IN THE LAND CLAIMS COURT OF SOUTH AFRICA

AT RANDBURG, JOHANNESBURG

Case No.: LCC 60/2012

In the matter between:

MDUMANE COMMUNITY TRUST	1st Applicant
MASINA KENNETH JOB MUSA	2nd Applicant
MGCINA REBECCA THOKOZILE	3rd Applicant
MASINA MAKABO MICAH	4th Applicant
MASINA PETRUS BHUTANA	5th Applicant
NKOSI FAISTINA LOMHLOPHE	6th Applicant
and	
LAND CLAIMS COMMISSION	1st Respondent
THE PREMIER: THE MPUMALANGA PROVINCE	2nd Respondent
MEC FOR AGRICULTURE, RURAL DEVELOPMENT AND LAND ADMINISTRATION	3rd Respondent
MINISTER OF AGRICULTURE, RURAL DEVELOPMENT AND LAND ADMINISTRATION	4th Respondent
NDWANDWE COMMUNITY TRUST	5th Respondent
NKOSI ROBERT	6th Respondent
MOKOENA VUSI FRANK	7th Respondent
JUNGBLUTH MARIO	8th Respondent
STOOP HERMANUS JACOBUS	9th Respondent
REGISTRAR OF DEEDS PRETORIA	10th Respondent
REGISTRAR OF DEEDS NELSPRUIT	11th Respondent

JUDGEMENT

Ngcukaitobi AJ:

1 The applicants applied for restitution of land rights in terms of section 10 of the Restitution of Land Rights Act 22 of 1994. After an investigation the Commission on Restitution of Land Rights (the Commission) concluded that the

claim was legitimate. A recommendation was made to the Minister in terms of section 42D of the Act for the conclusion of an agreement with the owners of the land. However, prior to the endorsement of the agreement, the Commission consolidated the claim with a different community. The applicants repeatedly informed the Commission of their opposition to the consolidation, but the opposition fell on deaf ears and the consolidation went ahead.

2 Pursuant to the agreement, substantial payments were made to the previous owners of the land, claimed by the applicants. A grant of R8,8 million was paid for the benefit of the claimants to develop the land. The papers show, however, that the money was not paid to the applicants, but to the fifth respondent, the Ndwandwe Community Trust, in whose name the land was registered. That trust is cited as the fifth respondent herein.

3 The result of the consolidation has been that the applicants, being the original claimants, did not receive the benefit of the transfer of the land to their name. Nor did they receive the benefit of the grant payment of the amount of R8,8 million. The applicants have approached this court in motion, to set aside the decision of the Commission to consolidate their claim with that of the fifth respondent. They say that the consolidation was procured without their consent and that the Commission has no statutory power to authorise the consolidation of claims, absent the consent of the original claimants.

4 The application was originally opposed. However, when the matter was enrolled for hearing on 2 November 2015, all the parties agreed that the consolidation of the claim was unlawful on the grounds that the Commission,

together with the Minister lacked statutory authority to consolidate the claim. The second ground was that to the extent that such power was vested upon the Commission or the Minister, it could only be lawfully exercised with the consent of the applicants, being the only lawful claimants. To this end, a draft settlement agreement was presented and I was asked to make it an order of court.

5 The powers of a superior court, such as this court, have been explained by the Constitutional Court in the matter of *Eke v Parsons* [2015] ZACC 13 when it comes to making settlement agreements orders of court. Settlement agreements must meet certain requirements to qualify as court orders. These requirements are:

5.1 An agreement must relate to an issue in dispute between the parties. An agreement resolving a matter not related to the dispute between the parties does not qualify to be made an order of court.[1]

5.2 An agreement must "*accord with both the Constitution and the law. Also, they must not be at odds with public policy*."[2]

5.3 The agreement must hold some practical and legitimate advantage.

6 There are various reasons, rooted in principle why a court must conduct a qualitative examination of any settlement agreement before it can approve it. First, the court is the custodian of the rule of law. It is important that it should ensure that agreements presented to it are consistent with the rule of law. While a court should not be mechanical, it should not be a rubber stamp. The second

[1] *Parsons*, para 25
[2] *Parsons*, para 26

reason relates to the consequences of a court order. Once an agreement is made an order of court, its status is transformed from an agreement between the parties to an enforceable instrument, from which consequences such as execution or contempt of court would arise. A court order is binding. The third reason is that a court order, even one flowing from an agreement between the parties would become *res judicata*.[3] A court order will accordingly not be capable of being reconsidered by the court which granted the original order, unless it can be shown that there are exceptional circumstances warranting the relaxation of the doctrine of *res judicata*.

7 The Constitutional Court noted:

> *"The effect of a settlement order is to change the status of the rights and obligations between the parties. Save for litigation that may be consequent upon the nature of the particular order, the order brings finality to the lis between the parties; the lis becomes res judicata (literally, 'a matter judged'). It changes the terms of a settlement agreement to an enforceable court order."*[4]

8 Against this backdrop, the terms of the agreement can be considered.

9 The key elements to the agreement are the following.

9.1 The decision of the Minister to approve the consolidation of the disputed claims should be declared to be invalid, reviewed and set aside.

9.2 The decision of the Commission to consolidate the claims should be declared invalid and set aside.

[3] Subject to the exceptions in the case of *Molaudzi v S* 2015 (2) SACR 341 (CC)
[4] *Parsons*, para 31

9.3 The decision of the Commission and/or the Minister to transfer the land to the Ndwandwa Community Trust must be declared invalid and set aside.

9.4 Pursuant to these declaratory orders, it has been agreed that the matter should be remitted to the Commission for "*further and proper investigation of all claims*" by the parties, which investigation must be undertaken by an independent researcher and should be completed within a period of six months from the date of the order.

9.5 Parties also agreed that the order remitting the investigation back to the Commission must be supervised by this court and to this extent a structural order is proposed. The elements of the structural order are that a working plan will be submitted to this court within ten days of the order; monthly progress reports will be submitted on an ongoing basis; any party affected by the order would have a right to approach this court on notice.

9.6 Once the Commission has finished the investigation, it is proposed that a mediation should be convened within a period of two months from the completion of the investigation by the Commission.

9.7 In the event a failure of the mediation, the matter must be referred by the Commission to this court for adjudication, on papers to be supplemented.

9.8 Pending the final determination of the matter, the Ndwandwe Community Trust is prohibited from disposing of any asset obtained

as a consequence of the transfer of the property to itself.

9.9 The remaining orders relate to costs.

10 I should consider the terms of the order by reference to the test laid down in the *Parsons*.

11 The first question is whether the agreement relates to an issue in dispute between the parties. There are two issues in dispute between the parties. The first is the lawfulness of the decision of the Minister, acting upon the recommendation of the Commission, to consolidate the applicant's claims into a single claim and having done so transfer the land to the chief respondent. The question is whether the Restitution Act countenances a consolidation of claims by unrelated parties without the consent of the claimants. The second issue, in the event the court agrees with the applicants, relates to remedy. Certain consequences have flown from the consolidation decision. The purchase price was paid to the then owners of the land. The fifth respondent received grant payments from which it appears disbursements have been effected. The agreement purports to resolve those issues in dispute. Accordingly, it passes the first stage of the *Parsons* test.

12 The second question is whether the agreement is in accordance with the Constitution or the law. This requirement is particularly apposite when it comes to matters before this Court, whose chief mandate, in terms of the Restitution Act is the restoration of land rights to persons who qualify both in terms of the Constitution and the law. Decisions pertaining to the compulsory acquisition of

land must strictly comply with the law, in view of their invasive nature.

13 The process to be followed by the Commission, when dealing with land claims was explained by this court in *Bouvest 2173 CC and Others v Commission on Restitution of Land Rights and Others* [2007] ZALCC7 (7 May 2007). The process is this.

13.1 The persons entitled to institute restitution claims for rights and land are "*communities*" or parts of communities, who can establish that their claims fall within the time limit prescribed by the act.[5]

13.2 When a claim is lodged, the Commission, acting through a Regional Land Claims Commissioner, must "*receive and acknowledge receipt of all claims for the restitution of rights in land*".[6]

13.3 Once a claim has been received, provided the lodgement complies with the prescribed manner and the claim is not precluded under section 2 of the Restitution Act, it must be published in the Government Gazette and steps should be taken to make it known in the district to which the land in question is situated.[7]

13.4 When the Commission decides whether or not to accept a claim and to publish it, it should "*be satisfied, already at the acceptance stage that, on the information in [it's] possession, it is arguable that the claim falls within the parameters of sec 2(1) of the Restitution*

[5] *Bouvest*, para 18
[6] *Bouvest*, para 19
[7] *Bouvest*, para 20

Act."[8]

13.5 The claims to be investigated *"are claims lodged by claimants who at the time of lodging qualified for restitution, not claims by a subsequently created entity which owes its existence to a 'measure' of claims. It might be permissible, should it appear that a particular claimant is entitled to restoration of the land which it claimed, to transfer that land with the consent of the parties concerned into the name of an overarching entity which also accommodates land claimed by others. That is not the case in the present instance. The 'Motse Community' did not lodge any claim. There was no such community in existence at the time of disposition."*[9]

14 It is apparent that neither the Commission nor the Minister failed to apply its mind to the question whether the fifth respondent was a community at the time of the dispossession or had in fact lodged a claim as required. The claim can only be settled and the land transferred in respect of a community as defined by the Act, meaning a community actually dispossessed of the land. It is also apparent that the fifth respondent only came into existence subsequent to the lodgement of the claim.

15 As this court held in *Bouvest*, it would not ordinarily be objectionable to transfer land to a subsequently created entity, if that transfer is done with the knowledge and consent of the original claimants. On the facts herein, it appears beyond contestation that the original claimants did not consent to the transfer of the property to the fifth respondent. In fact, they rejected such transfer. The

[8] *Bouvest*, para 24
[9] *Bouvest*, para 28

provisions of the Restitution Act have accordingly been breached.

16 That means a ground of review envisaged in section 6(2)(f)(ii) or (f)(ii) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) has been established. According to these provisions, a court may review an administrative action if the action "*contravenes a law or is not authorised by an empowering provision*". Further, a decision may be reviewed if it is not "*rationally connected to the information before the administrator*". On both grounds, the decision to consolidate the claims and to transfer the claims to a newly created entity were not authorised by the empowering provision. Insofar as the agreement seeks to correct and to set the record straight, it is consistent with the law and the Constitution. The agreement accordingly passes the second stage of the *Parsons* test.

17 I will now deal with the third stage of the *Parsons* test, namely, whether the agreement holds some practical advantage. In part, this is a remedial question. An agreement which cannot be sensibly brought into operation cannot be said to hold some practical advantage. I consider it to be a duty of the court to subject the agreement to the wide remedial power conferred by section 172 of the Constitution. That that section, it will be remembered, can be broken in two broad subsections. First, a court must declare conduct or a law which violates the Constitution as being invalid and of no force or effect. Second, a court must, having declared the impugned law or conduct to be invalid, grant an order which is just and equitable. The mere fact that a settlement agreement has been reached cannot divest the court of its obligation under the Constitution to ensure that the agreement to be made and order of court is just and equitable. This

applies with greater force when the agreement purports to give effect to the terms of the Restitution Act, which itself is concerned with the correction of historical injustices and the equitable distribution of land within the parameters of the Constitution.

18 The agreement, as presented, does not meet the third leg of the *Parsons* test. First, the agreement requires a fresh investigation of the claims. There is no justification for a new investigation of the claims. The investigation conducted thus far has established the validity of the claims. The issue in contention is limited to whether the land was transferred to the correct party upon the finalisation of the investigation. There is no basis upon which this court can prescribe to the Commission that it should appoint an "*independent researcher*". It must be up to the Commission to decide whom it appoints to conduct investigations on its behalf – the powers of this Court to direct the Commission on such matters ought to be sparingly exercised. Nothing has been put forward in this matter to justify interference with internal processes of the Commission such as the appointment of investigators.

19 The agreement is also circuitous: It requires a three-stage procedure: the appointment of an independent researcher; the mediation process; and adjudication by this court. Bearing in mind the delays that have already been occasioned in the finalisation of the original land claim, it would not be just or equitable for this court to impose such requirements, which would simply perpetuate the delays in the resolution of the matter.

20 The consequence is that the agreement will be substantially amended to bring it

into line with what this court considers would best promote the objects of the Restitution Act.

21 The following order is issued:

21.1 The consolidation of the claims under reference numbers KRP4134, 6526, 385, 2360, 5174, 6620, 6593, 3808, 11787, 2206, 3791, 12143, 6567, 12144, 6562, 450, 12147, 12146, 5174, 3808, 1032, 12215,11472, and 3971 into a single claim under reference number KRP12145 is declared to be invalid and is hereby reviewed and set aside.

21.2 The registration of the land into the Ndwandwe Community Trust is declared to be invalid and is hereby reviewed and set aside.

21.3 The tenth and eleventh respondents are directed to take immediate steps to ensure that the land is registered in the name of the fourth respondent, to be held on behalf of the State, which registration should happen by 1 January 2016

21.4 The orders in paragraphs 1 and 2 are suspended, pending a determination by this court of just and equitable relief.

21.5 The following questions are referred to oral evidence, on a date to be arranged with the registrar:

5.1 Whether the land should not be registered in the name of the applicants;

5.2 If the land should not be registered in the name of the applicants, the persons who are entitled to the land and the basis thereof;

5.3 What steps, if any, should be taken in respect of the funds paid to the fifth respondent in the form of a grant; and

6 The costs of the current application shall be paid by the first respondent.

NGCUKAITOBI AJ

Acting Judge of Land Claims Court

19 November 2015