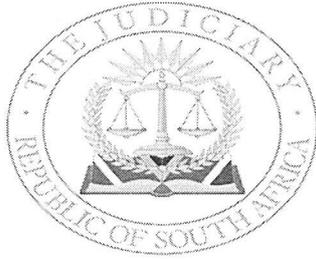


REPUBLIC OF SOUTH AFRICA



**IN THE LAND CLAIMS COURT OF SOUTH AFRICA
HELD AT RANDBURG**

CASE NO: LCC194/2013

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: YES/ NO
(2)	OF INTEREST TO OTHER JUDGES: YES/ NO
(3)	REVISED: YES/NO
	11 July 2023
..... SIGNATURE DATE

In the matter between:

TSHAKUMA COMMUNITY TRUST

First Applicant

MUKANDANGLAWO WILBERT MADZIVHANDILA N.O.

Second Applicant

and

**REGIONAL LAND CLAIMS COMMISSIONER FOR
THE PROVINCE OF LIMPOPO**

First Respondent

CHIEF LAND CLAIMS COMMISSIONER

Second Respondent

MINISTER OF THE DEPARTMENT OF RURAL

Third Respondent

DEVELOPMENT & LAND REFORM

THE DOMBO COMMUNITY

Fourth Respondent

MARTIN JOHN DOMBO N.O.

Fifth Respondent

RATSHILUMELA JOHN DOMBO N.O.

Sixth Respondent

This judgment was handed electronically by transmission to the parties' representatives by email. The date and time for hand down is deemed to be at 16h00 on the 11th July 2023

JUDGMENT

NCUBE J

Introduction

[1] This is an application for a review. The applicants seek a review and setting aside of the decision of the Regional Land Claims Commissioner, ("RLCC") Limpopo, to accept and approve the land claim lodged by the fourth respondent ("the Dombo Community"). The fourth, fifth and sixth respondents oppose the application. The RLCC and other two Government respondents do not oppose the application and did not file answering affidavits, but they filed Heads of Argument. Mr Seneke, Counsel for Government respondents made submissions which were largely in support of the Dombo Community.

Background Facts

[2] On 31 May 1995, Mr Butshiba Daniel Dombo, lodged a claim with the RLCC for the restitution of land rights under the Restitution of Land Rights Act, Act No 22 of

1994 (“the Act”). The claim was lodged on behalf of the Dombo Community. The claimed land was described in the claim form as the “Luvubu Dandani Ha Dombo Zoutpansberg District”. On 06 January 1998, Paramount Chief Andries Mashungu Madzivhandila, lodged a claim for the restitution of land rights with the RLCC on behalf of the Tshakuma Community (“the Tshakuma Community”). The land claimed by the Tshakuma Community was described in the Addendum to the land claim form as follows: -

1. “BAROTTA 17- 1 Lt
2. TSAKOMA 18- Lt
3. VALETTA 16- Lt
4. PORTIONS OF LEVUBU 15 Lt
5. PORTIONS OF LAATSGEVONDEN 19 + 20 Lt
6. PORTIONS OF ENTABENI 251 Mt”

[3] The Tshakuma Community Claim was investigated by the RLCC and found complaint with the Act.¹ The Tshakuma Community Claim was approved by the RLCC and published in the Government Gazette.² The same land claimed by the Tshakuma Community was also claimed by the Dombo Community. Clearly the RLCC was dealing with competing claims. Some of the properties claimed by the Dombo Community were already restored to Tshakuma Community. Consequently, the RLCC facilitated agreement between the two communities to solve the problem as provided for in the Act.³ The agreement was reached between the two communities. The

¹ Section 2 there of

² Notice 1528 of 2000 Government Gazette No 21074 dd 7 April 2000

³ Section 14 (3)

agreement was to merge the two claims into one claim under the Tshakuma Community land claim.

[4] Pursuant to the merger, the Tshakuma Community established and registered a Trust (“Tshakuma Community Trust”) which was going to acquire and administer the restored land. The trustees were elected from both Tshakuma and Dombo Communities. According to the letter of authority, there were going to be twelve (12) trustees, eight (8) from Tshakuma Community and four (4) from Dombo Community. Trust funds were later misappropriated and as a result, two of the trustees from the Dombo Community were suspended. Subsequent to the suspension of the trustees belonging to the Dombo Community, the Trust received a letter from the Dombo Community wherein all the Dombo representatives in the Tshakuma Community Trust were withdrawing from the merger agreement. The RLCC appointed a mediator to resolve the problem. The mediation process failed. The Dombo Community revived its original land claim.

[5] The RLCC investigated the Dombo Community Claim and found it to be compliant. The Dombo Community Claim was researched by Gloria Ratshitanga, (“Miss Ratshitanga”) who was RLCC’s project co-ordinator. Miss Ratitshanga recommended to the RLCC to accept and approve the Dombo Community Claim. She further recommended that the Dombo Community be awarded portions of the farm Levubu 15 LT and that the RLCC had to negotiate with the Dombo Claimants with regard to those portions already restored to Tshakuma Community. Finally, Miss Ratitshanga recommended to the RLCC to approve the amendment of Gazette No 21074 of 2000, so as to include the Dombo Community and “*withdraw those which*

were gazetted to Tshakuma erroneously.” I think she meant those portions which she says were erroneously gazetted to Tshakuma. The recommendation is dated 14 September 2012.

[6] The RLCC, Mr Lebjane Maphutha, took a decision to accept and approve Miss Ratitshanga’s recommendations and he published the Dombo Community Claim in Notice No 899 of 2012, published in Government Gazette No 35831 dated 2 November 2012. In that publication, it is indicated that fifteen (15) properties are currently owned by the Tshakuma Community Trust. Those properties have already been restored to the Tshakuma Community. These are the properties which Miss Ratitshanga recommended that they be taken away from Tshakuma Community since, according to her, they were erroneously restored to the Tshakuma Community.

Issues

[7] The main issue for the determination is whether the decision by the RLCC to accept and approve the recommendation of Miss Ratitshanga is reviewable. If the decision is found to be reviewable, whether the decision was valid, rational and in accordance with the prescripts and the law. The final and in my view, the most important issue is the status of the settlement agreement to merge the claim of the Dombo Community with that of the Tshakuma Community and other competing claimants. Mr Whittington, Counsel for the Dombo Community, is of the view that the decision of the RLCC is not reviewable since it was an internal process. That view is shared by Mr Seneke who insists that the applicants should have attacked the publication of the Dombo Community Claim and not Miss Ratitshanga’s report which is the internal process.

[8] I agree with Mr Matumba, Counsel for the Tshakuma Community, that the publication of the Dombo Community Claim was, an ultimate manifestation of the decision to accept and approve Miss Ratitshanga's recommendation. Based on the recommendation by Miss Ratitshanga, the RLCC found that the Dombo Community Land Claim was compliant and the RLCC took a decision to cause that claim to be published in the Gazette for the public to know about the existence of that Land Claim. Therefore, it is not correct to characterise Miss Ratitshanga's recommendation as a mere internal process which cannot be challenged. Miss Ratitshanga's report, is the basis on which the RLCC's decision to cause the Dombo Community Land Claim to be published in the Gazette, is founded.

The Law

[9] The starting point is section 11(1) of the Act. That section provides:

“Procedure after lodgment of claim

- (1) If the regional land claims commissioner having jurisdiction 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, he or she shall cause notice of the claim to be published in the Gazette and in the media circulating nationally and in the relevant province, and shall take steps to make it known in the district in which the land in question is situated.”

It will be noted that section 2 entitles a person or community, which was dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices to restoration of that right. The claim is lodged with the RLCC. The RLCC is required to investigate the merits of the said claim and determine if the claim is not precluded by the provisions of section 2 and whether it is not frivolous or vexatious.

Once the claim is accepted, it will be published in the Gazette. After the publication, the claim is further investigated. It is important to note that the purpose of further investigation is with a view of either reaching a settlement⁴ or if no settlement is reached, to refer the claim to the Land Claims Court for adjudication. I shall later deal with this point further in this judgment.

Discussion

[10] The starting point of exercise is the Constitution. One of the founding principles of our law is the Supremacy of the Constitution.⁵ The Constitution is the supreme law of the Republic. Law or conduct⁶ which is inconsistent with the Constitution is invalid and the obligations imposed by the Constitution must be fulfilled. The Constitution guarantees everyone the right to administrative action that is valid, reasonable and procedurally fair.⁷ The parliament is enjoined in terms of the Constitution, to enact legislation to give effect to the Constitutional right to just administrative action and such legislation must make provision for the review of administrative action by the court.⁸

[11] Pursuant to the Constitutional imperative,⁹ parliament enacted the Promotion of Administrative Justice Act¹⁰ (PAJA). PAJA provides that administrative action materially and adversely affecting the rights or legitimate expectations of any person must be procedurally fair¹¹. The court will review an administrative action if the administrator who took the action amongst other things, took irrelevant considerations

⁴ My own emphasis

⁵ Section 1 of the Constitution of the Republic of South Africa Act 108 of 1996

⁶ My own emphasis

⁷ Section 33 (1) of the Constitution

⁸ Section 33 (3) (as) of the Constitution

⁹ Section 33 (3) of the Constitution

¹⁰ Act 3 of 2000

¹¹ Section 3

into account or if he or she did not consider the relevant factors. In ***PG Group Ltd and Others v National Energy Regulator of South Africa and Another***¹² Leach JA said:-

“It is a fundamental requirement of administrative law that an administrative decision must be rational. This is entrenched in Section 6 (2) (f) (ii) of PAJA which provides for an administrative action being reviewable if it is not rationally connected, *inter alia*, to the purpose for which it was taken, the purpose of the empowering provision, or the reason given for it by the functionary who took it. Administrative action is also reviewable under PAJA if ‘it is one that a decision maker could not reach’ – see *Bato Star Fishing v Minister of Environmental Affairs* 2004 (4) SA 490.”

[12] As stated earlier in this judgment, investigation of a land claim is with a view to either reach a settlement or to refer the Claim to the Court for adjudication. In my view, the RLCC committed a gross irregularity by investigating a claim which did not exist anymore. The Dombo Community land claim had been merged with other claims and it came under the umbrella of the Tshakuma Community Trust. Some of the members of the Dombo Community became members of the Board of Trustees under the Tshakuma Community Trust. Members of the Dombo Community became beneficiaries under the Tshakuma Community Trust. After the merger, the Dombo Community land claim was settled by agreement between the parties. There was nothing further to investigate. There were no competing claims anymore. There was no longer any *lis pendens* between the parties. The dispute had been settled by agreement between the parties.

[13] The RLCC could not resuscitate a land dispute that had already been settled by agreement between the parties. If there was a dispute after the merger, it was not

¹² 2018 (5) SA 150 (SCA) at para 40

a dispute between the competing land claimants but it was a dispute between the trustees, which had to be resolved in terms of the Trust Deed. In *Eke v Parsons*,¹³ Madlanga J expressed himself in the following terms:-

“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).”

In *Gollah and Gomperts v Universal Mill Produce Co (Pty) Ltd*,¹⁴ the court found that the effect of a compromise is the same as *res judicata* on a judgment given by consent. I am mindful of the fact that *in casu*, the settlement agreement was not made an order of court but that agreement is still binding between the parties as it has not been challenged by any of the parties and it has not been set aside by a competent court of law. The agreement resulted into the establishment of a Trust for the benefit of all members including those of the Dombo Community. The agreement still stands repetition done (*ex abundanti cautela*).

[14] The claimed land has been restored to the beneficiaries of the Tshakuma Community Trust which includes members of the Dombo Community under the Umbrella of the Tshakuma Community Trust. It cannot happen that the same piece of land be restored twice to the same community. The other disturbing feature of Miss Ratitshanga’s report is that she recommends that properties restored to Tshakuma Community should be withdrawn as they were restored erroneously. This is a

¹³ 2016 (3) SA 37 (CC) para 31

¹⁴ 1978 (1) SA 914 (A) at 922 (H)

contradiction. The RLCC investigated the Tshakuma Land Claim and found it compliant with legislation. The land claim was then published in the Gazette and was ultimately restored. The same RLCC now says it committed an error in approving the Tshakuma land claim. That publication still stands as it has not been set aside. The fact remains that when the parties agreed to merge their claims and entered into a settlement agreement, giving rise to the establishment of the Tshakuma Trust, that was the end of the matter.

[15] The Dombo Community now alleges that the settlement agreement is not enforceable because it was not certified by the RLCC in terms of section 14 (3) of the Act. They cannot raise this point at this stage. They freely and voluntarily entered into the settlement agreement which they were happy with. They cannot approbate and reprobate. The RLCC facilitated the settlement agreement, it came into existence with his approval, a written certification was going to be a mere formality. The settlement agreement remains valid until set aside.

[16] I am told the Dombo Community Claim has been referred to court for adjudication. I do not know how that court will deal with the issue of the existing settlement agreement and the land which has already been restored and payment made to erstwhile land owners in purchase of that land. In my view the aggrieved trustees who resigned must consider renewing their membership. They are still trustees in terms of the Letter of Authority.

Conclusion

[17] I conclude that the acceptance, approval and subsequent publication of the Dombo Community Claim was irregular and is liable to be review as set aside.

Costs

[18] Applicants seek costs from the RLCC on the basis that the RLCC intentionally accepted and approved a land claim which had been merged and settled. The practice in this court is not to award costs in the absence of special circumstances.¹⁵ The RLCC did not oppose the review application but their views as interested party were indeed helpful. There are no special circumstances in this case which warrant an award of costs.

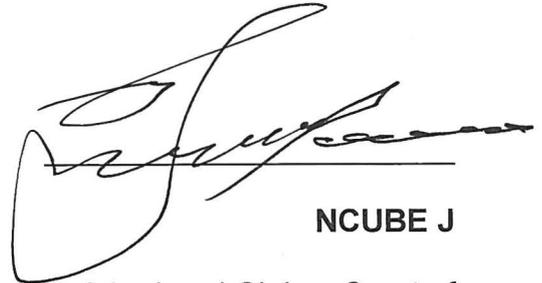
Order

[19] In the result, I make the following order: -

1. The decision of the Regional Land Claims Commissioner, Limpopo to accept and approve the recommendation of Miss Ratitshanga, contained in her report dated 14 September 2012 is reviewed and set aside.
2. The decision of the Regional Land Claims Commissioner, Limpopo to cause publication of the Dombo Community Claim in Notice No 899 of 2012, contained in Government Gazette No 35831 of 2 November 2012 is reviewed and set aside.

¹⁵ Hurenco Boedery (Pty) Ltd v regional Land Claims Commission Northern Cape and Another 2003 (4) SA 280 (LCC) at 281 G-282D

3. There is no order as to costs.



NCUBE J

Judge of the Land Claims Court of

South Africa, Randburg

Appearances

For Applicants: Mr Matumba, TE

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Instructed by: c/o The State Attorney

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Bloemfontein

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Date of hearing: 4 May 2023

Date judgment delivered: 11 July 2023