IN THE LAND COURT OF SOUTH AFRICA
HELD IN RANDBURG

CASE NO: **205/2021**
CASE NO: **19/2022**

Before: Honourable Ncube J
Heard on: 29 August 2024
Delivered on: 21 January 2025

DELETE WHICHEVER IS NOT APPLICABLE

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

21/01/2025 [redacted]
DATE SIGNATURE

In the Consolidated matter of:

KHOLEKA GLADYS POTI	**1st Applicant**
NOMBULELO MAVIS GENGE	**2nd Applicant**
MARGARET NOKUZOLA QUMZA	**3rd Applicant**
and	**Case LCC 19/2022**
NOSE PRINCESS JACOBS	**1st Applicant**
NOMATHEMBA PHALI	**2nd Applicant**
and	
MINISTER OF DEPARTNMENT OF RURAL DEVELOPMENT AND LAND REFORM	**1st Respondent**

DIRECTOR GENERAL OF DEPARTNMENT OF RURAL DEVELOPMENT AND LAND REFOEM	**2nd Respondent**
CHIEF LAND CLAIMS COMMISSIONER	**3rd Respondent**
REGIONAL LAND CLAIMS COMMISSIONER	**4th Respondent**

ORDER

In the result, I make the following order:

1. The point *in limine* raised by the Respondents herein is dismissed.

2. The period of 180 days mentioned in Section 7(1) of PAJA is, in terms of Section 9(1) (b), extended to 10 May 2022

3. The decision to pay compensation of R36000,00 in respect of each of the Applicants in both Case LCC 205/2021 and LCC19/2022 is reviewed, set aside and declared invalid.

4. The Settlement agreements entered into by all five Applicants in case LCC205/2021 and LCC19/2022are reviewed, set aside and declared invalid.

5. The Fourth Respondent is ordered to refer this case to the Land Court in terms of Section 14(3A) and (4) of the Restitution of Land Rights Act 22 of 1994.

6. The Respondents are jointly and severally ordered to pay the Applicants' Costs on Attorney and Client Scale. Such costs to include costs of two counsel.

JUDGMENT

NCUBE J

Introduction

[1] These are two consolidated applications. The Applicants seek an order reviewing and setting aside the decision of the fourth respondent *("the RLCC")* to settle their land claims which they had lodged in respect of the dispossession of their rights to the farm Veesplaas, in 1960's in a blanket amount of R36000.00 each. The Applicants also seek an order setting aside the settlement agreements entered into in respect of the said land claims and the remittal of the land claims to the RLCC. In the alternative, the Applicants seek an order directing the RLCC to refer the settlement agreements to this court for a consideration in terms of section14 (3A) and 4 of the Restitution of Land Rights Act[1] *("the Restitution Act").* The application is opposed.

Litigation History

[2] In terms of the court order granted on 24 January 2024, the two cases were consolidated under one case which is LCC 205/2021. The Case has a long history with somewhat unusual procedures employed by the State Respondents. The application was enrolled for hearing on four occasions but on three of those occasions it did not proceed because of certain reasons. The application was first set down for hearing on 15 August 2023 as the Respondents were late with their heads of argument. They filed their heads of argument on 10 August 2023. The matter was then adjourned to 8 September 2023. One day before the hearing scheduled for 8 September 2023, the Respondent's new senior Consel filed a further set of heads of Argument. The Judge's files were also not in order. The matter adjourned to 10 October 2023.

[11] Act 22 of 1994

[3] On 22 September 2023 the Respondents filed two identical supplementary affidavits under both case numbers LCC 205/2021 and LCC 19/2022. This, the Respondents did without first seeking leave from the court to file a supplementary affidavit. In the morning of the hearing, on 10 October 2023, the Respondents filed two Notices of Motion in respect of each case, seeking condonation for the late filing of the supplementary answering affidavits at the same time seeking an order admitting the affidavits as part of the record. The Applicants gave notice of their intention to oppose the belated applications.

[4] At the hearing of the matter the Applicants objects to the supplementary affidavits on the basis that a new case was made out in the so – called supplementary affidavits and such supplementary affidavits contradicted the Respondents' answering affidavits. The hearing was then adjourned to 24 January 2024 as the court was going to consider the admissibility of the two additional affidavits. After the adjournments, the Respondents, under the consolidated filing notice dated 06 November 2023, delivered two further identical applications referred to as *"Notice of Motion: Condonation"*. The Applicants again filed notice to oppose those fresh applications for condonation and also filed a joint answering affidavit to the two applications.

[5] The two condonation applications as pointed out by the Applicants, were not applications for leave to file supplementary affidavits. The relief sought by the State Respondents in the founding affidavit of Mr Maphutha, was seeking condonation for the late filing of supplementary answering affidavits. To cure the defect, the Respondents filed notice of amendment by adding the word "supplementary" before the word "answering". The correct procedure was to seek leave from the court to file further affidavits[2].

[2] See rule 33(6) of the Land Claims Court Rules

Point in Limine

[6] On 15 August 2024, the Respondents gave notice to raise a point *in limine*. The point raised was one of prescription. The Respondents averred that the. Applicants herein were basing their claims on contracts which were concluded and performed or should have been performed by the Respondents before the end of 2011. The so - called point *in limine* is misplaced. The Applicants in these proceedings do not lay a claim based on breach of contract. The Applicants seek a review and setting aside of the decision that led to the conclusion of settlement agreements as well as the agreements themselves.

[7] The other difficulty with the Respondents' points *in limine* is that the Respondents never raised prescription as a defence in their answering affidavit. In motion proceedings, affidavits delivered by the parties serve as both pleadings and evidence. To that extent, in **Swissborough Diamond Mines v Government of RSA**[3]. Joffe J expressed himself in the following terms:

> *"It is trite law that in motion proceedings the affidavits serve not only to place evidence before the Court but also to define the issues between the parties. In so doing the issues between the parties are identified. This is not only for the benefit of the Court but also and primarily for the parties. The parties must know the case that must be met and in respect of which they must adduce evidence in the affidavits* .....
> .....
> .....
> ..... *An Applicant must accordingly raise issues upon which it would seek to rely in the founding affidavit. It must do so by defining the relevant issues and by setting out the evidence upon which it relies to discharge the onus of proof resting on it in respect thereof".*

[3] 1999(2) SA 279(TPD) at 323 F – G

[8] On the other hand, in **Van Rensburg v Van Rensburg and Andere**[4], it was held that a party is entitled, in argument, to raise argument in support of the relief sought, even where such argument is not specifically mentioned in the papers. However, common sense dictates that the court will allow this only in cases where no prejudice will be caused to the other party. In *casu,* the Applicants might have been in a position to raise many defences had they been properly appraised of such a point *in li*mine in the Respondents' papers on time. There is no doubt that the step taken by the Respondent was not in the interest of justice and is clearly prejudicial to the Applicants. In any event, as stated earlier in this judgement, the relief sought by the Applicants herein is not a claim in respect of which a defence of prescription can be raised. I turn now to look at the merits of the review application.

Parties

[9] There are five (5) Applicants in two consolidated cases. Those cases are LCC 205/2021 and 19/2022. Case LCC 205/2021 has three (3) Applicants. Case LCC19/2022 has two (2) Applicants. The first Applicant in LCC205/2021 is Kholeka Gladys Poti *("Kholeka").* The Second Applicant is Nombulelo Mavis Genge *("Nombulelo").* The Third Applicant is Margaret Nokuzola Qumza ("Margaret). The first Applicant in LCC19/2022 is Nose Princess Jacobs *("Princess").* The second Applicant is Nomatemba Phali *("Nomatemba").*

[10] The first Respondent is the Minister of Rural Development and Land Reform. The Second Respondent is Director General of the same Department. The Third Respondent is the Chief Land Claims Commission. The Fourth Respondent is the Regional Land Claims Commissioner ("RLCC") Eastern Cape Province. All four (4) Respondents oppose this application.

[4] 1963 (1) SA 505 (A) at 509E to 510 B

Factual Background

[11] Kholeka is a first born daughter of Velile (father) and Winnie Poti *("parents").* The parents were tenants at Wilson's Ground in Veeplaas. They occupied the land with Kholeka, her siblings and other relatives. The family had shacks and some were rented out to other people. They also owned few livestock. As a result of racially discriminatory laws or practices, the parents together with the entire Poti family were forcefully moved to Zwide location where they were allocated a small house. As a result of the said removals, the parents, together with the family, were dispossessed of their tenancy rights. The family left behind their livestock and other valuables. No compensation was paid. Mr Poti passed away without lodging a restitution claim. Mrs Poti lodged a valid claim before the cut off date of 31 December 1998. Unfortunately, Mrs Poti also passed away in February 2004 before any compensation was paid. Kholeka took over the claim on behalf of the Poti Family.

[12] Kholeka subsequently received payments of R9000.00. Her other two siblings equally received R9000.00 each and the children of her deceased sister also received R9000-00 which was the share which was due to Kholeka's late sister. In total the Poti family was compensated in the amount of R36000-00from the RLCC.

[13] Nombulelo is the descendent of Boesman and Nompumelelo Genge, her parents. The parents were tenants on the land which was owned by one Ntshinga. Nombulelo together with the rest of the family were removed from Veeplaas and taken to Zwide. They were also dispossessed of their tenancy right. The dispossession was effected in terms of the racially discriminatory laws or practices of the past. No compensation was paid to the family at the time of the removal. Nombulelo's parents died without lodging a claim for restitution of their tenancy rights which they lost. Nombulelo lodged the claim which the RLCC found to be valid. In 2011, the RLCC paid the Genge family an amount of R36000 – 00 which was paid in two equal instalments of R18000.00 each.

[14] The Third Applicant, Margaret, is the descendant of Edward Mdlokovu and Nomisile Agnes Mdlokovu, her parents who were also tenants in Veeplaas on the land owned by Khonza. The said family was also dispossessed of its tenancy rights when it was forcefully moved from Veeplaas to Zwide. The dispossession was in terms of racially discriminatory laws or practices. Margaret's parents died without lodging a claim for a restitution of tenancy rights which they lost. Margaret lodged a claim which was subsequently accepted as valid by the RLCC. Margaret, like other claimants, opted for financial compensation as a form of equitable redress. In 2011 Margaret was paid compensation in the amount of R18000.00. The second R18000.00 which would make it R36000.00, has not been paid.

[15] Princess, being the first Applicant in case 19/2022, their mother Emerly Maziko *("Emely")* and Princess's other two sisters were tenants at Vessplaas on the land owned by One Komashini. The family occupied a shack built by Emely. The said shack was big enough to accommodate the entire family. The family was later forcefully moved to Zwide location where they were forced to take occupation in a very small house. The family was dispossessed of its right of tenancy due to racially discriminatory laws or practices. No compensation was paid at the time of dispossession. Emely died without lodging a restitution claim. Princess lodged a claim which was accepted as valid by the RLCC.

[16] The RLCC, without consultation with any of the claimants, unilaterally decided to pay the Jacobs family an amount of R36 000 as a form of just and equitable redress. On 18 June 2011, the RLCC paid Princess an amount of R9 000.00. The representatives of the estates of Princess's other two late siblings were also paid R9000-00 each. The balance of R9000.00 is still outstanding as the family was also earmarked to receive R36 000.00.

[17] Nomatemba as the second applicant in case 19/2022, with her sisters, were born in Veeplaas. They were the tenants on the land owned by one Mr. Adams. Their parents had a shack which the family occupied. Nomatemba's parents died without lodging a claim for the restitution of their tenancy rights which they lost when the family was forcefully moved from Veeplaas to Zwide location. Nomatemba lodged a restitution claim which was subsequently accepted as valid by the RLCC. Like other Veeplaas Claimants, Nomatemba opted for financial compensation. On 4 February 2011, Nomatemba's received payment of R36 000.00 into her banking account from the RLCC.

Grounds of Review:

[18] The Applicants base their application for review on the following grounds:

(a.) the RLCC, in determining the mount of compensation, did not consider the history of dispossession and hardship caused by dispossession.

(b.) the RLCC committed gross irregularity by determining the amount of compensation based on the value of the RDP Housing Subsidy and failed to take into account relevant considerations.

(c.) the RLCC determined the amount of compensation on the basis of unauthorised dictates of Vadec Consultants.

Legal Matrix

[19] The starting point of exercise is the Constitution of the Republic of South Africa[5]. One of the founding principles of our law is the Supremacy of the Constitution[6]. The Constitution is the Supreme law of the Republic. Law or conduct which is inconsistant with the Constitution is invalid and the obligations imposed by the Constitution must be fulfilled. The Constitution guarantees everyone the right to administrative action that is valid, reasonable, and procedurally fair[7]. The Parliament is enjoined to enact

[5] Act 108 of 1996
[6] Section 1 of the Constitution
[7] Section 33(1) of the Constitution

legislation to give effect to the Constitutional right to just administrative action and such legislation must make provision for the review of administrative action by the Courts[8].

[20] Section 217 of the Constitution provides that when the organ of state in the national, provincial or local sphere of government contracts for goods, or services, it must do so in accordance with the system which is fair, equitable, transparent, competitive and cost effective. Pursuant to Constitutional imperatives[9], Parliament enacted the Promotion of Administrative Justice Act[10] *("PAJA")*. PAJA provides that administrative action materially and adversely affecting the rights or legitimate expectations of any person must be procedurally fair[11]. The Court may review an administrative action if the administrator who took that action amongst other things, took irrelevant considerations into account or when he or she did not consider the relevant factors.

[21] In terms of Section 6(2) of PAJA a court may review an administrative action if the action taken was influenced by irrelevant considerations or where relevant considerations were not considered[12]. The administrative action may also be reviewed if such action was taken as a result of unauthorized or unwarranted dictates of another person [13] or body[14].

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[8] Section 33(3)(a) of the Constitution

[9] Section 33(3) of the Constitution

[10] Act No 3 of 2000
[11] See section 3 of PAJA

[12] Section 6 (2) (e) (iii) of PAJA
[13] My own emphasis
[14] Section 6 (2) (e) (iv) of PAJA

[22] In **PG Group Pty(Ltd). v National Energy Regulator of South Africa and Another**[15] Leach JA Said:

> *"it is a fundamental requirement of Administrative law that an administrative decision must be rational. This is entrenched in S 6(2) (f) (ii) of PAJA which provides for an administrative action being reviewable if it is not rationally connected inter alia, to the purpose for which it was taken, the purpose of the empowering provision, or the reasons given for it by the functionary who took it. Administrative action is also reviewable under 6(2) (h) of PAJA if' it is one that a reasonable decision maker could not reach' - See Bato Star Fishing V Minister of Environmental Affairs 2004 14, SA 490 (CC) para 44."*

Discussion

[23] In terms of Section 25(7) of the Constitution, 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 the Act of Parliament, either to restitution of that property or to equitable redress. The Act which governs the restitution of rights lost as a result of dispossession based on racially discriminatory laws or practices is the Restitution of Land Rights Act[16]. ("the Restitution Act"). In terms of the Constitution[17], the amount of compensation, the time and manner of payment must be just and equitable, reflecting the equitable balance between the public interest and the interest of those affected.

[24] Section 25(3) of the Constitution further prescribes the factors and circumstances which must be considered when the amount of compensation is to be determined. The following factors are to be considered when the amount of compensation is determined:

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[15] 2018 (5) SA 150 (SCA) Para 40

[16] Act 22 of 1994

[17] Section 25 (3)

(a) the current use of the property

(b) the history of the acquisition and use of the property

(c) the market value of the property.

(d) the extent of direct state investment and subsidy in the acquisition and beneficial capital Improvement of the property and

(e) the purpose of the expropriation.

[25] Section 33 of the Restitution Act provides:

"33 **Factors to be taken into account by Court** - *In considering its decision in any particular matter the Court shall have regard to the following factors:*

> *(a) The desirability of providing for restitution of rights in land to any person or community dispossessed as a result of past racially discriminatory laws or practices;*
>
> *(b) the desirability of remedying past violations of human rights;*
>
> *(c) the requirements of equity and justice.*
>
> *(cA) ..*
>
> *(d) ..*
>
> *(e)….*
>
> *(eA) the amount of compensation or any other consideration received in respect of dispossession, and the circumstances prevailing at the time of the dispossession.*
>
> *(eB) the history of the dispossession, the hardship caused[18], the current use of the land and the history of the acquisition and use of the land.*

[18] My own emphasis

(eC) in the case of an order for equitable redress in the form of financial compensation, changes over time in the value of money

(f)..... "

[26] The RLCC took a decision to pay all tenants of Veeplaas a blanket amount of R36 000.00. This amount is equal to the RDP housing subsidy. The payment of R36 000.00 was based on the recommendation of the Vadec Consultants *("Vadec")*. I am called upon to decide whether the decision to pay a blanket amount of R36 000.00 to all applicants was a rational and reasonable decision. It does not appear from the papers if any of the parties is challenging the validity of the agreements which were concluded pursuant to the decision to pay R36 000 to all the Applicants. I have noticed that the agreements were only signed by the Applicants and no one signed on behalf of the Commission. The space provided for the signature of the Commission is left blank. However, if the decision which led to the conclusion of those agreements is set aside, the agreements cannot stand.

[27] The Applicants contend that the RLCC's decision was irrational and unreasonable. On the other hand, the Respondents aver that the decision was rational and reasonable since the Applicants were only tenants and not the owners of the dispossessed properties.

[28] An irrational decision is the one which is shockingly bad and defies logic to the extent that no sensible person who had applied his mind correctly to the question to be decided could have arrived at that decision. On the other hand, to test the reasonableness of the decision or conduct, the Court must ask itself whether an ordinary person in the same circumstances would have had the same belief or acted in the same way. Substantive irrational or unreasonable decision or conduct offends the principle of legality, which is an incident of the rule of law. Taking into account

irrelevant considerations in the decision-making process also offends against the principle of legality[19]

[29] It is true that the Applicants were the tenants and not the owners of the property expropriated. The Applicants lost their tenancy rights. It was wrong to apply *"one shoe fits all'* principle when deciding on the amount of compensation to be paid to individual families. The tenants' circumstances were not the same and they were not subject to the authority of the same landlord. Some tenants were renting the land but they built their own shacks. Others occupied the shacks built by the land lord and paid rent for the shacks they occupied. Each land lord had his or her own rules determining access and occupation of his or her land. Some tenants were allowed and they kept livestock. Others were not allowed and they had no livestock on the land. They could not have paid the same amount of rent.

[30] The RLCC took a decision based on irrelevant factors suggested by Vadec. The value of RDP housing subsidy was irrelevant in the circumstances of this case. In fact, the Vadec report was useless since it did not provide an independent recommendation. The report shows that Vadec made a recommendation which was in any event preferred by the Commission, which is the compensation equal to the value of the RDP housing subsidy. Vadec states in its report that during the investigation, they established that the Commission preferred compensation which is equal to the value of the RDP housing subsidy. In other words, Vadec only told the commission what the Commission wanted to hear, nothing more than that. That shows the irrationality of the decision taken by the RLCC. Such a decision ought to be reviewed and set aside.

[31] The RDP housing subsidy is not one of the factors mentioned either in section 25(3) of the Constitution or section 33 of the Restitution Act. However, I agree with the Respondents that the RLCC is not obliged, in the determination of the just and equitable compensation to consider the hardship and loss suffered by the Applicants.

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[19] See Democratic alliance v President of the RSA 2013 (1) SA 248 (cc)

It is the Court which is enjoined to consider those factors in terms of section 33 of the Restitution Act. Whilst factors mentioned in section 25(3) of the Constitution are for every functionary exercising a public power, factors mentioned in section 33 of the Restitution Act are for the consideration by the court only.

Should the period of 180 days be extended?

[32] Section 7(1) of PAJA requires a judicial review to be brought 'without unreasonable delay' and not later that 180 days after the person concerned became aware of the administrative action. Section 9(1) of PAJA makes provision for the extension of 180 days' period either by agreement between the parties or by Court on application by person or administrator concerned. The Court may grant the application where the interests of justice so require. There is no doubt that the review proceedings were brought outside the period stipulated in section 7(1) of PAJA. The Applicants have asked for the extension of the period in terms of section 9(2) of PAJA. The granting of the application for extension of the period depends on the Court being satisfied with a reasonable explanation given for the delay. According to the Applicants, the delay was caused by lack of funds as they are indigent. Secondly, the Applicants entertained hope that the RLCC was still going to pay them a just and equitable compensation. Even today, there are Applicants who have not been paid the full sum of even that R36 000. They were paid half the amount, nothing more. The Applicants were therefore justified in waiting for payment of the full amount which was promised to them.

[33] The Applicants waited for the full payment until it was clear that no further payment was forthcoming. It is only then, that they sought funding in terms of section 29(4) of the Restitution Act. The Applicants have a good prospect of success on the merits. I therefore find that it is in the interest of justice to extend the period of 180 days to the time of institution of these review proceedings. The amended Notice of Motion is dated 10 May 2022

Remedy

[34] What remains is the appropriate and effective relief under the circumstances. The starting point of exercise is section 8(1) of PAJA which provides:

"I The Court or tribunal, in proceedings for judicial review in terms of section 6(1) may grant any order that is just and equitable, including orders___

(a) directing the administrator___

(i) to give reasons; or

(ii) to act in the manner the court or tribunal requires;

(b) ……..

(c) Setting aside the administrative action and-

(i) remitting the matter for reconsideration by the administrator with or without directions; or

(ii) in exceptional cases ----

(aa) ……..

(bb) ……..

(d) ……

(e)…….

(f) as to costs"

[35] Applicants want the hardship and loss they suffered, as well as solatium to be taken into account in the determination of just and equitable compensation. Those are the factors which can be considered by the Court, not the RLCC. Section 33 factors are for the determination by the Court. Therefore, the appropriate remedy will be for the RLCC to refer the matter to Court in terms of Section 14(3A) and (4) of the Restitution Act.

Costs

[36] The general practice in this court is not to award costs unless there are exceptional circumstances which warrant a costs award. In cases of successful litigation against the State, the position has changed, in that the successful private litigant will be awarded costs. In **Biowatch Trust v Registrar, Genetic Resources**[20] Sachs J said:

> *"Similarly, particularly powerful reasons must exist for a Court not to award costs against the State in favour of a private litigant who achieves substantial success in proceedings brought against it."*

This is one of those cases where private litigants were involved in constitutional litigation against an organ of State and were substantially successful. Counsel has asked for an award of punitive costs. The Respondents conducted litigation in somewhat reckless and shabby manner in the filing of the answering and supplementary answering affidavits, I am satisfied that a punitive cost order is justified in the circumstances of this case. Counsel asked for costs on scale B for the Junior Counsel and scale C for the Senior Counsel: Unfortunately the amended Rule 67(A) (3) (a) applies to party and party costs only. It does not apply to punitive costs.

Order

In the result, I make the following order:

1. The point *in limine* raised by the Respondents herein is dismissed.
2. The period of 180 days mentioned in Section 7(1) of PAJA is, in terms of Section 9(1) (b) extended to 10 May 2022
3. The decision to pay compensation of R36000,00 in respect of each of the Applicants is both Case LCC 205/2021and LCC 19/2022 is reviewed, set aside and declared invalid.
4. The Settlement agreements entered into by all five Applicants in case LCC205/2021 and LCC19/2022 are reviewed, set aside and declared invalid.

[20] 2009 (6) SA 232 at 247 Para 24

5. The Fourth Respondent is ordered to refer this case to the Land Court in terms of Section 14(3A) and (4) of the Restitution of Land Rights Act 22 of 1994.

6. The Respondents are jointly and severally one paying, the other to be absolved ordered to pay the Applicants' costs on Attorney and Client Scale. Such costs to include costs of two Counsel.

NCUBE J

JUDGE OF THE LAND COURT

OF SOUTH AFRICA

Legal Representation:

For the Applicants: 1. Adv HS Havenga SC

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Heard: 29 August 2024

Delivered on: 21 January 2025