

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Reportable

CASE NO: 572/2003

In the matter between :

NICHOLAAS HLOYIWE MAHLANGU NO

Appellant

and

MINISTER OF LAND AFFAIRS

First Respondent

THE PREMIER OF GAUTENG

Second Respondent

THE COMMISSION ON RESTITUTION OF LAND RIGHTS

Third Respondent

THE REGISTRAR OF DEEDS

Fourth Respondent

THE PREMIER OF THE NORTHERN PROVINCE

Fifth Respondent

MANALA TRIBAL AUTHORITY

Sixth Respondent

THE VUKU ZENZELE GROUP

Seventh Respondent

BANTWANE TRIBE

Eight Respondent

ISCOR LIMITED

Ninth Respondent

THE MINISTER OF AGRICULTURE

Tenth Respondent

Before: MPATI DP, CAMERON, MTHIYANE, NUGENT JJA & JAFTA AJA

Heard: 27 AUGUST 2004

Delivered: 14 SEPTEMBER 2004

Summary: Restitution of Land Rights Act 22 of 1994 – direct access to Land Claims Court – when permitted.

J U D G M E N T

NUGENT JA

NUGENT JA:

[1] The Restitution of Land Rights Act 22 of 1994 creates the means for restitution to be made to persons or communities who were dispossessed of rights in land pursuant to racially discriminatory laws or practices. The principal institutions that are created to manage the process are the Commission on Restitution of Land Rights ('the commission') and the Land Claims Court (the 'LCC'). The function of the commission, broadly speaking, is to receive and to investigate claims for restitution and to attempt to resolve them through mediation and negotiation. If a claim cannot be resolved by those means it must be referred by the commission to the LCC for the LCC to exercise its wide powers of adjudication. The LCC may, amongst other things, order the restitution of land or a right in land to the claimant, or order the state to grant the claimant an appropriate right in alternative state-owned land, or order the state to pay compensation to the claimant, or order the state to include the claimant as a beneficiary of a state support programme for housing or the allocation and development of rural land, or it may grant the claimant alternative relief (s 35).

[2] A community is entitled to restitution if it was dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices without payment of just and equitable compensation or other just and equitable consideration (s 2(1)(d) read with s 22(2)).

[3] The process for claiming restitution is initiated by the claimant lodging a claim with the commission in the prescribed form (s 10). If the relevant regional land claims commissioner who receives the claim is satisfied that it is in the prescribed form, and that the claim is not precluded by the provisions of s 2, and that it is not frivolous or vexatious, he or she is required to cause notice of the claim to be published and to be made known in the district in which the land is situated (s 11), after which the commission proceeds to investigate the claim and to perform its ordinary functions.

[4] The commission also has advisory functions and it is authorised by s 6(2)(b) to 'make recommendations or give advice to the Minister regarding the most appropriate form of alternative relief, if any, for those claimants who do not qualify for the restitution of rights in land in terms of this Act'.

[5] In certain circumstances a claimant may pursue a claim by approaching the LCC directly in terms of s 38B of the Act, which reads as follows:

'Notwithstanding anything to the contrary contained in this Act, any person who or the representative of any community which is entitled to claim restitution of a right in land and has lodged a claim not later than 31 December 1998 may apply to the Court for restitution of such right: Provided that leave of the Court to lodge such application shall first be obtained if –

- (a) an order has been made by the Court in terms of section 35 in respect of a right relating to that land; or
- (b) a notice has been published in the *Gazette* in terms of section 12 (4) or 38D (1) in respect of that land and the period specified in the said notice has expired.'

[6] Where a claim has been pursued directly in terms of this section the regional land claims commissioner who is dealing with the matter is entitled to suspend his or her investigation of the claim and the LCC may order that all claims that have been lodged in respect of the land in question be transferred to it. After considering the application the LCC is authorised to make any of the various orders allowed for by s 35, or it may dismiss the application, or it may transfer all the claims before it to the regional claims commissioner, or it may decline to make any order but permit the claimant to supplement and renew the application.

[7] Access to the LCC in terms of s 38B (1) requires its prior leave in the circumstances specified in subsections (a) and (b). We are concerned in this appeal only with subsection (b), which precludes an application to the LCC without its leave when a notice has been published in terms of s 12(4) of the Act and the period specified in the said notice has expired. The notice referred to in that section is one that the Chief Land Claims Commissioner may cause to be published if at any stage during the investigation of a claim he or she is of the opinion that the resources of the commission or the LCC would be more effectively utilized if all claims for restitution in respect of the land in question were to be investigated

simultaneously. The notice serves to advise potential claimants of that decision and to invite them to lodge claims within a specified time.

[8] The present appeal arises from an application that was made by the Litho Ndzundza community (represented by the appellant, its chief) for the LCC's leave to pursue a claim for restitution as provided for in s 38B. Leave was required because a notice had been published as contemplated by s 38B(1)(b). The LCC refused the application and the appellant now appeals against that decision with the leave of the LCC.

[9] The claim relates to approximately 35 000 hectares of state farmland situated about 80 km north of Pretoria. The Litho Ndzundza community alleges that it was dispossessed of the land in approximately 1917 as a result of past racially discriminatory laws and practices and that it received no compensation or other consideration for the loss of its rights. The land is also subject to claims by other communities with the result that the disposition of the land has been the subject of considerable controversy for many years. The Chief Land Claims Commissioner formed the opinion that the resources of the commission or the LCC would be more effectively utilized if all claims in respect of the land in question were to be investigated simultaneously, and on 13 October 1995 a notice was published in the *Gazette* inviting potential claimants, other than those who had already lodged claims, to lodge any claims that they might have within a period of sixty days.

[10] The Litho Ndzundza community lodged its claim with the commission on about 9 November 1995. (It seems that the claim was mislaid and that a duplicate was lodged on 13 June 1996). The relevant regional land claims commissioner declined to cause notice of the claim to be given as provided for in s 11(1) because he or she was of the view, after investigating the matter, that the community had not been dispossessed of the land and that the claim was accordingly 'precluded by section 2' of the Act. Apparently the commission itself was similarly of the view that the Litho Ndzundza community did not qualify for restitution because it recommended to the Minister in terms of s 6(2)(b) that their needs instead be addressed through a land redistribution scheme. The community was initially content with that recommendation but when no progress was made in its implementation and the state expressed its intention to alienate part of the land – it seems to the SA Jeep Club – the community had a change of heart and the present proceedings were commenced.

[11] In these proceedings the community sought leave from the LCC to pursue its claim directly as provided for in s 38B, and it also sought a temporary interdict restraining the state from alienating any portion of the land. The interdict is no longer being sought and I need say no more about it. Ten respondents were cited in the proceedings: the Ministers of Land Affairs and Agriculture, the Premiers of Gauteng and Northern Province (now Limpopo), the commission, the registrar of deeds, Iscor (which has an

interest in the mineral rights) and the three competing claimants. The Minister of Land Affairs and the commission opposed the application but they have not opposed this appeal.

[12] The LCC concluded that the commission's decision to recommend to the Minister that the community be included in a redistribution scheme, which must have been preceded by a finding by the commission that the community was not entitled to restitution, precluded a claim for restitution being made in terms of s 38B, and that until that decision was set aside in review proceedings the community's claim was premature.

[13] The LCC pointed out in *Farjas (Pty) Ltd v Regional Land Claims Commissioner, KwaZulu-Natal* 1998 (2) SA 900 (LCC) para 41 that it is not the function of a regional commissioner – and that applies also to the commission – to adjudicate upon the merits of a claim for restitution. While s 11(1) of the Act requires a regional commissioner to be satisfied that a claim 'is not precluded by the provisions of section 2' before the process is set in motion, Dodson J held that a claimant need exhibit only 'an arguable case' (924C). In my view even that threshold might be too high but it is not necessary in this appeal to decide that question. It is sufficient to say that on the material that is before us it is doubtful that the commission was entitled to decline to consider the present claim and instead to make alternative recommendations. If that is correct, the community would of course have been entitled to have the commission's finding and

recommendation set aside on review. But there is nothing in the Act that precludes the LCC from entertaining proceedings in terms of s 38B while that finding and recommendation remain extant. On the contrary, s 38B provides expressly that the LCC may entertain such proceedings '[n]otwithstanding anything to the contrary contained in the Act'.

[14] In my view the LCC misdirected itself by finding that the existence of the commission's recommendation precluded the claim being pursued in terms of s 38B, with the consequence that it failed to exercise the discretion that is conferred on it by the Act.

[15] Bearing in mind that none of the respondents have opposed this appeal no purpose is served by referring the matter back to the LCC to enable it to exercise its discretion. No grounds have been advanced for that discretion to be exercised against the community and I see none. On the contrary, given the history of this matter, in my view there is every reason why the claim (and I express no opinion on its merits) should be considered by the LCC and brought to finality.

[16] In his notice of appeal the appellant sought no order for costs either in this court or in the LCC. In the absence of such notice to the respondents it would thus be inappropriate to make any order in relation to costs.

The appeal is upheld. The order of the LCC is set aside and the following orders are substituted:

- '1. The appellant is granted leave to lodge an application for the restitution of rights in land to which the Litho Ndzundza community claims to be entitled.
2. The appellant is directed to lodge the application within thirty days of this order or within such further period as the court may allow.'

R W NUGENT
JUDGE OF APPEAL

MPATI DP)

CAMERON JA)

MTHIYANE JA)

JAFTA AJA)

CONCUR