REPUBLIC OF SOUTH AFRICA

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Reportable
Case Number : 441 / 05

In the matter between

POPELA COMMUNITY	**FIRST APPELLANT**
MAMORIBULA MAAKE	**SECOND APELLANT**
JOHANNES THOLO MAAKE	**THIRD APPELLANT**
RAMOTHABA PHINEAS MAAKE	**FOURTH APPELLANT**
MABULE MAAKE	**FIFTH APPELLANT**
MOLATOLO MAMOYAHABO MAAKE, NO	**SIXTH APPELLANT**
SEAKWANE WILSON MALEMELA	**SEVENTH APPELLANT**
ABRAM MAAKE	**EIGHTH APPELLANT**
MASELELO MOSIBUDI MAAKE	**NINTH APPELLANT**
MOHLAGO MAMOTLATSO MAAKE, NO	**TENTH APPELLANT**
DEPARTMENT OF LAND AFFAIRS	**ELEVENTH APPELLANT**

and

GOEDGELEGEN TROPICAL FRUITS (PTY) LTD	**RESPONDENT**

Coram : **FARLAM, CONRADIE, PONNAN JJA, THERON and CACHALIA AJJA**

Date of hearing : **8 SEPTEMBER 2006**

Date of delivery : **28 SEPTEMBER 2006**

SUMMARY

Restitution of Land Rights – no causal connection between racially discriminatory law or practice and dispossession where farmer terminating labour tenancies for reasons of productivity and efficiency.

Neutral citation: This judgment may be referred to as
Popela Community & Others v Goedgelegen Tropical Fruits (Pty) Ltd **[2006] SCA 124 (RSA)**

J U D G M E N T

CONRADIE JA

[1] A land claim brought by the first appellant, the Popela Community, and in the alternative by the second to tenth appellants, the individual claimants, a claim supported by the eleventh appellant, the Department of Land Affairs, was dismissed in the Land Claims Court by Gildenhuys J who gave leave to appeal to this court.

[2] The land claimed by the first to tenth appellants is part of what used to be the remaining extent of the farm Boomplaats. It has now been consolidated with the farm Goedgelegen, the property on which the respondent conducts its farming operations. The dispossession of rights in the land is said to have occurred as a result of the termination of the labour tenancy relationship[1] between those workers resident on the farm at the time of the termination and the farm owners, Mr August Altenroxel and his brother Bernard.

[3] Gildenhuys J assumed that the individual claimants were, within the meaning of the Restitution of Land Rights Act 22 of 1994 (the Act), dispossessed of their cropping and grazing rights. I make the same assumption. The crucial question is whether the dispossession occurred as a result of past racially discriminatory laws or practices.[2][4] Racially discriminatory laws

[1] The Act defines a right in land as '. . . any right in land whether registered or unregistered, and may include the interest of a labour tenant and sharecropper, a customary law interest, the interest of a beneficiary under a trust arrangement and beneficial occupation for a continuous period of not less than 10 years prior to the dispossession in question.'

[2] Section 2(1) of the Act reads:
'(1) A person shall be entitled to restitution of a right in land if –

include ‘laws made by any sphere of government and subordinate legislation’. It was not argued before us that the first to tenth appellants were dispossessed as a result of a racially discriminatory law as defined. The only relevant legislation is an amendment to the Native Trust and Land Act of 1936, introduced by the Bantu Laws Amendment Act 42 of 1964 as s 27bis(1):

'Whenever the Minister considers it in the public interest to do so, he may by notice in the Gazette declare that as from a date fixed in such notice –

‘(a) no further labour tenants' contracts shall be entered into and no further labour tenants shall be registered in respect of land in the area referred to in such notice; or

(b) no labour tenants shall be employed on land in the area referred to in such notice.'

Subsection (2) makes failure to comply with the notice an offence and voids the contract.

[5] The amendment to the Native Trust and Land Act did not by itself deprive any labour tenant of a right in land. It did no more than authorise the Minister to take such a step in areas where he considered it in the public interest to do so. The Minister could, by way of subordinate legislation, either prohibit labour tenancy altogether or phase it out, depending on what he thought appropriate for a particular area. On 31 July 1970 the Minister caused to be published in the Government Gazette of that date a notice prohibiting with effect from the next day any further labour tenants' contracts on land in many areas including that in which Boomplaats fell.

(a) he or she is a person dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices; or

(b) . . . ; or

(c) . . . ; or

(d) it is a community or part of a community dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices; and

the claim for such restitution is lodged not later than 31 December 1998.'

[6] The court *a quo* correctly found that the amendment to the Native Trust and Land Act and the government notice issued pursuant thereto were racially discriminatory. The appellants were nevertheless faced with two dilemmas. First, by the time the notice was published the individual claimants had already been deprived of their labour tenants' rights and of whatever such rights they or others might have held as a community.[3] It is common cause that these had been terminated by the brothers Altenroxel the year before. Secondly, and in any event, the notice did not bring about a deprivation of the rights of existing labour tenants and it was not argued on behalf of the appellants that it did. The court *a quo* was therefore correct in finding that the individual claimants were not deprived of their rights to the land they occupied as a result of the 1964 amendment or any implementation measure that followed it.

[7] This leaves the question of racially discriminatory practices. They are defined as –

'racially discriminatory practices, acts or omissions, direct or indirect, by

(a) any department of state or administration in the national, provincial or local sphere of government;

(b) any other functionary or institution which exercised a public power or performed a public function in terms of any legislation.'

[8] The first to tenth appellants were therefore obliged to demonstrate that the dispossession of their rights to the land occurred as a result of some direct or indirect discriminatory practice (whether manifested by commission or omission) by a department of state, or administration in any of the spheres of government, or by any functionary or institution endowed with public power

[3]Members of a community who may at one time have been labour tenants, but were no longer labour tenants or even residents on the land at the time of the dispossession of the labour tenants can only derive rights to the land in question through the latter.

which it exercised in the performance of a legislatively mandated function. It was not suggested that these appellants were directly dispossessed by any of the bodies mentioned in the definition. Indeed, there was no body that had the power to dispossess or order the dispossession of existing labour tenants on land in the Boomplaats area. At best for the individual claimants any such body could have acted indirectly through the actual dispossessors, the brothers Altenroxel.

[9] The appellants sought to meet this difficulty by putting forward the thesis that by 1969 August Altenroxel knew of the proposed phasing out of the labour tenancy system in the Moketsi area and (presumably with the complicity of his brother) decided to go one better in terminating the rights of their existing labour tenants there and then. For this thesis to succeed, the appellants would have had to demonstrate that the Altenroxels served as an instrument for indirectly carrying out or promoting a practice of a government institution or functionary. There is no evidence that any institution or functionary charged with overseeing the policy prevailing in the Moketsi area – which went no further than preventing future labour tenancies – had adopted a practice of encouraging or persuading farmers, in particular the Altenroxels, to anticipate and, indeed, exceed the requirements of the notice.

[10] The furthest the evidence went is the production of an enigmatic letter called an 'Arbeidsvoorligtingsbrief no 20' dated 25 August 1969 on the topic of Bantu labour control boards, written by the secretary of Bantu Administration and Development. It relates that one Adv Froneman, at the time when he was a full-time member of the Bantu Affairs Commission, in July 1953 gave an instruction that farmers should gradually reduce the number of labour tenants in

their employ so that the system might disappear by the end of 1970. What the status of the instruction was, or if anyone who came to know of it paid any attention to what Adv Froneman had said in 1953, is not known.

[11] August Altenroxel testified that he did not know of any proposed measure to phase out the labour tenant system. The argument that, despite his assertions to the contrary, he must have known of it because he sometimes attended farmers' association meetings where these matters must have been discussed is far too speculative to have any probative value. The fact of the matter is that most of the farmers in the Moketsi area, those who would have belonged to the Moketsi Farmers' Association, had moved away from the labour tenant system by 1969, many of them by as early as 1960, so that it was not a burning issue in that district. The evidence of Mr Van Zyl, a prominent farmer in the district and former chairperson of the Moketsi Farmers' Association, that there was no discussion around the issue, is thus not unlikely to be true.

[12] August Altenroxel's evidence that he changed the system on his farm because it was inefficient and not suited to modern farming methods and because he saw that their neighbours who had abolished it were benefiting from the change, is not improbable. Nor is it improbable when he says that the hardships imposed by the system on labour tenants played a role in his decision: The best they could manage was a primitive level of dry-land subsistence farming that led to their crops failing and their cattle dying in times of drought.

[13] The way the appellants sought to counter this evidence was to suggest that whatever decision the brothers Altenroxel took was on a balance of

probabilities tainted by the prevailing apartheid dogma and, whether August Altenroxel admitted it or not, conducive to carrying out the apartheid scheme to remove black people on white farms to the homelands. This was the thesis of Dr Schirmer who gave expert testimony on behalf of the appellants. The view that he espoused was that the racially motivated government strategy to end the occupation of white-owned farms by black labour tenants permeated every decision by a white farmer to abolish the labour tenancy system on his farm. It was, he said, impossible for a decision like that to have been a purely business decision.

[14] Dr Schirmer's premise seems to me seriously flawed but it does not matter. Even if the Altenroxels knew of the projected phasing out of labour tenancy agreements I am gravely doubtful whether that knowledge by itself, and without any counselling or prompting by a government agency to move in that direction, would be sufficient to establish the necessary causal connection between the racially motivated law or practice and the dispossession. The Act does not require every dispossession of land taken in the context or even in furtherance of the apartheid doctrine to be made good. It envisages reparation in respect of a racially discriminatory law or practice of government or one of its agencies (a functionary or institution exercising a public function) that directly or indirectly resulted in a dispossession. If such an agency had prompted the decision by the Altenroxels to terminate their labour tenants' contracts one might have been able to say that the termination was the indirect result of a discriminatory practice, but the evidence accepted by the court *a quo* is all the other way.

[15] In my view the court *a quo* cannot be faulted, either in its assessment of the evidence or in its application of the law. The phrase ‘as a result of’ in the expression ‘as a result of past discriminatory laws and practices’ connotes a causal connection.[4] In a case such as this where there is no discernable causal connection at all I refrain from expressing a view on how close that connection would have to be in order to bring s 2(1) of the Act into operation.

[16] Counsel for the first appellant argued that there was a community or part of a community on the land in question so that not only the individual claimants who have all along been resident on the farm but also others forming part of the community are to be considered for restitution. The respondent contended that the farm residents never belonged to a group cohesive enough to be characterized as a community in terms of the Act.. The Act defines a ‘community’ as ‘any group of persons whose rights are derived from shared rules determining access to land held in common by such group, and includes part of any such group.'

[17] The court *a quo* found the evidence tendered to establish the existence of a community inconclusive. I incline to the view that the finding is unassailable but it is not necessary to resolve the issue. If the individual claimants were not dispossessed in the circumstances contemplated by the Act no community of which they formed a part can be said to have been dispossessed within the contemplation of the Act.

---

[4] *Minister of Land Affairs and Another v Slamdien and Others* 1999 (1) BCLR 413 (LCC) at 435D-E. These dicta have since been followed in *Boltman v Kotze Community Trust* [1999] JOL 5230 (LCC) and *In re Former Highlands Residents: Naidoo v Department of Land Affairs* 2000 (2) SA 365 (LCC) at 368G - 369C.

[18] There was some argument about the propriety of ordering the appellants to pay the costs of both counsel employed by the respondent. Counsel for the second to tenth appellants subjected the decision of the court *a quo* to wide-ranging criticism. In addition, the eleventh appellant seems to have regarded this case as an important one for the success of the land reform program and produced a spirited argument in support of the first appellant's claim. Faced with opposition from two counsel on the appellants' side, and given the issues raised, the employment of two counsel by the respondent was, in my view, no more than a sensible precaution.

[19] The appeal is dismissed with costs which are to include the costs of two counsel payable by the appellants jointly and severally.

J H CONRADIE
JUDGE OF APPEAL

CONCUR :

FARLAM JA
PONNAN JA
THERON AJA
CACHALIA AJA