case of deceased persons, it is trite that it is necessary for an executor to be appointed whether the estate is testate or intestate.

13. In the case of the estate of van Rooyen the only additional information provided is that the Master has confirmed that no executor has been

appointed. Once again there is no evidence on the papers that any attempt has been made to attend the premises, leave appropriate notices at the main gates, or to establish from the municipal or rural authorities whether any responsible person is on the property or whether the land is being used or has been neglected. If any person is present on the land then enquiries should be made through him or her to locate the owner or establish whether that person would be competent to receive service on behalf of the owner. The case of a deceased estate requires the RLSS to comply with such legal requirements as may otherwise be necessary or to approach the court to waive them on good cause and, as stated earlier after satisfying the court that the suggested steps set out earlier have been taken or to produce evidence to the court that the land has been abandoned in which case an affidavit by a senior official producing such evidence that such a conclusion can be drawn (e.g. b way of photographs) is to be placed before the court.

14. In relation to the de-registered companies, the land owned would have become *bona vacantia* and forfeited to the State. In the one case, the situation has endured for a number of decades while in the other it is only a matter of some six ears. In the case of Bevro and because of a number of instances where the court has had to deal with re-registration of companies that have been removed under the old Companies Act simply by reason of failing to file an annual return or pay a fee, it is necessary for enquiries to be made of the auditors, at the registered address and of the members recorded as at 2007 in the records of the Companies and Intellectual Property Commission (CIPC). There are no facts to even suggest that a letter was dispatched to even the postal address recorded with CICP.

15. This leaves the case of Southbroom Development. There is no similar information recorded. In its case it will be sufficient to attend on the property and establish if it is occupied, whether rates and utility charges

are being paid and proceed with investigations from there. While the effect of de-registration results in the property being forfeited to the State it is difficult for the beneficial members to claim that they are prejudiced if indeed they abandoned their assets. However the difficulties encountered by the courts by reason of the application of the old Companies Act in recent times cannot provide the court with the comfort that indeed the members or office bearers are in fact aware of the deregistration.

16. I accept that I the case of Southbroom Development, the deregistration was as far back as 1985. If it was the only case before for substituted service then I may have taken a different view of the matter bearing in mind the further delay and that Southbroom Development would represent only one of the 101 landowners who, aside from the claimants, may also be prejudiced by delay and whose interests generally appear to coincide and are represented by senior counsel. However,, since it will still be necessary to make the enquiries in the other cases,, before the application can be brought again, I will not at this stage treat it differently to those where I consider it necessary to physically establish if the land is occupied or lies abandoned and if rates and other utility bills are being sent and paid for.

17. The court appreciates that delay in finalizing land claims is potentially detrimental to the interests of all affected parties. Nonetheless the consequences of the rights affected require the court to be sufficiently satisfied that all reasonable steps have been taken to locate the beneficial owners.

18. For these reasons the application in its present for is inadequate and the RLCC is afforded a further opportunity to bring its application duly supplemented. Accordingly the application is postponed to 27 January 2014 with leave to supplement their papers.

Date of hearing: 25 November 2013

Date of Judgment: 28 November 2013

LEGAL REPRESENTATIVES:

For the DLR & RLCC:	Adv. T Mthembu SC
(Applicant's in interlocutory)	State Attorney (KwaZulu-Natal)