IN THE LAND COURT OF SOUTH AFRICA
HELD AT RANDBURG

CASE NO**: LCC93/2014**

Before: Honourable Ncube J
Heard on: 26 August 2024
Delivered on: 06 December 2024

DELETE WHICHEVER IS NOT APPLICABLE

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

....
DATE SIGNATURE

In the matter between:

FEROZ SHAH 1st Plaintiff

& 37 OTHERS 2nd to 38th Plaintiffs

and

MINISTER OF RURAL DEVELOPMENT AND LAND REFORM 1st Defendant

& 7 OTHERS 2nd to 8th Defendants

and

CASE NO:LCC 180/2014

In the matter between:

NADAR SHAH Plaintiff

and

MINISTER OF RURAL DEVELOPMENT
AND LAND REFORM 1st Defendant

& 40 OTHERS 2nd to 41st Defendants

ORDER

The following order is made:

1. The first and/or second defendants are ordered to pay the amount of R13 666 035.00 (THIRTEEN MILLION SIX HUNDRED AND SIXTY SIX THOUSAND AND THIRTY FIVE RAND), which amount is calculated as follows:

1.1 just and equitable compensation based on market value:	R11 739 672.00
1.2 financial loss and *solatium*:	R1 036 448.05
Total amount payable:	R13 666 035.00

2. The total amount payable as calculated in paragraph 1 above is to be paid to the plaintiffs' attorney of record: **Peet Grobbelaar Attorneys, Trust account, ABSA Bank Menlyn Square, Account number: 4[…], Branch Code: 6[…], Reference: G[…]**, within 30(THIRTY) days from date of this order;
3. The first and second defendants are ordered, jointly and severally, to pay the

costs incurred by the plaintiffs on the scale as between attorney and client, such costs to include the following:

3.1 The costs incurred in respect of consultations with the plaintiffs and the plaintiffs' expert witness, Mr. A Stephenson, including all travelling and accommodation expenses and costs in respect of travelling time as determined by the Taxing Master;

3.2 The qualifying fees and expenses of the expert witness, Mr. Stephenson, such costs to include the costs of visiting the various archives, copying of discovered documents, inspections *in loco* conducted by him, the consultations by him with the plaintiffs to obtain relevant information and documentation to compile his report and updated schedules to it, the drafting of the report, consultation time with the plaintiffs' counsel and attorney, the attendance of the various joint meetings with the RLCC's expert witness and the drafting of joint minutes subsequent to such meetings, and the attendance fees for the trial;

3.3 All costs incurred by the plaintiffs' attorney, in preparing, collating, copying, indexing, and paginating all court documents, the courier costs of such documents to the Registrar and the Court and the making of copies of the bundles and files for use in the Court.

4. In the event that the first and/or second defendants fail to pay the amount on or before the date referred to in paragraph 2 above, the first and/or second defendants will be liable to pay *mora* interest on the total amount due and payable at the prescribed interest rate, calculated from date of this order.

5. All reserved cost.

JUDGMENT

NCUBE J

Assessor: Mr Mike Gibbins

Introduction

[1] Two actions were instituted for the restitution of rights in land in terms of the Restitution of Rights in Land Act ("the Act"). The first action was brought by Feroz Shah together with 37 other members of the Shah family under case no LCC93/2014. The second action was brought by Nader Shah in his representing capacity representing the Estate of the Late Sayed Omar, Estate Late Jaitun Bee and Estate Late Jafar Shah. Both, actions were instituted in terms of section 38B of the Act. The affected land was formerly described as subdivision 12 of SB5 of the Farm Cato Manor No 812 situated in the city and county of Durban, Province of Natal, in extent of fifty three (53) acres, two (2) roods, four(4) perches. The property was later known as Lot 1414 of the Farm Cato Manor, in extent of 16 615 square meters.

[2] The deceased were disposed of their rights in land in respect of the property due to racially discriminatory laws or practices applicable at the time of dispossession. The City of Durban acquired the property in terms of the Title Deeds Number 11688 of 1965.

Agreed Facts and Facts in Dispute

[3] On 27 November 2018, the parties signed a statement of agreed facts and facts in dispute. The first and second defendants admitted the claims and their validity and conceded that the plaintiffs are entitled to restitution in the form of equitable redress.

Common Cause Facts

[4] It is common cause that the Shah family was dispossessed of its property in 1964. It is also common cause that the dispossession was as result of racially discriminatory laws or practices. It is common cause that at the time of dispossession the Shah family was compensated in the amount of R20 000-00. It is equally common cause that the amount if R20 000 was not adequate to compensate the family.

Facts in dispute or Issues

[5] What is in issue, is the appropriate amount which should be paid to the Shah family. The second issue is whether solatium should be paid to the claimants and if so in what amount. The last issue is whether the plaintiffs are entitled to costs.

Legal Matrix

[6] Section 25(7) of the Constitution of the Republic of South Africa[1] ("the Constitution") 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 that property or to equitable redress"

Pursuant to the provisions of section 25(7) of the Constitution, the Parliament enacted the Restitution of Land Rights Act[2] ("the Act"). The Act defines the phrase "***Restitution of a right in land"*** as meaning:

(a) the restoration of a right in land or

(b) equitable redress

[7] In turn the phrase, ' **restoration of a right in land'** is defined as meaning:

"**return of a right in land or** a portion of land dispossessed after 19 June 1913 as a result of past discriminatory laws or practices". "**Equitable redress**" is defined as meaning- " any equitable redress, other than the restoration of a right in land, arising from the dispossession of a right in land after 19 June 1913 including

(a) the granting of an appropriate right in alternative state- owned land,

(b) the payment of compensation …."

[8] In *Department of Land Affairs and Others v Goedgelegen Tropical Fruits*[3]*,* the Constitutional Court held that purposive interpretation should be applied when

[1] Act 108 of 1996
[2] Act 22 of 1994
[3] 2007 (6) SA 199 (CC) para 53

interpreting the Act, as it is a remedial legislation which is umbilically linked to the Constitution and when interpreting it, the spirit, purport and objects of the Bill of Rights must be promoted. In *Mphela v Haakdoornbult Boerdery CC*[4] Mphathi AJ expressed himself in the following terms:

> " *It seems to me therefore that where land which was a subject of a dispossession as a result of past discriminatory laws is claimed and the claim is not barred by section 2 (2) of the Act, the starting point is that the whole of the land should restored save where restoration is not possible due to compelling public interest considerations*"

In *Florence v Government of Republic of South Africa*[5] Van Der Westhuizen J held:

> " *In Mphela this court held that the 'starting point is that the whole of the land should be restored, save where restoration is not possible due to compelling public interest considerations'. This recognises the primacy of restoration. Equitable redress, including in the form of financial compensation, is generally ' second prize'. In Goedgelegen the court noted that ' the Restitution Act is an enactment intended to express the values of to express the value of the Constitution and to remedy the failure to respect such values in the past, in particular the values of dignity and equal worth'*
>
> *In keeping with the ideal and Constitutional value of equality, it seems that all are entitled to at least roughly equivalent claimants compensation- whether or not restoration of the land is possible"*

[9] If financial compensation is considered a form of equitable redress, the amount of compensation must be sufficient to make up for what was taken away at the time of dispossession. In many instances, there will be a possibility of over compensation where restoration is ordered whilst the claimant at the same time is allowed to keep the amount of compensation received at the time of expropriation.

Evidence

[4] 2008 (4) SA 488 (CC) para 32
[5] 2014 (6) SA 456 (CC) Para 46

[10] There are two expert witnesses who testified in this case. No factual witnesses were called, since the only issue was the amount of compensation. The plaintiff called Mr Alan Stephenson ("Mr Stepheson") who is a professional valuer. Mr Stepheson conducted a historical valuation of the property and compiled a report and he also issued many updated valuations. The first and second defendants led the evidence of Mr. Serfontein who is also a professional valuer. Mr Serfontein compiled four reports based on the investigation which he had conducted. Both expert witnesses had met prior to the hearing date in order to draft the joint minute. The latest and the most relevant joint minute is the one dated 29 February 2024. It is clear from that joint minute that are few differences between these two experts. The difference is in the calculation method and whether direct financial loss and solatium should be included.

Differences

[11] Both witnesses used the income method. However, Mr. Serfontein used the income method to determine what he calls "*the current use value*". Mr. Stephenson used the same income method, but in using that method, Mr Stephenson wanted to determine the estimated "*market value*". Mr Serfontein concluded that the "*current use value*" which he established from using his income method was in terms of section 25(3)(a) of the Constitution. Mr. Stephenson opined that his "*market value*" which he established by employing his income method was in terms of Section 25 (3) (c) of the Constitution. Whilst Mr. Stephenson used the capitalisation rate of 10% in regards to his income method, Mr. Serfontein used the capitalization rate of 15%. Mr. Serfontein did not add the contributory, value of the buildings at the time of dispossession whilst Mr. Stephenson did. Mr Stephenson used R5500 per hectare plus the contributory value of the buildings. Mr. Serfontein used R3500 per hectare without adding the contributory value of the buildings. Mr. Stephenson, rightly in my view, escalated the shortfall by the CPI.

[12] Whilst Mr. Serfontein was of the opinion that the plaintiffs were not entitled to direct financial loss and solatium, Mr. Stephenson opined that the plaintiffs had suffered great hardship as a result of the dispossession and he calculated the compensation by adding direct financial loss and solatium to the amount to which the

plaintiffs are entitled. This difference of opinion between the two experts boils down to this:

i) the court must decide on the most appropriate method to be used to calculate the shortfall.
ii) the court must decide on the most appropriate value per hecter of land at the time of dispossession.
iii) the court must decide whether the plaintiffs are entitled to direct financial loss and solatium adjusted by CPI to today's value.

Evaluation

[13] In my view, the valuation method applied by Mr. Stephenson is more reliable than that of Mr. Serfontein. In the first place, Mr. Serfontein was unwilling even to testify, which might have been an indication that he had no confidence in the integrity of his investigations. In addition, Mr Serfontein produced no less than four reports, not indicating which report the court should rely on. Mr. Serfontein also introduced unknown constitutional concepts like the "*current use value*" which he said it was mandated by section 25(3)(a) of the Constitution. Section 25(3)(a) of the Constitution refers to "*the current use of the property*" being one of the factors to be taken into consideration in determining the amount of compensation. There is nothing like *" the current use value*" in the Constitution. Mr Stephenson correctly referred to "*the market value of the property*" which is mentioned in section 25(3)(c) of the Constitution which is one of the factors, to be considered in the determination of the appropriate amount of compensation.

[14] Mr Serfontein also had no idea about the locality of the land he was working on. On several occasions Mr Serfontein referred to Cato Ridge instead Cato Manor. His valuations were also influenced by the Property Valuation Act and its Regulations as prescribed by the Office of the Valuer General. That Act does not apply in this case. It is for all these reasons that Mr Serfontein's calculations are found wanting. Mr Stephenson's opinion and calculations are acceptable and more reliable than those of Mr Serfontein. Mr Serfontein's calculations can be safely rejected.

Solatium

[15] The plaintiffs have asked for solatium to be included as a form of financial loss. Mr Setephenson has calculated solatium based on different scenarios. Solatium is compensation awarded for injury to the feelings. Mr Grobbelaar, counsel for the Plaintiffs submitted that no solatium was paid to the plaintiffs during expropriation. Expropriation of someone's property, by its very nature causes emotional trauma for which the owner of the expropriated property should be compensated. The Expropriation Act[6] prescribes a fixed formula in terms of which solatium should be determined. According to that formula solatium should be 10% of the first R100 000.00 plus 5% of the amount by which it exceeds R100 000-00[7]. Mr Stephenson did the calculations based on market value including land and improvements at R5 500 per m^2 plus solatium at 10% as prescribed by the Expropriation Act.

Costs

[16] The general approach in this court is to award costs only in special circumstances or where a private litigant has obtained substantial success in proceedings against the State like in the present case. In terms of the Act, this court has a wide discretion to make cost wards where the circumstances permit[8]. The present matter is akin to constitutional litigation. In *Biowatch Trust v Register Genetic Resources and Others*[9] the Constitutional Court provided guidelines to the proper judicial approach to be adopted in the determination of costs in constitutional litigation. In certain instances, where various functionaries of the State had been found to be remiss, punitive costs orders have been awarded[10]. In *Qwabe-Waterfall Community v Minster of Rural Development and Land Affairs and Others*[11] Bertelsmann J said:

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[6] Act 63 of 1975
[7] See calculations in section 12(2)(a)-(d) of the Expropriation Act
[8] See section 35(2)(g) of the Restitution Act.
[9] 2009(6) SA 232 (CC) Paras 8 and 23
[10] See Emakhasaneni Community & Others v Minister of Rural Development and Land Reform & others 2019 (4) SA 286 (LCC) paras 40-42
[11] (03/2014) [2018] ZALCC 15 (11 December 2018)

" applying the principle established in Biowatch Trust v Register Genetic Resources and Others 2009(6) SA 232 (CC) that in constitutional litigation- which includes a restitution claim individuals unsuccessfully pursuing constitutional relief against the State should not be mulcted in costs, the punitive costs order will issue against the First and Second Defendants only"

[17] In *casu,* the State did not attempt to settle the matter even though it was clear that Mr Serfontein's valuation was in shambles. Mr Serfontein even conceded in cross examination that he employed a wrong methodology. Under normal circumstances, the commission would support the claimants in their claim but in *casu*, the State only opposed the claim, even though it was clear that the plaintiffs were under compensated during the expropriation of their property. It was also obvious that Mr Serfontein's report was not going to see the light of the day as he also confused Cato Manor with Cato Ridge. He also in his calculations applied principles obtained from the Office of the Valuer General (OVG) which are inapplicable in this case. Litigation has endured for a period of almost 28 years from the date of lodgement of the claim, which should have been settled to avoid payment of unnecessary costs. The conduct of the Commission justifies the payment of punitive costs.

Order

[18] In the result, I make the following order:

1. The first and/or second defendants are ordered to pay the amount of R13 666 035.00 (THIRTEEN MILLION SIX HUNDRED AND SIXTY SIX THOUSAND AND THIRTY FIVE RAND), which amount is calculated as follows:

1.1 just and equitable compensation based on market value:	R11 739 672.00
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2. The total amount payable as calculated in paragraph 1 above is to be paid to the plaintiffs' attorney of record: **Peet Grobbelaar Attorneys, Trust account, ABSA**

Bank Menlyn Square, Account number: 4[…], Branch Code: 6[…], Reference: G[…], within 30(THIRTY) days from date of this order;

3. The first and second defendants are ordered, jointly and severally, to pay the costs incurred by the plaintiffs on the scale as between attorney and client, such costs to include the following:

3.1 The costs incurred in respect of consultations with the plaintiffs and the plaintiffs' expert witness, Mr. A Stephenson, including all travelling and accommodation expenses and costs in respect of travelling time as determined by the Taxing Master;

3.2 The qualifying fees and expenses of the expert witness, Mr. Stephenson, such costs to include the costs of visiting the various archives, copying of discovered documents, inspections *in loco* conducted by him, the consultations by him with the plaintiffs to obtain relevant information and documentation to compile his report and updated schedules to it, the drafting of the report, consultation time with the plaintiffs' counsel and attorney, the attendance of the various joint meetings with the RLCC's expert witness and the drafting of joint minutes subsequent to such meetings, and the attendance fees for the trial;

3.3 All costs incurred by the plaintiffs' attorney, in preparing, collating, copying, indexing, and paginating all court documents, the courier costs of such documents to the Registrar and the Court and the making of copies of the bundles and files for use in the Court.

4. In the event that the first and/or second defendants fail to pay the amount on or before the date referred to in paragraph 2 above, the first and/or second defendants will be liable to pay *mora* interest on the total amount due and payable at the prescribed interest rate, calculated from date of this order.

5. All reserved cost.

NCUBE J

Judge of the Land Court

of South Africa

Mike Gibbins
Assessor

Appearances:

For the Plaintiffs:	Mr Grobbelaar
For the First and Second Defendants:	Adv Choudree SC Adv Nqala
Instructed by:	State Attorney Durban