

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

***Constitutional Court Case No. 42/07
Supreme Court of Appeal Case No.553/05***

In the matter between:

M M MPHELA AND 217 OTHERS

1st – 218th Applicants

and

HAAKDORINGBULT BOERDERY CC

First Respondent

***PETRUS JACOBUS BEZUIDENHOUT N.O
(in his capacity as trustee of the
BEZUIDENHOUT FAMILIETRUST)***

Second Respondent

***JANETHA CHRISTOFFELINA
BEZUIDENHOUT N.O (in her capacity as
trustee of the BEZUIDENOUT FAMILIETRUST)***

Third Respondent

***JACOBUS ADRIAAN VAN STADEN N.O
(in his capacity as trustee of the
BEZUIDENHOUT FAMILIETRUST)***

Fourth Respondent

***FRANCOIS JOHANNES FURSTENBURG N.O
(in his capacity as trustee of the
F & S FURSTENBURG FAMILIETRUST)***

Fifth Respondent

***SUSANNA FRANCINA FURSTENBURG N.O
(in her capacity as trustee of the F & S
FURSTENBURG FAMILIETRUST)***

Sixth Respondent

***MINISTER OF AGRICULTURE AND LAND
AFFAIRS***

Seventh Respondent

SEVENTH RESPONDENT'S HEADS OF ARGUMENT

INTRODUCTION

- 1 These heads of argument are submitted on behalf of the seventh respondent, the Minister of Agriculture and Land Affairs (to whom we shall, for convenience, refer in these heads as "*the Minister*").

- 2 These heads have been submitted late and there is accordingly an application for condonation of the late filing thereof.

- 3 The role which the Minister seeks to play in this matter is a limited one. The Minister seeks to present brief submissions on a few of the aspects raised in the appeal¹ which have wider implications at a policy and administration level. The main issue relates to the return of compensatory land in the event of a restitution. The Minister wishes also to make brief submissions in relation to the issue of just and equitable compensation. The Minister's submissions in this

¹ The Minister does not oppose the application for leave

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regard will not deal with the specific facts of this matter. Indeed, the Minister takes no active part in the determination of the appeal insofar as the facts of this specific matter are concerned. Her submissions will instead be confined to the specific issues which have wider implications in the general handling of restitution claims for which the Minister, her Department and the Commission on Restitution of Land Rights are responsible.

- 4 Comprehensive heads have been filed on behalf of both the applicants and the first to sixth respondents. In respect of the broad issues canvassed in these heads for the Minister, the Minister is in broad agreement with the submissions made on behalf of the applicants in their heads of argument. The Minister's heads will not repeat or traverse in any detail the submissions made on behalf of the applicants. These heads will be confined to making submissions which complement those advanced in the heads for the applicants, and deal only with those aspects which have relevance in the wider context.

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5 The format of these heads will be as follows:

- The framework of the Constitution and the Restitution of Land Rights Act insofar as it affects private landowners whose properties are the subject of restitution claims.
- Observations regarding the role of the Minister in the process to be followed in respect of claims for restitution of land rights;
- The question whether compensatory land should be returned in the event of a restitution order;
- The test for just and equitable compensation;
- Whether the State is entitled to waive its right to claim the return of compensatory land;

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- Whether the Supreme Court of Appeal was correct in its approach, which in effect created a *lis* between parties (the claimants and the State) who do not have a dispute insofar as it has referred the issue of over-compensation to the Land Claims Court for adjudication.
- Whether restitution can be divorced from other land reform objectives such as tenure reform and redistribution

THE FRAMEWORK OF THE CONSTITUTION AND RESTITUTION OF LAND RIGHTS ACT INSOFAR AS IT AFFECTS PRIVATE LANDOWNERS WHOSE PROPERTIES ARE UNDER RESTITUTION CLAIMS

6 S 25(7) of the Constitution provides the basis for restitution of land rights to individuals or communities who have been dispossessed of property as a result of racially discriminatory laws or practices.

7 The Restitution of Land Rights Act 22 of 1994 (“*the Restitution Act*”) is the legislative framework which gives effect to the Constitutional

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imperative for restitution to be effected.

8 The Restitution Act provides for various mechanisms and structures through which the constitutional imperative of restitution is to be given effect. These structures are the Commission on Restitution of Land Rights, the Minister of Land Affairs and the Land Claims Court.

9 S 2 of the Restitution Act provides the basis for claims for restitution of land rights to be made.

10 S 42D and 35 provide the framework for relief to a claimant who has made a claim in terms of s 2 of the Restitution Act.

11 It is apparent from s 42D and 35 that the State is required and obliged to fulfil the requirement for restitution once a claimant has satisfied the requirements of s 2 of the Restitution Act.

12 Section 35(1) provides for land to be acquired or expropriated to satisfy the need for restitution. This provision affects private landowners whose land is the subject of a claim.

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- 13 S 25(1) of the Constitution provides that no one may be deprived of property except in terms of law of general application and no law may permit arbitrary deprivation of property. S 25(2) of the Constitution permits expropriation of land for a public purpose or in the public interest provided that compensation is paid. Such compensation is required by s 25(3) of the Constitution to be just and equitable.
- 14 S 25(4) of the Constitution provides that the public interest includes the nation's commitment to land reform and to reforms to bring about equitable access to all of South Africa's natural resources.
- 15 S 42E of the Restitution Act provides for expropriation of property to fulfil the objectives of restitution. S 42E mirrors s 25(3) of the Constitution in relation to the compensation which the affected land owner is entitled to receive once his or her property has been expropriated.
- 16 The above analysis shows how the Constitution is intertwined with the Restitution Act and the extent to which the interests of private landowners are catered for by the Constitution and the Restitution

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Act. It is clear from the Constitution and the Restitution Act that once a claimant has established a proper basis to claim restitution in the form of restoration, the State is obliged to acquire that land either through agreement or expropriation. The land in question may be the subject of a claim or it may be any other land which is required for restitution purposes.² It follows that there is even more reason to acquire or expropriate land which is privately owned and directly affected by a claim.

17 The scheme of the Restitution Act does not entitle a private landowner to dictate the form of relief to which a claimant may be entitled. The landowner's interest relates mainly to whether he or she has received just and equitable compensation when his or her land is being acquired for restitution purposes.

THE ROLE AND INTEREST OF THE MINISTER AND THE STATE

18 The Restitution of Land Rights Act 22 of 1994 (*“the Restitution Act”*) is an important piece of legislation, enacted in the new constitutional

² S 42E(1)(b)) of the Restitution Act

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era, to give effect to the entitlement of a person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices, either to restoration of that property or to some other form of equitable redress. This right is guaranteed - as part of the fundamental rights in Chapter 2 of the Constitution³ - in s 25(7) of the Constitution.

- 19 The State has an important role in ensuring that land claims are resolved speedily and on the basis of justice and equity.
- 20 Restoration of the land of which claimants have been dispossessed will frequently be a fair and just form of restitution to resolve a land claim. Restoration of land must be feasible. It may not be feasible where the land claimed may have substantial agricultural or other operations which benefit the interests of the country as a whole. Creative solutions may in appropriate circumstances be found, such as the formation of partnerships between current land owners, the claimants and the State, with a view to ensuring that farms continue

³ Constitution of the Republic of South Africa, 1996

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to operate as going concerns, while providing appropriate redress for deserving claimants.

21 The Court has wide powers under s 35 of the Restitution Act, which include the power to determine conditions to be fulfilled before a right in land can be restored or granted to a claimant.⁴ This entitles the Court, in appropriate circumstances, to play a supervisory role in ensuring that the land to be restored will be properly utilised.

22 The State has an important role to ensure that the process after settlement of a claim on the basis of restitution will involve the necessary support in the form *inter alia* of grants to beneficiaries, and assistance from other organs of state such as the Department of Agriculture as well as local government. A program referred to as the “*Comprehensive Agriculture Support Program*” is being implemented by the Department of Agriculture in this regard.⁵

⁴ S 35(2)(a) of the Restitution Act

⁵ Progress Report on the Implementation of the Comprehensive Agriculture Support Program of the Department of Agriculture, May 2004, Record Vol 15, from p 1288

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23 The State must consider all implications of a proposed restitution. These include not only the implications for the current owners and occupiers of the land which is claimed, and the productive uses to which such land may have been put, but also implications for the community that are to be resettled, particularly where they are currently occupying other (compensatory) land. That is the issue to which we now turn.

RETURN OF COMPENSATORY LAND

24 In the present matter, in the Land Claims Court, *a quo*, the State did not raise any contention, by way of counterclaim or otherwise, to the effect that the compensatory land received by the present claimants, being the farm Pylkop, should be returned in the event of the claimants being restored to the relevant portion of the farm Haakdoringbult.

25 The position of the State remains that return of the compensatory land in this matter is neither necessary nor appropriate in the circumstances.

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26 This is consistent with the general approach of the State - although there may be exceptional circumstances which militate in favour of the return of land in a particular case. Other cases in which the general approach has been followed include the *Makuleke Community* matter,⁶ the *Mayibuye* matter,⁷ the *Kranspoort* case⁸ and the *Macleantown* matter.⁹ There are sound policy reasons why the State is reluctant in general to insist on the return of compensatory land. There are a number of factors relevant in this regard.

27 In the first place, little purpose would be served in the cause of advancing land reform if the State were to insist on the return of so-called “*compensatory land*”. The Constitution requires, in s 25 (4), that the State ensure that steps are taken to bring about equitable access to all of South Africa’s natural resources. There is a clear constitutional objective to redistribute land, in accordance with a fair and equitable system, to redress the disproportionate ownership of

⁶ *Maluleke Community re Pafuri Area of the Kruger National Park and Environs, Soutpansberg District Northern Province* – unreported judgment of the Land Claims Court Case No 90/98 15 December 1998

⁷ *Ex Parte Mayibuye : In re Sub 121, Farm Trekboer* (1998) 4 All SA 604 (LCC)

⁸ *In re Kranspoort Community* 2000 (2) SA 124 (LCC)

⁹ *In re: Macleantown Residents Association* 1996 (4) SA 1272 (LCC)

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land distorted by the previous apartheid system. This objective is advanced if a community which succeeds in a land claim and has its former land restored is allowed in addition to retain the compensatory land, rather than simply being moved from one farm to another.

28 In the second place, where restoration of the dispossessed land is appropriate, it is wrong to assume that every one in the community will be interested in going back to the restored land. Frequently, this is not the case. Some members of the community may wish to stay where they are on the so-called compensatory land. It must also be borne in mind that the population of the claimant community will typically have grown substantially and in many instances they share the compensatory land with other people who may not be part of the same claimant community. Some members of the claimant community may have set down roots on the compensatory land and may find it difficult to leave it. Frequently, the compensatory land has been developed with infrastructure such as schools, community clinics, irrigation systems and other facilities and resources. These may not be present or available or suitable on the land to be

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restored.¹⁰

29 To demand the return of the compensatory land is therefore likely to cause serious social disruption, which cannot be in the public interest. It would potentially require a process of resettling the affected people, in some cases against their will. Particularly in view of the sensitivities of our history of forced removals under the apartheid system, this would be highly undesirable.

30 If compensatory land had to be returned, communities in many cases would face a stark dilemma : move to the restored land but face enormous disruption because of the move or stay on the compensatory land, and forfeit the land which is claimed. In many cases, members of claimant communities would not want to leave the compensatory land because of the resources and links established there. They might then feel induced to forfeit their claim to the restored land. In that event, the primary objective underlying land restitution would be frustrated.

¹⁰ These factors were considered in the judgment of the Court *a quo* in the present matter : Vol 19, p 1646, paragraph 9

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31 Because of the previous system of dispossession of land on the grounds of race, communities such as the one in the present matter have developed important associations with both the land from which they were dispossessed and, after they were moved, with the compensatory land where they have resettled. A just and equitable system of land restitution must take into account not only the association of the community with the land from which they were dispossessed, but also the links developed later with the compensatory land. It would generally not be just and equitable to displace the community from the latter land to which they have important links by requiring them all - including those who are unwilling - to move to the original land which is restored to them.¹¹

32 It is important to note that the mechanism for the resolution of a land claim provided by s 38B of the Restitution Act - which was invoked in the present matter - is not the only mechanism for the resolution of such claims. In all, there are three mechanisms, as follows:

¹¹ *Khosis Community Lohatla and Others v Minister of Defence and Others* 2004 (5) SA 494 (SCA)

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- The first mechanism, provided for in s 38B of the Restitution Act, involves the bringing of claims by the affected claimants directly to the Land Claims Court. This would typically be the case where a claimant feels frustrated by lack of progress on the part of the Department in processing the claim;
- S 42D provides for a different – the second - mechanism, through an administrative process. It gives the Minister the power, where she is satisfied that a claimant is entitled to restitution of a right in land, and that the claim qualifies, to enter into an agreement with interested parties providing for the award of the land or a portion thereof or right therein, the payment of compensation or both and the various terms and conditions which may be appropriate. This mechanism does not involve any referral to the court or any judicial determination of the claim;

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- The third mechanism is that provided by s 14 of the Restitution Act, which applies where the Commission has undertaken an investigation of a claim which cannot be settled by mediation and negotiation. The Regional Land Claims Commissioner then refers the claim to the Land Claims Court.

33 The vast majority of claims are resolved administratively by the Minister in terms of s 42D (the second mechanism referred to above)

34 In exercising her powers under s 42D, the Minister is required to consider essentially the same factors as are considered by the Commission in its investigation and by the Land Claims Court if the matter is referred to it under s 14 or s 38B of the Restitution Act.

35 In dealing with matters for determination under s 42D of the Restitution Act, the Minister generally does not require the return of compensatory land where restitution is awarded to claimants, unless there are exceptional and compelling circumstances. This is

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consistent with the approach of the State where matters are referred to the Court under s 14 or s 38B of the Restitution Act, as referred to above.

36 This approach on the part of the Minister has been adopted for the various reasons set out above, in particular the need to advance greater access by historically disadvantaged communities to land, and the need to avoid the enormous social disruption which would result if compensatory land had to be returned.

37 It is respectfully submitted that this approach is fully justified.

38 To require the return of compensatory land in court proceedings under s 38B (as in the present matter) or s 14 of the Restitution Act would give rise to a serious anomaly : it would mean that claims which fortuitously come to be dealt with through the process under s 14 or s 38B of the Restitution Act will be required to return compensatory land, whereas the vast bulk of claims that are resolved by the Minister under s 42D of the Restitution Act would not require the return of compensatory land, in terms of the current policy and

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practice.

39 It is respectfully submitted that it is neither legally necessary nor appropriate (having regard to the sound policy reasons referred to above) to require the return of compensatory land.

40 In its judgment in the present matter¹² the Land Claims Court considered the issue of the compensatory land - as it was required to do¹³ - but concluded that the claimants were not required to return the compensatory land (Pylkop). It is respectfully submitted that its conclusion in this regard was correct.

JUST AND EQUITABLE COMPENSATION

41 In determining, for purposes of the provisions of s 2(2) of the Restitution Act, whether just and equitable compensation had been

¹² *Mphela and Others v Engelbrecht and Others* (2005) 2 All SA 135 (LCC) at 188 g – 190 j (Vol 21, p 1797 – 1798)

¹³ *Prinsloo and Another v Ndebele-Nduzundza Community and Others* 2005 (6) SA 144 (SCA) paras 52 to 55; *Abrams v Allie NO and Others* 2004 (4) SA 534 (SCA) paras 15 to 27

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received by the claimants in the form of the compensatory land (Pylkop), the Land Claims Court¹⁴ adopted the approach set out in the judgment of Gildenhuis J in the *Baphiring* matter.¹⁵ In terms of this approach “*regard may be had to whether or not the State committed the necessary resources to ensure that the relocation was successful... In this regard it must be assumed that the State’s purpose was to successfully re-establish the affected persons on the compensatory land.*”¹⁶

42 It is respectfully submitted on behalf of the Minister that this approach is the correct one and was rightly followed by the Land Claims Court.

WHETHER THE STATE IS ENTITLED TO WAIVE ITS RIGHT TO CLAIM THE RETURN OF COMPENSATORY LAND

43 As stated above, the Minister has in settlement of various claims in terms of s 42D of the Restitution Act waived the right of the State to

¹⁴ *Mphela and Others v Engelbrecht and Others supra* at 174 h – I (Vol 21, p 1789)

¹⁵ *Baphiring Community v Uys and Others* LCC 64/1998 - unreported judgment 5 December 2003

¹⁶ *Mphela supra* at 174 I (Vol 21, p 1789)

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claim the return of the compensatory land. This is in line with the stated objective of the State to increase access to land by communities which were previously deprived of land rights. This objective would not be achieved if the Minister were required to engage in the sort of exercise which the Supreme Court of Appeal has indicated is required.¹⁷ It does not suffice to merely “*top up*” whatever was allocated to claimants under the discredited system of social engineering through spatial apartheid.

44 The Constitution and the Restitution Act have as an objective to re-engineer and to change the dynamics of historical land ownership patterns which were unfair, inequitable and discriminatory to the majority of the citizens of this country. The land reform programmes which include restitution must play a significant role in reversing the inequities of apartheid. There is a danger that if proper and full constitutional rights are not given effect, this country could find itself in a situation of upheaval and unrest. The comment by Justice Sachs

¹⁷ SCA judgment Vol 21, p 1827 to 1828., paras 43 to 45

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in the *Port Elizabeth Municipality* case¹⁸ that for black people and for Africans in particular dispossession was nine-tenths of the law is apposite in all matters relating to access to land rights.

45 In the matters concerning the communities of Macleantown, Mayibuye I Cremin and Khosis¹⁹ the right of the State to waive its rights was recognised. This accords with the Minister 's approach in settling claims in terms of s 42D.

46 It is submitted that the approach is sound and accords with the constitutional imperative of fostering access to land.

WHETHER THE SUPREME COURT OF APPEAL'S APPROACH WAS CORRECT IN EFFECTIVELY CREATING A LIS BETWEEN PARTIES WHO DO NOT HAVE A DISPUTE INSOFAR AS IT HAS REFERRED THE ISSUE OF OVER-COMPENSATION TO THE LAND CLAIMS FOR ADJUDICATION

47 On the basis of our analysis above of the framework of the Constitution and the Restitution Act, it is submitted that the State's

¹⁸ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 9

¹⁹ *Supra*

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role is to satisfy all claims which are made in terms of the Restitution Act. Once a claim is shown to have merit, appropriate relief must be granted and this will ordinarily take the form of restoration and other ancillary relief.

48 We have, in an earlier section of these heads, outlined the policy process which is exercised by the Minister in settling land claims. A distinction has to be made between urban claims which are predominantly settled by financial compensation, and rural claims, where land accessibility is prominent.

49 The Minister has consciously ensured that land claims in respect of rural land are generally settled by restoration.

50 It is submitted with respect that if the approach of the Minister is not permitted to be followed, because of the judgment of the Supreme Court of Appeal in the present matter, this would not advance the achievement of the fair and equitable resolution of land claims. Nor would it achieve adequate redress for the enormous prejudice suffered by communities such as the applicants.

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51 Due deference should be given to the difficult policy choices made by the Minister in implementing legislation and achieving the constitutional objective.²⁰

WHETHER RESTITUTION CAN BE DIVORCED FROM OTHER LAND REFORM OBJECTIVES

52 Sections 25(5), (6) and (7) of the Constitution provide for land reform in the form of redistribution, tenure reform and restitution. All these three forms of land reform promote access to land and other natural resources.

53 It is submitted with respect that the approach of the Supreme Court of Appeal in differentiating between restitution and redistribution is in respect unjustified and inappropriate and is not consistent with the objectives of the statutory provisions.

54 The true distinction between the three forms which land reform may take merely relates to the manner in which those rights are to be accessed. However, the purpose in respect of all of them is the same

²⁰ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (4) SA 490 (CC) para 48

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– to ensure that access to land is optimised and not compromised.

55 The effect of the ruling by the Supreme Court of Appeal that restitution does not amount to redistribution is to diminish restitution to a lesser status, while the Constitution and the Restitution Act indicate otherwise.

56 S 6(2) (b) of the Restitution Act establishes a clear link between restitution and redistribution, by providing that the Commission on Restitution of Land Rights may make recommendations or give advice to the Minister regarding the most appropriate form of alternative relief for those claimants who do not qualify for restitution of rights in land in terms of the Restitution Act.

57 S 35(4) empowers the Land Claims Court to order restitution of rights in land or to grant a right in alternative state-owned land. That includes the power to adjust the nature of the right previously held by the claimant and to determine the form of title under which the right may be held in future. That is aimed at giving effect to the requirement in s 25(6) of the Constitution that “*a person or community whose tenure of land is legally insecure as a result of past*

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racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secured or to comparable redress..”

58 S 6(2)(b) and 35(4) of the Restitution Act demonstrate that in discharging their functions, both the Commission and the Land Claims Court have also to deal with redistribution and tenure reform, even in the context of restitution.

59 The manner in which the Commission deals with s 6(2)(b) is by recommending acquisition of land for redistribution where a claim for restitution is not sound but the community has a need for access to land.

60 As far as s 35(4) is concerned, the Land Claims Court usually makes an order that the title to compensatory land be adjusted to that of full title ownership - in addition to ordering restoration of the dispossessed land.

61 In *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Services & Another; First National Bank of SA Ltd*

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t/a Wesbank v Minister of Finance,²¹ this Court stated that the provisions of s 25(4) to (9) of the Constitution underline the need for and are aimed at redressing one of the most enduring legacies of racial discrimination in the past, namely the grossly unequal distribution of land in South Africa.

CONCLUSION

62 For the reasons set out above, the Minister supports the relief sought by the applicants.

63 In view of the nature of issues raised in these proceedings and the Minister's limited role, the Minister will not be seeking an order for costs.

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1 October 2007

²¹ 2002(4) SA 768 (CC) para 49

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