

SOUTH AFRICA / JUDGMENT

Van der Merwe v The Commission on Restitution of Land Rights and Others (LCC183/2016) [2018] ZALCC 27 (12 December 2018)

[2018] ZALCC 27

COURT

Land Claims Court

BEFORE

Meer

CASE / FILE NUMBER

LCC183/2016

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IN

THE LAND CLAIMS COURT OF SOUTH AFRICA

HELD

AT RANDBURG

CASE

NUMBER: LCC183/2016

Before:

Meer AJP

Heard:

26 November 2018

Delivered:

12 December 2018

In

the matter between:

JACOBUS

WILLEM VAN DER MERWE

Applicant

and

THE

COMMISSION ON RESTITUTION OF

LAND

RIGHTS

First

Respondent

THE

CHIEF LAND CLAIMS COMMISSIONER

Second

Respondent

REGIONAL LAND CLAIMS
COMMISSIONER:

THE
WESTERN
CAPE
PROVINCE
Third
Respondent
THE
MINISTER OF RURAL DEVELOPMENT AND
LAND
REFORM
Fourth
Respondent
THE
MINISTER OF PUBLIC WORKS
Fifth
Respondent

JUDGMENT

delivered 12 DECEMBER 2018

MEER AJP

- [1] The Applicant applies for the review and setting aside of a decision by the Third Respondent, the Regional Land Claims Commissioner, Western Cape that his land claim was non-compliant with the provisions of Section 2 of the Restitution of Land Rights Act No 22 of 1994 (“the Act”). The decision dated 30 June 2016, contends that the Applicant’s claim lodged in respect of the property described as “Driebosch” No. 17 in Piketberg, Western Cape, (“the property”) was not compliant as there was no evidence that the property was dispossessed as a result of a racially discriminatory law or practice. The purpose of the dispossession, contends the Third Respondent was to set aside a wilderness area “for the preservation of Waterfall Forests Reserve” of the waterfall forests reserve on the property previously owned by the Applicant.
- [2] The First to Fourth Respondents oppose the application whilst the Fifth Respondent abides the decision of the court.

Background

Facts

- [3] The Applicant’s restitution claim relates to property which was owned by his late father, Gerhardus Du Plessis Van der Merwe. The property is more fully described as the remainder of farm Driebosch 17 in Piketberg, measuring 964, 4529 hectare, situated in the Berg River Local Municipality, West Coast District Municipality, Western Cape.

- [4] The land was situated in an area that was declared a white group area in terms of the Group Areas Act 77 of 1957. The Applicant and his father are of the white group. The claim was lodged on 12 August 1996 by Maria Johanna Olivier.

The Research Report of the Commission on Restitution of Land Rights

- [5] The decision of the Third Respondent that the applicant's claim was non compliant, was informed by an investigative research report compiled by Portia Mazwai in February 2016 some 19 years and 6 months after the lodgement of the claim. It is not apparent from the papers why there was this inordinate delay in researching the claim.
- [6] Paragraph 6 of the Report under a heading "Particulars of Legislation or Practice used to dispossess the claimants",

states:

"6.1 The property was endorsed in terms of Section 16 of Act No 47 of 1937 and was transferred to the Republic of South Africa. (Annexure A3: Erf Register). The Claimants who were members of a white group bought the farm in 1962 in an area that was declared a white group area in terms of the Group Areas Act No 77 of 1957. (Annexure A5: Group Areas Act Affidavit). However, there is no proof of the implementation of a racial law or practice regarding the dispossession. The family was also moved to another white area."

Paragraphs 8 of the Report under a heading

"Date and circumstances of the dispossession", states as follows:

"8.1 The Claimants were removed in 1970. The purpose of the dispossession was to set-aside a wilderness area for the preservation of WATERFALL FORESTS RESERVE (Annexure A6: an instruction to take possession of the farm by the Department of Forestry and Description of Reserve)."

- [7] The parties agreed that the official documents which were referred to in support of the statement at paragraph 8.1 formed part of the record as Annexures "LM2" "LM3" and "LM4". The first of these is an undated letter on the letterhead of the Department of Forestry, from the District Forest Officer Kluitjieskraal to the Forester, Waterval. It states in relevant part as follows:

PLS TYPE PARAS 2,3 AND 4 OF LM2

"2. Please immediately take possession of the property- Remainder of Driebosch

17. The beacons should be found and painted for this purpose I have inserted data of the corner beacons on the diagram. Please note that as a result/of many, subdivisions of the adjoining farms there are at least two line beacons between the beacons marked H and K and one line beacon between G and H.
3. Two forms C.F.43 are enclosed. Please complete as far as possible and return one to me. A note on the occurrence of Bush Tea, and/or Buchu on the property is also required.

The property constitutes Component No.21 of Waterval Forest Reserve. The acquisition of 964.4529 Ha must be reflected in the Annual Report for 1970/71.”

In response to ‘LM2’ it would appear , Annexure ‘LM3’ is a Minute stamped Department of Forestry which states at paragraph 2, “Possession of the Remainder of Driebosch -17 was undertaken on the 21st 1.71 and am attaching For 43 in this connection”

Annexure “LM4” has a marking C.F.43, and the Applicant contends this document is the form which annexure “LM2” instructed the Forester, Waterval to complete. The second page of ‘LM4’ records:

“VII – Doel van Reservering

Objects of Reservation

Protection of water catchment area”

[8] Mr Botha for the Applicant submitted that that these documents do not support the statement at paragraph 8.1 of the Investigation report that the purpose of the dispossession was to set aside a wilderness area for the preservation of the Reserve. Instead, they supported the Applicant’s version as alluded to below, (as relayed to them by a Mr Van Rhyn who worked for the Department of Forestry and Water Affairs), that the property was acquired for the building of a dam. The Applicant states in his replying affidavit that it appears from the documents that the land was taken in order to incorporate same in a nature reserve for the purpose of serving as a water catchment area which is nothing else than a dam or an area to catch water in order to fill a dam. Ms Mokhoaetsi for the First to Fourth Respondents very properly conceded that the statement at paragraph 8.1 of the Investigation Report was not borne out by the documents which informed that statement. The Respondents, she submitted never alleged that the possibility of a dam would be excluded.

[9] Annexures LM 2,3 and 4 inform us that the Forester Waterval was instructed to take possession of the property which was part of the Waterval Forest Reserve and that possession was taken on 21 January 1971. Furthermore in its Description of the Reserve, the Department of Forestry records “protection of water catchment area” under a heading “Objects of Reservation”. What is abundantly clear is that there is no references whatsoever in these official documents to possession of the property being taken by the Department of Forestry as a consequence of a racial law or racial practice.

[10] Paragraph 8.2 of the Investigative Research Report states as follows:

“According to the information submitted the area in which Claimants were dispossessed from was inhabited by whites and coloured farmers.

They all stayed together as one farming community sharing everything e.g. their children were playmates, schooling together and even marrying each other. However, at the time of dispossession both groups were removed from the area as the Government informed the families that the area was preserved for a wilderness area. (Annexure A7: Affidavit from the Claimant and one of the neighbouring farmers.)

It should be noted that there is no proof of racial law or practice in the dispossession.”

[11] The affidavit of the Applicant referred to in paragraph 8.2 of the report forms part of the record of documents which was in the Third Respondent’s possession, and is dated 7 July 2015. In it he states that his family farmed next to the Engelbrechts and Van Huffels “(previously disadvantaged)” as one farming community. They were all given one month’s notice to move. He goes on to say, “We believe the Government wanted to disrupt the racial harmony that existed. On the other side of the valley where only white farmers farmed they were left alone. No dam was built. Today all our farms are empty”. The affidavit of W H Engelbrecht dated 26 August 2015 is not entirely legible and I was not handed a typescript of it. The part I was able to decipher stated, in similar vein, “Ons ouers vriende was” and ... “was daar nooit stryery nie”.

[12] I pause at this juncture to mention that Mr Botha for the Applicant’s’ charecterisation of the research report as “one sided, not investigating the other side, and following unfair procedure”, cannot be accepted, given that the Applicant’s and his neighbour’s affidavits, were clearly part of the report. It is simply not so as submitted by Mr Botha that the Third Respondent made a decision without the evidence of his client.

[13] Under a heading, “Compensation Received” at paragraph 10, the report records at paragraph 10 that compensation in the sum of R23 050.00 was paid. It records moreover that a historical valuation established that the property was valued at R51 600.00 at the time it was sold. The report notes that the current owner of the property is the Republic of South Africa.

[14] Under a heading, “Hardship suffered by the Claimants” at paragraph 11, the report refers to the Claimant’s affidavit, which records inter alia that they were robbed of their ancestral land and livelihood as a result of which their parents died of broken hearts. The report notes that the Claimant is leasing a farm in Wolsely.

[15] Under a heading, “Recommendations” at paragraph 15, the report states:

PLS TYPE PARA 15 15.1 15.2 of the research report

“ 15. Recommendations

Taking into consideration what has been stated above, it is evident that this claim does not meet the requirements and criteria set out in Section 2 of the Restitution of Land Rights Act No. 22 of 1994 as amended.

It is therefore recommended that:

15.1 The claim be found non-compliant on the basis that prima facie it does not meet the requirements of the Restitution Act for a compliant claim because for claim reference O39 the dispossession was not racially based as contemplated in section 2(1)(a) of the Constitution.

15.2 The RLCC signs the non-compliance letter to be sent to the claimant herewith attached as Annexure A10.

[16] Informed and advised by the report, the Third Respondent notified the Applicant on 30 June 2016 of its decision

that there was no evidence that the dispossession was as a result of past racially discriminatory laws or practices and that the claim was non compliant in terms of Section 2 of the Act.

[17] The property is currently under the control of Cape Nature and incorporated in the Groot Winterhoek Nature Reserve.

The Stance of the Applicant

[18] Mr Botha on behalf of the Applicant submitted that in contrast to the Respondents who rely on official documents, the Applicant relies on what was actually told to him and his late father by the official “who attended to the dispossession”. In this regard the Applicant states in his founding affidavit that during 1970 the Applicant and his father were visited by a Mr Van Rhyn who worked for the Department of Forestry and Water Affairs. He informed them that the whole area, including his father’s farms and those of the Engelbrechts and Van Huffels, were required for the building of a dam. He instructed them to vacate within 2 months and offered his father R22 000.00 for his farm, saying his father had no choice. If he did not take this amount he would not be compensated at all. The family vacated the farm within

30 days and the applicant’s father received R22 000 from the State.

[19] After his family vacated the farm the Applicant was employed by the Department of Forestry and Water Affairs. His founding affidavit at paragraph 29 states that his first instruction as employee was to demolish all buildings and improvements on the family farm, which he did with a heavy heart. After a few months he realised that no dam was being built as indicated by Mr Van Rhyn. The Applicant asked him whether the farm would be given back to his father. Mr Van Rhyn said that nobody would be allowed to return to the area as the whole idea was to get rid of Coloured people in the area. This led to a presumption on the part of the Applicant, expressed in his founding affidavit as follows:

“I presume that, in order to make discrimination against coloured people less obvious, the authorities instructed all people in the area to vacate and that my father was dispossessed of his land in order to give effect to a calculated policy and practice of discrimination against coloured people on the basis of race.”

This, according to Mr Botha is what the Applicant relies upon for a claim of dispossession as a result of a racial practice in accordance with Section 2(1) (a) of the Restitution Act.

- [20] Responding to the above averments at paragraph 29 of the founding affidavit, the answering affidavit of Lejane Maphutha, an employee of the Third Respondent denies that the reason the Applicant and his family were instructed to vacate the land, was to make discrimination against Coloured people less obvious and or to get rid of the Coloured people. He points out that the Applicant and his family did not belong to the Coloured group. The answering affidavit adds that the Respondents have no knowledge of the rest of the allegations made in paragraph 29, do not admit same, and the Applicant is put to the proof thereof.
- [21] It is simply not so in the light of this response, that the Applicant's version of what actually happened is not disputed and must be accepted, as submitted by Mr Botha. Nor does it follow that Mr Van Rhyn's theory that "the whole idea was to get rid of coloured people," is not disputed and should prevail without more, as contended by Mr Botha. The Applicant was put to the proof of Van Rhyn's theory and simply ignored the invitation. There is no affidavit by Mr Van Rhyn explaining his theory, whence it derived or indeed the position he occupied in the Department which made him privy to such information. It must be noted that on the Applicant's own version this theory contradicts Mr Van Rhyn's earlier statement that Applicant's land was to be acquired for the building of a dam, an explanation which the Applicant, in fact favoured as being borne out by the official documents, as alluded to above. The facts as stated by the Respondents together with those of the Applicant which the Respondent admits, when applied to the disputed theory of Van Rhyn, does not favour the Applicant, whose version stands to be rejected.

Judicial Notice

- [22] As aforementioned, the Applicant's reliance on dispossession as a result of a racial practice, is based on Mr Van Rhyn telling him that the whole idea was to get rid of Coloured people in the area and the Applicant's deduction from this that in order to make discrimination against coloured people less obvious, his father was dispossessed. The difficulty with this thesis however is that the Group Areas Act specifically authorised the removal of Coloured people from White areas, and as such open and obvious discrimination against Coloured people was legally sanctioned and encouraged under apartheid. As Ms Mokhoaetsi for the Respondents submitted the Applicant provides no particulars as to why the Government would have wanted in this particular instance to make discrimination against coloured people less obvious when the laws made provision for forced removals in respect of persons who were disqualified from occupying premises in a group area from which they were expressly excluded.
- [23] The Applicant's assumption that his family's dispossession occurred in order to make discrimination against Coloured people less obvious flies completely in the face of apartheid policy at the time which openly and aggressively invoked the Group Areas Act and similar legislation to divide the country spatially along racial and ethnic lines and to openly

dispossess communities all over South Africa. BRING IN ANNEKE ON DISPOSSESSIONS IN 70S. I can take judicial notice that the apartheid state in its vigorous enforcement of spatial apartheid openly dispossessed persons of rights in land with no moral qualms.

Conclusion

[24] There is no evidence that the acquisition of the Applicant's father's land was as a result of a racial law or practice, there was none in the record of documents used to compile the investigative report, and there was indeed none before the Third Respondent when it took the decision that the Applicant's claim was non compliant. The fact that a dam was not built, the first reason for the acquisition proffered by Mr Van Rhyn, or that Van Rhyn then might have proffered a completely unsubstantiated second reason, in no way detracts from the absence of evidence of a racial practice. Nor does the fact that the Coloured neighbouring families might have succeeded in their claims, detract from this. The answering affidavit aptly states that the Applicant's reliance on the successful claims of the Engelbrecht and Van Huffer families is misguided and that the facts pertaining to their claims are neither relevant nor in issue in these proceedings. The investigative report aptly noted that the Applicant and his family belonged to the White group and the zoning of the area for occupation by White persons did not discriminate against them.

[25] The Investigative report showed no causal link between the acquisition and a racially discriminatory practice or law and correctly in my view concluded there to have been none. The decision of the Third Respondent was therefore reasonable and rational in light of the information that was placed before it by way of the investigative report. The information evidenced that the

intention of the Government was to preserve the property for a forest reserve and that such intention was not linked to any racially

discriminatory practices as alleged. The Applicants fathers' property was purchased to give effect to this intention, no more no less. I am nonetheless mindful of the very real pain experienced by the applicant and his family who were forced to sell their family farm to the state.

[26] Finally, it remains to be said that on a simple application of the Plascon Evans test, the facts as stated by the respondent

together with those of the Applicant which the Respondents admit, do not favour the granting of the relief sought by the applicant.

[27] In the premises the Applicant's application falls to be dismissed. In keeping with this Court's practice not to award costs except in exceptional circumstances of which I find none in the present matter, no order as to costs is made.

[28] I accordingly order as follows:

1. The application is dismissed.

Y S MEER

Acting Judge President

Land Claims Court

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Prepared on 12 October 2026 · Esheria