

SOUTH AFRICA / JUDGMENT

Pegma 27 Investment (Pty) Ltd and Another v Regional Land Claims Commissioner, Kwazulu-Natal and Others (LCC 07/2009) [2010] ZALCC 27 (13 September 2010)

[2010] ZALCC 27

COURT

Land Claims Court

BEFORE

T.M Ncube

CASE / FILE NUMBER

LCC 07/2009

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IN THE LAND CLAIMS

COURT OF SOUTH AFRICA

HELD AT DURBAN

CASE NO: LCC 07/2009

In the matter between:

PEGMA 27 INVESTMENT

(PTY) LTD

.....First

Applicant

PEGMA 40 TRADING (PTY)

LTDSecond

Applicant

and

REGIONAL

LAND CLAIMS COMMISSIONER

.....1st

Respondent

KWAZULU-NATAL

LAND CLAIMS COMMISSION

.....2nd

Respondent

THE CROC WORLD

COMMUNITY

.....3RD

Respondent

JUDGMENT

NCUBE A J:

- [1] This is an opposed application for a judicial review of a decision of the Regional Land Claims Commissioner (“the RLCC”) for the Province of KwaZulu-Natal who is the first respondent in these proceedings. She decided to accept and publish various claims lodged by members of the third respondent in terms of the Restitution of Land Rights Act¹ (“the Act”) for the restitution of rights in land which they claimed to have lost. The application is made in terms of section 36 of the Act. That section gives this court the exclusive jurisdiction to review the decisions of officials under the Act.
- [2] There are four Claimants who separately lodged restitution claims with the RLCC. All four claims were lodged before the cut off date of 31 December 1998. The claims were accepted, investigated and subsequently published by the RLCC in the Government Gazette². The said Government Gazette, reflected the claim as that of the Crock- World Community duly represented by one Mnengwa Edward Majola. Mnengwa Edward Majola was one of the four claimants. His claim was lodged with the RLCC on 26 November 1998.
- [3] Included in the Government gazette, were two properties owned by the two Applicants³. As on the date of the publication of the Government Gazette, the said properties were still under the ownership of a certain company by the name of Banana Station.
- [4] The Government Gazette invited any party or parties having an interest in the properties mentioned thereon, to submit, within sixty (60) days from the date of such publication, representations or information which would assist the RLCC in proving or disproving the claims.
- [5] On 27 March 2006, the Applicants’ Attorneys addressed a letter⁴ to the RLCC. Attached to the letter, were representations with regard to the two applicants’ properties affected by the claim of the third respondent. In their representations, the applicants contended that the claims, in respect of the two properties mentioned, had no factual foundation and they fell outside the parameters of the Act. The RLCC was called upon to withdraw the publication in terms of the relevant provisions⁵ of the Act.
- [6] In a letter, reference number KRN 6/2/2/E/47/0/0/27, dated 03 August 2007 the RLCC rejected the applicants’ representations and she refused to withdraw or amend the publication with regard to the applicants’ properties⁶.
- [7] The applicants’ Notice of Motion is divided into two parts. Part one is an application for an interim relief. Part two is a review application. In part one, the applicants sought leave to submit their development proposals in respect of portion 2 and remainder of portion 3 of the Farm Clansthal to the Development Facilitation Tribunal whilst still waiting for the outcome of the review proceedings.

- [8] The Applicants had purchased the properties in question, in order to develop them into residential areas⁷. The interim relief was granted. The consent order to that effect was made by my brother Bam JP on 05 October 2009. Although the 3rd respondent was aware of the application being made⁸, it deliberately decided not to participate in the proceedings at that stage. The 3rd respondent was also served with the interim order on 12/10/2009 but it decided not to challenge it.
- [9] The Applicants' papers are badly drafted. Some paragraphs do not make sense. Others are contradictory. The grounds on which the applicants' seek the review of the first respondent's decision are not immediately ascertainable from the papers.
- [10] With regard to review, the Notice of Motion reads as follows:

"- - - - - the above applicants intend making application to the honorable court for an order in the following terms:

that the decision of the First and Second respondents to accept the claims of the Claimants in terms of the Restitution of Land Rights Act against the properties described as Remainders of Portion 2 of the Farm Clansthal No 1202 and Remainder of Portion 3 of the Farm Clansthal No 1202 as published in the Government Gazette of 27 January 2006 be and is hereby reviewed and set aside.

That the said claims, namely Number 14 and 15 of the schedule to Notice No 96 of 2006, Government Gazette of 27 January 2006 published in terms of the Restitution of Land Rights Act be rejected and be de-gazetted.

----- “

- [11] Paragraph (b) above, does not make sense. I cannot make an order that a claim which has been accepted and published should be rejected. There is yet another contradiction. Paragraph 13.2.6 of the Founding Affidavit states:-

“As the claim was not lodged by certain individuals but by a group that there was no claim⁹”.

Paragraph 13.2.8 of the Founding Affidavit states:-

“ the commissioner was not entitled to automatically substitute an individual claim for a community claim as that would constitute a submission of a new claim after 31 December 1998”¹⁰.

These two paragraphs are irreconcilable. The first paragraph states that the claim was not lodged by individuals but it was lodged by a group. Yet the second paragraph says that the claim was an individual claim. This does not make sense at all.

[12] The first, second and third respondents have argued that the Applicants' review application should have been brought before court within the time period allowed by the Promotion of Administrative Justice Act¹¹. This argument was not raised in the Respondents' answering affidavits. It was raised for the first time in Court. The applicants

had no opportunity to respond to it. Therefore, this is not an issue which should detain me any further.

[13] The applicants state in their founding affidavit that there was no link between the information placed before the RLCC and the subsequent decision taken by her to accept and publish a claim in respect of the two properties owned by the applicants. The same argument was pursued by the applicants' Counsel in Court.

[14] In my view, the applicants rely on lack of reasonableness or rationality on the part of the RLCC. The applicants in my view and that was confirmed by the Applicants' Counsel in Court, contend that the decision of the RLCC to accept and publish a claim of the third respondent with regard to the two properties in question was irrational.

[15] The RLCC, when she accepted and subsequently published the third respondent's claims, was performing a statutory duty. Section 11 of the Act prescribes the procedure which the Commission must follow after the claim has been lodged.

[16] Section 11(1) reads:-

"Procedure after lodgment of claim

if the regional land claims commissioner having jurisdiction is satisfied that -

the claim has been lodged in the prescribed manner;

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

the claim is not frivolous or vexatious,

he or she shall cause notice of the claim to be published in the Gazette and shall take steps to make it known in the district in which the land in question is situated."

It is apparent from the above statement that the RLCC must be satisfied as to all the requirements of paragraph (a) to (c). Clearly, once the RLCC is satisfied as to the existence of factors mentioned in paragraphs (a) – (c) of section 11(1), she has no discretion but "shall cause notice of the claim to be published in the Gazette and shall take steps to make it known in the district in which the land in question is situated".

[17] The meaning of "satisfied" was examined in *Farjas (PTY) LTD v Regional Land Claims Commissioner, KZN*¹². In that case, Dodson J (as he then was) expressed himself in the following terms: -

“ it is sufficient if the applicants (claimants) can show in relation to both the factual, and the legal issues that they have an arguable case , even if the arguments are relatively weak”.

The word “satisfied” need not always signify proof. In *Breitenbach v Fiat SA (Edms) Bpk13*, Colman J, with reference to an application for a summary judgment, stated:-

“ It must be accepted that the subrule was not intended to demand the impossible. It cannot, therefore, be given its literal meaning when it requires the defendant to satisfy the court of the bona fides of his defence. It will suffice, it seems to me, if the defendant swears to a defence, valid in law, in a manner which is not inherently and seriously unconvincing”.

[18] In *Farjas case14*, Dodson J stated as follows:-

“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”.

The same approach was adopted in *Mahlangu N.O. v Minister of Land Affairs and Others15*.

[19] The satisfaction of the RLCC is a condition precedent to the discharge of her duties in terms of the Act. The RLCC submits in the answering affidavit that she was satisfied that the claim was lodged in a prescribed manner, it was not precluded by the provisions of section 2 of the Restitution of Land Rights Act and it was not frivolous or vexatious¹⁶. The applicants on the other hand contend that the claim of the third respondent was an invalid and there was no link between the

information placed before the RLCC and the subsequent decision to gazette that claim.

[20] Lord Wilberforce, in *Secretary of State for Education and Science v Timeside Metropolitan Borough Council17*, commenting on irrationality as a ground of judicial review expressed himself in the following terms:-

“If a judgment requires, before it can be made, the existence of some facts, then, although the evaluation of those facts is for the Secretary of state alone, (RLCC in this case) the court must enquire whether those facts exist, and have been taken into account, whether the judgment has been made upon a proper self direction as to those facts, whether the judgment has not been made upon other facts which ought not to have been taken into account. If these requirements are not met, then the exercise of judgment, however bona fide it may be, becomes capable of challenge.”

[21] The above statement confirms the principle that the decision taken must be rationally justifiable in term of information place before the administrative functionary whose decision is sought to be reviewed. See in this regard *Trinity Broadcasting (Ciskei) v Independent Commission Authority of South Africa18*.

[22] I must now enquire what were the facts upon which the RLCC expressed herself to be satisfied that the criterion set by section 11(1) had been met. The facts on which she was satisfied must be gleaned from the record of decision which she submitted for the purposes of these proceedings. The information upon which the RLCC acted consisted of various documents including:-

claim forms submitted by four claimants

a case report containing various annexure as documentary evidence

minutes of meetings which were held with members of the third respondent.

[23] The first claim was lodged by one Mnengwa Edward Majola on 26 November 1998. This claim, according to paragraph 3 of the prescribed

claim form was lodged on behalf of a group of claimants¹⁹. The claim form clearly shows that Mr. Majola was lodging the claim in his representative capacity. Paragraph 1.1 of the claim form requires a description of the property being claimed. Mr. Majola described the property as being:-

“Elambihi (lighthouse) – mhlongo hlongo farm – (crockworld) – scottburg)”

[24] Paragraph 9 of the claim form requires the claimant to state any other information he wants to bring to the attention of the Commission. In this regard Mr. Majola states:-

“THE COMMUNITY WAS UNDER TRIBAL AUTHORITY OF ZEMBENI + CELE, INDUNA WAS MOYENI MGOBHOZI OF THE CELE TRIBAL VUNDLA TSHATSHATSHA WAS HEADMAN IN THE FARM”

[25] The second claim was lodged by Cicil Vundla on 17 November 1998, in his capacity as a co-ordinator. Paragraph 3 of the claim form shows that this particular claim was lodged on behalf of the “AMAVUNDLA COMMUNITY”. The property claimed is described as “LIGHT HOUSE” (Crock-World) in Scottburgh, South Coast “. Paragraph 6 of the claim form requires a reason for the claim and Mr. Vundla gave the following reason:-

“WE LOST A VALUABLE PROPERTY WHICH WE NOW INTEND TO CLAIM BACK AND DEVELOP FOR THE BENEFIT OF OUR GROWING FAMILIES”

[26] The third claim was lodged by Bhekani Stanley Majola on 31 December 1998. He described the claimed property as “Crock-world” Scottburg – RSA – KZN. The fourth and last claim was lodged by Ninini Livingston Mlaba, on 17 December 1998. He described the property as “Umkomaas- Fenainglen Farm – Renishaw – John Croocks”.

[27] According to the RLCC record, all claims were lodged, not later than the 31st of December 1998. The claims therefore satisfied the requirements of section 2(1) (e) of the Act. After the lodgment of the claims, the officials of the RLCC conducted investigations and concluded that this was in fact a community claim. On 18 January 2003 the official from the First Respondent’s office, convened a meeting with claimants’ representatives. At that meeting, a

resolution was taken to consolidate the claims into one community claim as all the claims pertained to one farm, albeit known by different names i.e. “Elambini”, “Mhlongohlongo”, “Crock-World” etc²⁰. The consolidated claim was then given the Name “Crockworld Community Claim”.

[28] The claimants knew the farm Clansthal 1201 by its Zulu name, “Elambini”, “Mhlongohlongo” etc. The properties of the two applicants form part of the bigger farm known as Clansthal 1201. The argument of the applicants that there is no mention of Portion 2 and Remainder of Portion 3 of Farm Clansthal 1201 in any of the claim forms does not hold water. The claimants knew the farm by its Zulu name and they could not have been expected to know that the farm was subsequently subdivided into different portions which were accordingly numbered .

[29] On 14 September 2005, Gugu Gumede, the project officer from the office of the RLCC compiled a case report. The description of the properties claimed is given in that report. The history of dispossessions is also given. The Tribal Communities affected by dispossessions are also identified. The racially discriminatory laws which were used to forcefully remove the Communities are also mentioned in the case report²¹. The same report also contains copies of various letters written by the Magistrate for the district of Umzinto to the Chief Native

Commissioner, Pietermaritzburg, concerning “Natives” who were resident on the farm Clansthal 1201²².

[30] In my view, on the information before her, the RLCC was justified, in accepting and subsequently publishing the claim of the third respondent. There is no evidence of unreasonableness or irrationality in her decision. “Irrationality” is conventionally

defined as “the quality of being devoid of reason”.²³ “Unreasonableness” is conventionally defined as “irrationality”.²⁴ In my view, the claimants, on the information before the RLCC, had established, to say the least, an arguable case.

[31] The third Respondent asked for an order of costs to be made against the applicants. The practice in this Court is not to award costs unless, there are exceptional circumstances justifying a departure from the said practice. In this case, no such circumstances have been shown to exist.

[32] In the result, I make the following order:-

The application is dismissed.

There is no order as to costs.

T.M Ncube

Acting Judge of Land Claims Court

Heard on: 02 September 2010

Decided: 13 September 2010

For Applicants: Adv RP Nirghin

Instructed by: Livingston Leandy Inc

Durban

For 1st and 2nd Respondents: Adv P Naidu

Instructed by State Attorney

For 3rd Respondent: Adv G.D Goddard

Instructed by: Mndaba Attorneys

1Act 22 of 1994

2Government Gazette No 28413 dated 27 January 2006.

3Portion 2 of the farm Clansthal No 1202 and Remainder of Portion 3 of the farm Clansthal No 102

4See page 51 of the indexed record.

5Section 11A

6See page 84 of the indexed record.

7See paragraph 14 of the Founding Affidavit.

8See Sheriff's Return of Service, page 107 of the indexed record.

9My own emphasis

10My own emphasis

11Act 3 of 2000.

12 1998

(2) SA 900

13 1976

(2) SA 226 (T) at 228 A-B

14Supra, n 12

15 2005

(1) SA 451 (SCA)

16See paragraph 18.1 of the First Respondent's answering affidavit.

17 1977 A C 1014

18 2004

(3) SA 346 SCA 19 See page 159 of indexed papers

18 2004

(3) SA 346 SCA

19 See page 159 of indexed papers

19

20See page 201 of the indexed papers.

21See page 203-210 of the indexed papers.

22See pages 230 to 260 of the indexed papers.

23Oxford English Dictionary, 2nd ed, Vol VIII at 89.

24Oxford English Dictionary, 2nd ed, Vol XIX at 160.

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