

SOUTH AFRICA / JUDGMENT

Nephawe and Another v Regional Land Claims Commissioner, Limpopo and Others (LCC 93/2010) [2013] ZALCC 8 (17 May 2013)

[2013] ZALCC 8**COURT**

Land Claims Court

BEFORE

Sidlova, Mpshe

CASE / FILE NUMBER

LCC 93/2010

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Source record**IN THE LAND****CLAIMS COURT OF SOUTH AFRICA****HELD IN RANDBURG****CASE****NUMBER:**

LCC:

93/2010

BEFORE: SIDLOVA

AJ

MPSHE AJ

Decided on: 17 May

2013

In the case of:

AZWIDOWI

TSHIDZIWELELE NEPHAWE

.....First

Applicant

THE NEPHAWE ROYAL

COUNCIL

.....Second

Applicant

and

REGIONAL LAND

CLAIMS COMMISSIONER, LIMPOPO

.....First Respondent

REGIONAL LAND

CLAIMS COMMISSION, LIMPOPO

.....Second Respondent

CHIEF LAND CLAIMS

COMMISSIONER
.....Third
Respondent
THE COMMISSION ON
RESTITUTION OF LAND RIGHTSFourth
Respondent

JUDGMENT

SIDLOVA AJ:

Introduction

- [1] The applicants lodged an application seeking to review the decision by the fourth respondent to dismiss the land claim of the Vhangona Nation as per the letter dated on 26 August 1998. Secondly, applicants are seeking an order to compel the first respondent to process, investigate and finalise the Vhangona Nation and the Nephawe Tribe land claims. Thirdly, that the respondents be ordered to gazette the two land claims mentioned above within 90 days of the granting of this order. And finally the applicants are also seeking a cost order.
- [2] The facts in brief are as follows. The applicants lodged two land claims in March and July 1995 on behalf of the Vhangona Nation and the Nephawe tribe respectively. The claims were lodged in the prescribed form. The claims were received by the first respondent. In August 1998 the first respondent caused correspondence to be sent indicating that they had rejected the Vhangona Nation land claim on the grounds that the claim is based on “jurisdiction historically enjoyed by the rulers of the Vhangona Nation and not on the loss of rights in land as defined in section 1 of Act 22 of 1994”. The subject of this review application is the rejection of the claim on that basis and the failure to indicate the status of the Nephawe Tribe claim give that a decision regarding that claim has yet to be discussed 17 years after the claim was lodged.

Parties

- [3] The first applicant is Azidowi Tshidivele Nephawe acting in his capacity as traditional leader of the Nephawe Community and Vhangona Nations who have both lodged land claims. The second applicant is the Nephawe Royal Council. The first respondent is the Regional land Claims Commissioner, Limpopo, the second respondent is the Regional Land Claims Commission Limpopo, the third respondent is the Chief Land Claims Commission and the fourth respondent is the commission on Restitution of Land Rights.

Background facts

- [4] The first applicant gives a background of the lodgement of the land claims on behalf of the Vhangona Nation and the Nephawe tribe which were both acknowledged and seemingly consolidated as they were acknowledged on the same form. After the lodgement it is alleged that there was no communication from the first respondent. In 2005 after a lengthy delay the applicants took a decision to engage the services of an attorney. Following this the letter dated 28 August 1998 purporting to dismiss the land claim of the Vhangona Nation was made available to the applicants. The applicants deny ever receiving such letter and questioned why it was only made available some 7 years after it was dated.
- [5] Meetings were held between the applicants and first respondent and in such meetings the applicants expressed their dissatisfaction. The applicants allege that the minutes of the meeting did not fully record all that was discussed. After a number of meetings were held whereby no resolutions seemed forthcoming the applicants then decided to bring this application. It is alleged that the decision to dismiss the land claim amounts to unfair administrative action which is reviewable in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).
- [6] The first respondent raised two points in limine the first is that the applicants' claim falls outside the Restitution of Land Rights Act 22 of 1994 read with Rule 3 of the Rules Regarding the Procedure of the Commission on Restitution of Land Rights of 1995 (hereinafter Rule 3)1anc" HREF="#sdfootnote1sym">1. The second point is with regard to the non-joinder of other interested communities and various land owners who objected to the claim.
- [7] The respondent denies that the Vhangona Nation and the Nephawe community were dispossessed of rights to land after 19 June 1913 as a result of part racially discriminatory laws and/or practices. It is alleged that a copy of the letter of 26 August 1998 was indeed given to the applicants in 1998, and a response from the first applicant dated 6 September 1998 is attached as proof of that. It is alleged by failing to indicate in the founding papers that the letter had been received the applicants were misleading the Court. It is alleged that the applicant has done nothing for a period of almost seven years that lapsed between the response in September 1998 up until the actions taken in May 2005.
- [8] The first respondent alleges that they have not taken any decision with regard to the Vhangona land claim and indicate that they have merely followed the procedure as set out by Rule 3 of the Rule. It is alleged that PAJA is not applicable to the present case. The first respondent also alleges that the land claim of the Vhangona Nation has no distinguishable features of an arguable case

- [9] In reply the applicants alleged that two land claims were lodged on behalf of the Nephawe Tribe and the Vhangona Nation, and the basis of such claim was the loss of land rights as a result of past racial laws or practices after 19 June 1913. It is alleged that a right in land refers to any right in land whether registered or unregistered and may include a customary law interest. It is alleged that the two land claims pertain to rights of use and occupation enjoyed by communities prior to their dispossession in 1919.
- [10] The applicants admit having received the letter of August 1998, but allege that due to the passage of time the deponent had forgotten receiving it or replying to it as he did not have a copy. The applicants deny that they did nothing for a period of 7 years following the receipt of the letter of 1998. It is contended that the applicant sought to obtain assistance from various bodies having sent letters to the President of the Republic of South Africa, the Minister of Agriculture and the Minister of Land Affairs.

Issues Raised

- [11] Issues that are common cause

The first applicant lodged two land claims on behalf of the Vhangona Nation and the Nephawe Tribe

An acknowledgement letter indicated that both land claims had been received.

The land claim by the Vhangona Nation was dismissed in August 1998 by virtue of the provisions of Rule 3 of the Commission's Rules.

- [12] Issues that are in dispute

12.1. Whether or not the first respondent took a decision in dismissing the applicant's land claim?

Whether or not the provisions of PAJA apply to the first respondent's decision?

Whether or not the decision is in accordance with Rule 3 of the Land Claims Commissions Rules and Procedure?

Vhangona Nation Land Claim

Did the first Respondent take a decision?

- [13] "The word decision implies the exercise of judicial determination as the final and definite result of examining a question." Quoted with approval from *Words and Phrases Legally Defined* in *Herbert Porter & Co Ltd v Johannesburg Stock Exchange* 1974 4 SA 781 (W) 794. Decision is a judgment or ruling upon some matter at issue. The Supreme Court of Appeal in *Mobile Telephone Networks (Pty) Ltd v SMI Trading CC* [2013] 1 All SA 60 (SCA) held that:

*"The kind of action that will constitute a "decision" is a matter of construction in the context of the case"*²

[14] Rule 3 of provides at the time³ when the first respondent dismissed the Vhangona Nation Land Claim provided as follows:

“The Regional Land Claims Commissioner shall –

decide whether the claim which has been lodged substantially complies with the requirements contained in the prescribed claim form;

consider whether the claimant was dispossessed of a right in land as defined in s 1(xi) of the Act;

consider whether the dispossession was effected under or for the purpose of furthering the objects of a law as contemplated in s 121(2)(b) of the Constitution; consider whether the dispossession occurred on or after 19 June 1913;

in the event that rights in land were expropriated under the Expropriation Act . . . , consider whether just and equitable compensation was paid as contemplated in s 121(4)(a) and 123(4) of the Constitution; consider whether the claim was lodged within three years of 1 May 1995; consider whether the claim is frivolous or vexatious; and consider whether any order has been made by the Land Claims Court in respect of rights relating to the land in question.

Notice that the claim has been accepted for investigation.”

The first respondent alleges in its papers that a decision was not taken to dismiss the Vhangona Nation Land Claim but that Rule 3 was merely applied. This argument is considered in the context of the case, the first respondent is the statutory body created by the Restitution Act, to redress the injustices of the past as part of a greater scheme of land reform. Part of the duties of the first respondent include accepting land claims, validating them, investigating them and finally settling them or referring them to this Court.

[15] The first respondent is empowered by the Restitution Act to exercise certain duties, the first respondent had or at the very least could have obtained the relevant information to make a decision, the first respondent had to have evaluated the land claim against the requirements of Rule 3 in order to dismiss it and the first respondent reached a conclusion by dismissing the claim based on the exercise of a statutory power. Therefore the argument that the first respondent could have dismissed the Vhangona Nation land claim without taking a decision is ludicrous. This should also be noted in view of *Farjas (Pty) Ltd and Another v The Regional land Claims Commissioner, KwaZulu Natal* 1998 (2) SA 900 (LCC) whereby Rule 3 was relied upon to dismiss the claimants land claim and the Court found that a decision was taken and such decision was reviewable. Thus, the first respondents argument that a decision was not taken is rejected.

Do the Provisions of PAJA apply?

[16] The immediate difficulty facing the applicants in this regard is that PAJA came into operation on 30 November 2000; almost two years after the decision which the applicants now wish this Court to review was taken. In *Bullock NO & Others v Provincial Government, North West Province & Another* 2004 (5) SA 262 (SCA) at 267B-D para [7], the Supreme Court

of Appeal appears to have held that PAJA did not operate retrospectively - see further: Premier, Western Cape v Faircape Property Developers (Pty) Ltd 2003 (6) SA 13 (SCA) at 29 and Ntame & Others v Member of the Executive Council, Department of Social Development, Eastern Cape (unreported judgment of Plasket J in this court in cases numbered 3667/04, 3634/04 and 3635/04, delivered on 11 January 2005). In view of the above it is found that the provisions of PAJA do not apply to the decision of the first respondent.

Was the decision compliant with rule 3?

[17] PAJA is not the only source which empowers a Court to judicially review administrative action at common law the practice of judicial review was present. It is trite that common law grounds for judicial review are still applicable and were not replaced by PAJA. This Court would still be able to determine if the decision was complaint with Rule 3, however, a problem exists. While the applicant relies on PAJA, he did not properly bring before this Court a review application, there was no mention of section 36, which is the empowering provision with regard to reviews in the Restitution Act, and the form required for review proceedings was not used. This is not brought up as a technicality as it is of utmost importance, the proper form indicates that the respondent is required to avail the record of the proceedings, the applicant did not use this and thus the record of the proceedings is not before the Court. This Court would be unable to determine if the decision was compliant because it does not have the necessary record that would indicate the process that took place in coming to the decision.

Nephawe Community Land Claim

[18] The position with regard to the Nephawe community land claim differs greatly from that of the Vhangona Nation. While the first respondent has alleged in its papers that the Nephawe community land claim was also dismissed, there is no evidence of such dismissal. The letter dispatched in August 1998 only mentions the Vhangona Nation claim, repeatedly the respondent has alluded to dismissing this claim but has yet to give any documentation indicating that or any reasons for such a decision. The applicants' queries regarding this claim have not been responded to properly and at this stage the only inference the Court can draw is that the Nephawe Community claim was validly lodged and has yet to be published, the first respondent has had 14 years to decide whether or not this claim is valid and has failed to do so.

Order

In view of the above it is ordered as followed:

the application in as far as it relates to the Vhangona Nation is dismissed;

The first respondent is ordered to take steps in accordance with section 11

(1) of the Restitution Act with regard to the Nephawe community claim within 30 days of the date of this order; and

There is no order as to costs

1GN 703 published in GG 16407 of 12 May 1995

2 [2013] 1 All SA 60 (SCA) at para 21

3Rule 3 of The Rules Regarding the Procedure of the Commission was substituted in 2001 by GN R 706 of 2001

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