THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not-Reportable

Case no: 900/2019

In the matter between:

SILWANE COMMUNITY DEVELOPMENT TRUST **APPELLANT**

and

REGIONAL LAND CLAIMS COMMISSIONER, KWAZULU-NATAL **FIRST RESPONDENT**

COMMISSION ON RESTITUTION OF LAND RIGHTS **SECOND RESPONDENT**

MINISTER OF RURAL DEVELOPMENT AND LAND REFORM **THIRD RESPONDENT**

DIRECTOR GENERAL OF THE DEPARTMENT OF RURAL DEVELOPMENT AND LAND REFORM **FOURTH RESPONDENT**

THE CHARL SENEKAL SUIKER TRUST IT 855/1984 **FIFTH RESPONDENT**

MBONGENI ZULU	**SIXTH RESPONDENT**
NOMUSA MATHE	**SEVENTH RESPONDENT**
NTOMBIFUTHI MATHABELA	**EIGHTH RESPONDENT**
NDABA GUMBI	**NINTH RESPONDENT**
MUSWENKOSI MATHABELA	**TENTH RESPONDENT**
REGISTRAR OF DEEDS, KWAZULU-NATAL	**ELEVENTH RESPONDENT**

Neutral citation: *Silwane Community Development Trust v Regional Land Claims Commissioner, Kwazulu-Natal and Others* (900/2019 [2021] ZASCA 02 (6 January 2021)

Coram: PETSE DP, MBHA, DAMBUZA and NICHOLLS JJA and MATOJANE AJA

Heard: 18 November 2020

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives via e-mail, publication on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down are deemed to be delivered on 7 January 2021.

Summary: Restitution of Land Rights Act 22 of 1994 – claim for restitution of land rights – review of Regional Land Claims Commissioner's decision to publish claim as described in claim form – appellant alleging that additional properties depicted in map wrongfully omitted – no reviewable irregularity established.

ORDER

On appeal from: The Land Claims Court, Randburg (Kollapen J sitting as court of first instance):

The appeal is dismissed with costs, such costs to include those consequent upon the employment of two counsel.

JUDGMENT

Matojane AJA (Petse DP, Mbha, Dambuza and Nicholls JJA concurring):

[1] This is an appeal against the judgment of the Land Claims Court, Randburg (LCC) dismissing a review application in respect of a decision of the Regional Land Claims Commissioner (the RLCC) to publish a notice in the government gazette in terms of section 11(1) of the Restitution of Land Rights Act 22 of 1994 (the Restitution Act) without including a number of farms that the appellant contends ought to have been included.

[2] The application has its origin in two restitution of land claims that were lodged by the late Inkosi Silwane Ernest Myeni (Inkosi Myeni) with the RLCC on 4 February 1997. The claims were submitted on behalf of the community by virtue of the provisions of the Restitution Act, for the restitution of the land to the community. They were published in the Government Gazette Notice 1586 of 26 August 2005.

[3] After the death of Inkosi Myeni, the appellant trust was formed to pursue the claims on behalf of the community. In a letter dated 24 October 2016, the appellant took issue with the land description as set out in the Government Gazette publication by the first respondent in terms of s 11(1) of the Restitution Act. The applicant contended that the RLCC had wrongly excluded 28 other farms not expressly referred to in the two claim forms in the gazette notice. The RLCC, on the other hand, took the view that the claim forms lodged by Inkosi Myeni were clear and precise as to the claimed farm portions and that it acted procedurally fair before publishing the notice.

[4] With the impasse having arisen, the appellant applied to the LCC for an order reviewing and setting aside the decision of the RLCC to publish the Government Gazette Notice. It also sought an order directing the RLCC to withdraw the said notice and publish a new notice in the Gazette containing the additional properties that were not published in Government Gazette Notice 1586 of 26 August 2005.

[5] The application was unsuccessful. On 24 July 2019, Kollapen J granted limited leave to the appellant to appeal to this Court in relation to the manner and process in which the state respondents dealt with the matter once there was the identification of additional properties.

[6] A right to restitution of rights in land was created by s 8(3)(b) of the Interim Constitution of the Republic of South Africa Act, 200 of 1993 and was entrenched in the final Constitution of the Republic of South Africa Act

108 of 1996.[1] Section 25(7) of the Constitution provides for the restitution of rights in the land as follows:

'A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress'.

[7] The Restitution Act is the Act envisaged in s 25(7) of the Constitution. The object of the Restitution Act is, amongst others, to give effect to the constitutionally entrenched rights of individuals and communities who had been dispossessed of land rights and disadvantaged as a result of past racially discriminatory laws and practices. The restitution process is a finite one with a limitation placed on the period within which claims may be lodged. Section 2(1) and (2) of the Restitution Act deals with entitlement to restitution and provides:

'(1) A person shall be entitled to restitution of a right in land if -

(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) it is a deceased estate dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices; or

(c) he or she is the direct descendant of a person referred to in paragraph (a) who has died without lodging a claim and has no ascendant who -

  (i) is a direct descendant of a person referred to in paragraph (a); and

  (ii) has lodged a claim for the restitution of a right in land; 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

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

[1] *Gamevest (Pty) Ltd v Regional Land Claims Commissioner for Northern Province and Mpumalanga and Others* [2002] ZASCA 117; 2003 (1) SA 373 (SCA) paras 3 and 4.

[8] Section 6 of the Restitution Act sets out the general functions of the Commission. Those functions include, amongst others, receiving and acknowledging receipt of claims, the taking of reasonable steps to ensure that claimants are assisted in the preparation and submission of the claims, advising claimants of the progress of their claims and investigating the merits of claims that have been submitted, and mediating and settling disputes arising from such claims.[2]

[9] Section 10 of the Restitution Act sets out the requirements for lodging a valid claim. s 10 (1) provides:

'(1) Any person who or the representative of any community which is entitled to claim restitution of a right in land, may lodge such claim, which shall include a description of the land in question, the nature of the right in land of which he, she or such community was dispossessed and the nature of the right or equitable redress being claimed, on the form prescribed for this purpose by the Chief Land Claims Commissioner under section 16.' (My emphasis.)

[10] Section 11(1) obliges the RLCC having jurisdiction to cause a notice to be published in the Gazette and make it known in the district in which the land in question is situated if he or she is satisfied that:

'(a) the claim has been lodged in the prescribed manner;

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

(c) the claim is not frivolous or vexatious.'

[11] In terms of s 11(2) the RLCC may, on such conditions as he or she may determine, condone the fact that a claim has not been lodged in the prescribed manner.

[2] Section 6(1)(cA) and (cB) of the Restitution of Land Rights Act as amended.

[12] Section 16 empowers the Chief Land Claims Commissioner to make rules regarding, among others, any matter which is required or permitted to be prescribed. Section 16(1)(b) confers the power to make rules in regard to the filing of claims. Rule 2(1) of the Rules Regarding Procedure of the Land Claims Court[3] provides that a claimant:

'. . . shall lodge a claim in writing on a duly completed claim form, as prescribed by the Commission in terms of section 10 of the Act, substantially in the form of Annexure A together with such additional documents as are relevant to substantiate the claim, with the regional office of the Commission having jurisdiction over the land in respect of which such a claim is instituted.'

[13] In the present matter, Inkosi Myeni was able to identify the claimed properties in the claim forms with precision. He completed the claim forms with meticulous care. In paragraph 1.1, the standard form requires the person completing the form to provide 'the portion(s), name(s) and number(s) of the farm and district in which it is situated'. He provided the correct portions and farm names in the first claim form as follows:

'MORGENSTOND. NO. 599 A-B AND
AVONSTOND MP. 581 B-C. STRAIGHT TO PONGOLA
UBOMBO DISTRICT'

[14] In the second claim form, he provided the accurate name, portion and district in which portions of the farm Overwin lay. He described the property as follow:

'OVERWIN NO. 163 A & B - UBOMBO DISTRICT.'

[3] Promulgated in Government Gazette 16407 of 12 May 1995.

[15] In paragraph 15 of the review application, the appellant explained that the land described in the claim forms and claimed by the Myeni community encompasses the following properties:

'The land described in the said claim forms and accompanying description by the Inkosi and the applicant community includes land which stretches from the Mkuze River, i.e. from Overwin Farm to Pongola River and all the farms which are on the Myeni land including the land on which the Inkosi of the applicant community lived during the material period and continues to live. In support of this description of the subject land, I annex hereto marked "C" a copy of the document entitled Meeting of the Myeni Ntsinde [Tribal] Authority in connection with the restitution of land.'

[16] In the review application the appellant also relied on a transcription of the minutes of the Myeni Ntsinde Tribal Authority held on 14 January 1997, in which the land sought to be claimed was described as stretching from:

'Mkuze river i.e. Overwin farm to Pongola River, and all the farms which are there are on the Myeni's land . . .

The other land is Makhathini on the Eastern part which is now used as a development area, that is Myeni land. We therefore refer the Commission to the District Code which states everything and the Old Maps with the boundary beacons, this land also stretches from Pongola river Nyawashana where the old wagon road was to Mkuze river where the Delukufa area is. There is now a great dispute of land in this area amongst three Amakhosis ie J.Z. Gumede, M. Qebe and the Myeni.'

[17] The difficulty with the description contended for by the appellant is that it is inconsistent with the description in the claim forms. Secondly, the last paragraph of the resolution of the Myeni Ntsinde Tribal Authority on which appellant relies records that the claim to this very broad area of land is disputed. It is recorded that 'there is now a great dispute of land in this area amongst three Amakhosis, i.e. JZ Gumede, M Qebe and the Myeni.'

18] After receipt of the claim forms, the RLCC appointed Khuhlaza Management Consultants CC to investigate the claims. The consultants produced three validation reports dated 3 December 2001. The validation reports record the historical name of the area where people were removed as Nkonkoni Farm (current name Avonstond No 581), Mooi Plaats (current name Morgenstond No 598) and Overwin (current name Overwin 163(A) and Overwin 163(B)).

[19] The RLCC also assigned Ms Xolisa Shembe, the Project Officer of the RLCC, to investigate the merits of the claims. She interviewed Inkosi Myeni and the claimant community and compiled an investigation case report. Her report states that there were two different removals from the three farms, the first being from Farm Overwin No 163 A & B in the late 30s and the second, from the farms Morgenstond No 598 A & B and Avonstond no 581 B. This report is in respect of only the land claimed in the claim forms and not the farms listed in the amended notice of motion.

[20] As part of the investigation process, a mapping exercise of the areas from which the community was alleged to have been removed was undertaken by officials of the Commission. Members of the claimant community and an official from the Surveyor-General's office took part in the mapping exercise. A map of the areas pointed out by the appellant community was produced by the office of the Surveyor-General. The map depicts properties extending over a total area of 72 082 740 hectares stretching between the Mkhuze River in the South and the Pongolapoortdam in the North.

[21] Following the mapping exercise, the Commission discovered that a large number of the land portions that were pointed out in relation to the appellant's land claim during the mapping exercise had not been claimed by the appellant. Instead they were the subject of a land claim of the Gumbi Community who had also lodged a claim for restitution with the Commission.

[22] As a result of the competing claims, the RLCC convened a meeting of the representatives of the two communities on 2 March 2005 to discuss the conflicting claims, more particularly with reference to the farm Avonstond.

[23] The recorded minutes of the meeting have, in item 3 thereof, a heading 'Introductory remarks', under which the following is recorded:

'Walter pointed out that a claim was lodged by Myeni and Gumbi
-Properties claimed and restituted are those stated in the claim form only
-Once a claim is mapped and gazetted there are no additions allowed
-He then asked the Commissioner to take over.'

[24] The minutes continued:

'Apart from Avonstond, there are properties mapped by Myeni which are not on the claim form. Ms Shange asked the committee members to comment on what she had just pointed out.
Mr Myeni responded by saying that they understand how restitution works, they are prepared to leave out properties, not on the claim form.'

[25] In relation to this minute, Mr Walter Silaule, the deponent to the answering affidavit on behalf of the first to fourth respondents, who was present at the meeting states that he recalls what Mr Myeni said and meant. He states that the Myeni community accepted that the properties not

specifically identified in the claim form, but identified in the mapping exercise, could not legitimately be claimed. The claimant community denies that it relinquished any land it claimed as alleged by Mr Silaule.

[26] The RLCC was satisfied that the claim was lodged in the prescribed manner and that the requirements of s 2 of the Restitution Act had been satisfied. The properties listed in the claim form were published in Government Gazette Notice 1586 of 26 August 2005.

[27] An applicant who seeks final relief on motion must, in the event of a dispute of fact arising, recognise that final relief may be granted only if the facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. However, where the court is of the opinion that the respondent's denials do not raise a real, genuine or bona fide dispute of fact or are so far-fetched or clearly untenable that the court would be justified in rejecting them merely on the papers, it may grant final relief.[4]

[28] The version of Mr Silaule is supported by the minutes of the meeting which show that representatives of the community were made aware, and accepted that only the farms identified in the claim forms and not farms identified in the mapping exercise would be included in the Government Gazette. This version is not contradicted by any witness. The belated allegations by Ms Shembe in her confirmatory affidavit put up in reply that

[4] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 62 3 (A) at 634E -635C. *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* [2008] ZASCA 6; 2008 (3) SA 371 (SCA) at paragraph 13

she informed Mr Silaule that certain information in the respondents' answering affidavit was incorrect are inconsistent with the minutes of the relevant meeting and was not made in the founding papers where they would have been subjected to scrutiny in the answering papers.

[29] The appellant alleges that Mr Silaule omitted to annex the third page of the minutes of the meeting of 2 March 2005, which allegedly, indicates that no resolution was taken. From the context of the minutes it appears that after dealing with the matter of the properties omitted from the claim, the discussion reverted to the purpose of the meeting, namely, the conflicting claims between the Gumbi and the Myeni communities concerning the Farm Avonstond. It is to this farm that Mr Myeni suggested a field visit so that both communities could point out beacons to resolve the conflict.

[30] It follows that the allegations raised by the respondents have not, on genuine and bona fide grounds, been disputed and must thus carry the day.

[31] The appellant claims that it became aware of the publication of its claim in the Government Gazette by chance only on 8 September 2016 when its attorney overheard a conversation about the transfer of the Farm Gumbi 2. This assertion is not credible because its attorney was already at that time acting for the community and was well-versed with the facts of the claim at that time.

[32] In any event, the appellant would have become aware of the gazetting of the properties when its other claim concerning the Overwin No 163 was negotiated and finalised on 24 January 2007. The appellant was made to

understand that the part-settlement of their claim was phase 1 and that phase 2 dealing with the remaining two properties mentioned in the claim form, Avonstond and Morgenstond, would be dealt with later as the owner had objected to the claim.

[33] In *Makhuva-Mathebula Community v Regional Land Claims Commissioner, Limpopo and Another*[5] a review of the RLCC's decision was brought on the basis that the RLCC did not include the more extensive land described in the map attached to the claim form but published the claim on the basis of information contained in paragraph 1.1 of the claim form. The issue was determined by reference to whether the RLCC had failed to apply his mind when refusing to add these farms to the claim. This Court concluded that in publishing the claim on the face value understanding that the properties claimed were those listed in paragraph 1.1 of the claim form, the RLCC applied his mind in accordance with the Restitution Act and acted rationally in so doing.

[34] *In Minaar NO v Regional Land Claims Commissioner for Mpumalanga and Others*,[6] the decision of the RLCC to publish a notice in the Gazette in respect of all subdivisions of Daisy Kopje farm and not confine the publication to Portion D only was set aside on review. The LCC held that as no claim as required by s 2(1)(e) was lodged in respect of the other portions, the RLCC had no power to include unclaimed portions of Daisy Kopje as part of the claimed land.

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[5] *Makhuva-Mathebula Community v Regional Land Claims Commissioner, Limpopo and Another* [2019] ZASCA 157.
[6] *Minaar NO v Regional Land Claims Commissioner for Mpumalanga and Others* [2006] ZALCC 12.

[35] In the present case, the RLCC relied on the accurate property descriptions in paragraph 1.1 of the claim forms, which is a primary source of information which is required to gazette a claim. Inkosi Myeni well knew the area of land his community occupied when they were dispossessed. He did not mention the additional 28 disputed properties listed in the amended notice of motion when he completed the claim form.

[36] The RLCC applied her mind to the precise location and extent of the land identified in the claim form as appears from the various validation reports and the case reports which are a result of investigations regarding the history of the communities' residence and forced removal from the land. The appellant was afforded a procedurally fair opportunity to respond before the publication of the notice as appears from the minutes of the meeting of 2 March 2005. The RLCC acted as a reasonable decision-maker.[7]

[37] That being so, the appellant has failed to establish a legally cognisable ground of review upon which the decision under challenge could have been set aside. It follows that the LCC correctly dismissed the community's application, and therefore, this appeal cannot succeed.

Order

[38] In the result the following order is made:

The appeal is dismissed with costs, such costs to include those consequent upon the employment of two counsel.

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[7] *Batho Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* [2004] ZACC 15; 2004 (4) SA 490 (CC) para 44.

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K MATOJANE

ACTING JUDGE OF APPEAL

Appearances

For appellant:	M Naidoo SC
Instructed by:	Maseko Mbatha Inc., Durban
	Phatshoane Henney Attorney, Bloemfontein
For respondents:	A Dodson SC (with him P Naidu)
Instructed by:	State Attorney, Durban
	State Attorney, Bloemfontein