IN THE LAND CLAIMS COURT OF SOUTH AFRICA

HELD AT RANDBURG

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED.

4/02/2014 .....

Before: **Canca AJ and Assessor Van Wyk**

CASE NO.: LCC 204/2010

In the matter between:

MOLOTO COMMUNITY	Plaintiff
and	
MINISTER OF RURAL DEVELOPMENT AND LAND REFORM	First Defendant
LUMO BELEGGINGS TRUST	Second Defendant
PETRUS LOURENS JOUBERT	Third Defendant
FERDINANTES WEHELLEMUS BREEDT	Fourth Defendant
JOHANNES STEPHANUS GERHARDUS VENTER	Fifth Defendant
COLLIN LAI	Sixth Defendant

JOHN MSIZA	Seventh Defendant
ABRAHAM CAREL JANSE VAN RENSBURG	Eight Defendant
PIETER JACOBUS STEPHANUS ROBBERTS	Ninth Defendant
JAMES ANDRE ROBERTS	Tenth Defendant
FREDERICK JACOBUS LEONARD BOTHA	Eleventh Defendant
RENTIA KEMP	Twelfth Defendant
HERCULES DAVID FOURIE	Thirteenth Defendant
PAUL BRINK JANSEN VAN RENSBURG	Fourteenth Defendant
PIETER MATHYS BEUKES	Fifteenth Defendant
JAKKALSDANS BOERDERY CC	Sixteenth Defendant
PIETER JOHANNES STRYDOM	Seventeenth Defendant
ANTON RUDOLF LOTTER	Eighteenth Defendant

Matter heard: 26 and 27 November 2018
Judgment: 04 February 2019

JUDGMENT

CANCA AJ

Introduction

[1] This matter was set down for the determination of just and equitable compensation the first defendant, the Minister of Rural Development and Land

Reform ("the Minister"), would be obliged to pay the second, fifth, sixth, ninth, tenth, twelfth, fifteenth, sixteenth and seventeenth defendants ("the landowner defendants") in respect of various properties which the Minister had, in terms of an Order dated 5 June 2017, agreed to acquire from them.

[2] The landowner defendants rejected the compensation offered by the Minister. The rejection culminated in an Order, granted by consent on 24 May 2018, which provides that any dispute, in respect of the compensation payable by the Minister to the landowner defendants, would be adjudicated upon by this Court.

[3] At a hearing held on 24 August 2018, where the trial was postponed to 26 and 27 November 2018, Mr. Notshe, for the Minister, indicated that the Minister (and, possibly the Valuer General) intended to institute an application to set aside the Order granted on 24 May 2018. In response to this, the Court, in an Order granted later that day, set strict time limits regarding the filing of such an application and subsequent affidavits, in respect of the contemplated application.

[4] Neither the Minister (nor the Valuer General) instituted the application referred to above. Rather, Mr. Notshe, at the commencement of the hearing on 26 November 2018, handed the Court a document titled "Notice" to which was attached a schedule setting out the following:

4.1. the description of the landowner defendants' properties;

4.2. the value of each of the properties as determined by the private valuer, who had been retained by the Valuer General to undertake the valuations;

4.3. the value of each of those properties as determined by the Valuer General. These values are exactly the same as those arrived at by the private valuer. Also, the amounts referred to in the document are the same as the offers made by the Minister to the landowner defendants on 1 December 2017, which offers were rejected by them at the beginning of 2018, as recorded in the Order dated 14 May 2018; and

4.4. certain comments by the Valuer General regarding, *inter alia,* the valuation analysis and market value adjustments in respect of those properties.

[5] The Notice which, from the Registrar's date stamp, appears to have been filed at Court only on the morning of the hearing, seeks to convey that the Valuer General has determined the just and equitable compensation for the aforementioned properties. The Notice, in relevant parts, reads as follows:

> *"**BE PLEASED TO TAKE NOTICE** that the first respondent **will** acquire the properties mentioned below and pay the owners thereof just and equitable compensation set out in the column marked "**VALUE OVG**".*
>
> ***PLEASE NOTICE FURTHER** that the amounts mentioned below are based on the valuation determination report issued by the Valuer General in terms of section 12 of the Property Valuation Act, 2014 (Act No. 17 of 2014).*

PLEASE TAKE NOTICE FURTHER *that the first respondent [sic] is bound by the valuation determination report issued by the Valuer General in terms of section 12 of the Property Valuation Act, 2014.*

PLEASE TAKE FURTHER *[sic] take if you are not satisfied with the decision of the first respondent [sic] you are entitled to instituted [sic] application proceedings to set aside his [sic] decision and the valuation determination report on which the decision is based.*

S/NO	Project /Farm/Erf	Private Valuer	Value (R) OVG	Comments
	1. **Ptn 5 of Re of farm Jakkalsdans 243 JR-21. 4133ha**	1. R 1 675 000	1. R1 675 000	**Valuation analysis & Market value adjustment** - All value forming factors in terms of the Property Valuation Act 17 of 2014 were taken into account in arriving at the above recommended value. Therefore the overall value for land and buildings has been adjusted accordingly.
	2. **Ptn 13 of Farm Jakkalsdans 243 JR-21. 4133ha**	2. R 2 200 000	2. R 2 200 000	
	3. **Ptn 12 & 49 of Farm Jakkalsdans 243 JR-21. 42.8329ha**	3. R 3 644 000	3. R 3 644 000	
	4. **Ptn 36 of Re of Farm Jakkalsdans 243 JR-21. 4133ha**	4. R 2 552 000	4. R 2 552 000	**Current Property Status and Conditions**

5. **Ptn 75 of Re of Farm Jakkalsdans 243 JR-21. 4133ha**	5. R 2 064 000	5. R 2 064 000	- **The current use value.** The farm is currently used as a grazing farm and residential purposes. The current value is determined on the basis of current land use. - **History of acquisition** There is no evidence that the property was purchased below market value when the current owner acquired it. The properties were bought in different years by different owners. The properties land uses has always been agricultural, there haven't been any major land use changes. - **Market Value** Sale 6 is the most comparable in terms of extent and date. Adjustments for extent were effected to compare with the subject property.
6. **Ptn 18 of Re of farm Jakkalsdans 243 JR-21. 4136ha**	6. R 1 170 000	6. R 1 170 000	
7. **Ptn 73 of Re of farm Jakkalsdans 243 JR-21. 4133ha**	7. R 2 033 000	7. R 2 033 000	
8. **Ptn 19 of Re of farm Jakkalsdans 243 JR-21.4139ha**	8. R 1 169 000	8. R 1 169 000	
9. **Ptn 63 of Re of farm Jakkalsdans 243 JR-21. 4138ha**	9. R 880 000 (Land Only)	9. R 880 000 (Land Only)	

				All these properties are small holdings and have same uses. Improvements are all average to good. - **Investments/subsidy by state** There were no information found suggesting that there were direct state Investments previously. - **Purpose of acquisition** These properties are being claimed. The acquisition is for land reform purposes, which is public interest.

[6] Section 12 (1)(a) of the Property Valuation Act, No. 17 of 2014 ("the PVA Act") provides that:

"Whenever a property has been identified for-

(a) purposes of land reform, that property must be valued by the Office of the Valuer-General for purposes of determining the value of the property having regard to the prescribed criteria, procedures and guidelines."

[7] Mr. Notshe, submitted that, based on the provisions of section 12(1)(a) of the PVA Act and the definition of value[1] in the PVA Act, which according to him includes just and equitable compensation, the Minister has no other basis for compensating the landowners other than with the values determined by the Office of the Valuer General ("the OVG"). Failure to comply with that determination and to, thereafter, compensate landowners with values other than those determined by the OVG, would result in that compensation being unlawful, so the submission continued.

[8] Mr. Notshe further submitted that the Notice had overtaken the Order granted on 24 May 2018. This is the Order which, as alluded to earlier, provides, in part, that any dispute pertaining to the compensation payable to the landowner defendants would be adjudicated upon by this Court.

[9] It was further argued on behalf of the Minister, as also appears in the Notice, that, if the landowner defendants were unhappy with the Minister's decision, they were at liberty to launch proceedings to have same set aside. Similar proceedings could also be launched in respect of the valuation determination report upon which the Minister's decision was based, so the argument continued.

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[1] Value, for the purposes of section 12(1)(a), according to section 1 of the PVA Act,
"means the value of the property identified for purposes of land reform, which must reflect an equitable balance between the public interest and the interests of those affected by the acquisition, having regard to all relevant circumstances, including the-

(a) Current use of the property;
(b) History of the acquisition and the use of the property;
(c) Market value of the property;
(d) Extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
(e) Purpose of the acquisition."

[10] Mr. Roberts, for the landowner defendants, objected strongly to the Minister's new stance on the matter. He contended that, not only was the Notice not properly before Court, given its late filing, but that it, despite Mr. Notshe's submissions to the contrary, did not and could not "overtake" or nullify a Court Order. The fact that the PVA Act provides for the Valuer General to determine the compensation, did not mean that, once a matter had been referred to this Court for adjudication, the Court's jurisdiction to determine same was ousted, so the contention continued. Mr. Robert cited *Simpson v Selfmed Medical Scheme and Another* 1992 (1) SA 838 (CPD), where it was held that there was a strong presumption against legislative ouster of a Court's jurisdiction, in support of the said contention.

[11] Mr. Roberts contended further that, the failure to bring the contemplated application to rescind the Order of 24 May 2018, where it is recorded that the parties have agreed that the Court would determine the issue of just and equitable compensation, rendered that Order valid and binding on the parties, a state of affairs which would prevail until the impugned Order was set aside or rescinded by the Court, so the contention continued.

[12] Given this turn of events, the Court was obliged to stand the matter down in order to consider, first, whether the Notice was properly before Court. This was in view of the fact that the Notice, on which the Minister's entire argument is based, was only filed at Court shortly before the commencement of the hearing that morning. The Court, not having had sight of the Notice before then, needed an opportunity to consider the implications of the contents of that document.

[13] Second, the Court had to consider whether there was merit in Mr. Notshe's contention that the Notice had, indeed, "overtaken" the Order of 24 May 2018 and whether the PVA Act ousted the jurisdiction of the Court insofar as it pertained to the determination of just and equitable compensation, in circumstances where the Valuer General had made such a determination.

[14] With regard to the issue of whether the Notice was properly before Court, following a short adjournment, I held that, having had sight of the contents of that document, I could not ignore same. Also, although the Notice had only been filed that morning, the Court had, during argument, been informed that the Notice had, in fact, been served on the landowners' attorneys approximately a week before the hearing. In the interest of a speedy resolution of the issues, I decided against adopting a strict legalistic approach to the matter and found that the Notice was, indeed, before the Court.

[15] What was of more importance to the Court, at that stage, was the issue of the alleged ouster of its jurisdiction, as contended for by Mr. Notshe, who, despite having raised this novel argument, failed to support same with heads of argument or any authority.

[16] Mr. Roberts had, for obvious reasons, also not prepared heads of argument. Counsel were then directed to prepare heads, on the issue of whether the Notice had overtaken the Court Order of 24 May 2018 and the alleged ouster of this Court's jurisdiction by the PVA Act, for argument the following day. The Court is grateful for the comprehensive heads of argument prepared at such short notice.

[17] The issue was duly argued on 27 November 2018. This judgment, therefore, only concerns itself with that issue.

Discussion

Is the Court Order granted on 24 May 2018 binding on the Minister?

[18] Once a claim for the restitution of a right in land, instituted in terms of the provisions of the Restitution of Land Rights Act No 22 of 1994 ("the Restitution Act"), has been referred to this Court for adjudication, that claim is subject to the Court's jurisdiction. In such an instance, the Court also has the power to determine or approve the compensation payable to the owner, whose property is the subject of such a claim, upon expropriation or acquisition by the State. See the provisions of sections 22(1) (a) and (b) of the Restitution Act.[2]

[19] When the issue of the compensation payable to the landowner defendants was finally due to be adjudicated upon in November 2018, it had been almost 8 years since this matter came before this Court. During that time various Orders were granted, most with the consent of the parties, including the Minister.

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[2] Sections 22(1)(a) and (b) of the Restitution Act provides that:
"*Land Claims Court*
(1) There shall be a court of law to be known as the Land Claims Court which shall have the power, to the exclusion of any court contemplated in section 166 (c), (d) or (e) of the Constitution –
(a) to determine a right to restitution of any right in land in accordance with this Act;
(b) to determine or approve compensation payable in respect of land owned by or in the possession of a private person upon expropriation or acquisition of such land in terms of this Act...."

[20] The fact that the issue of the determination of the amount of just and equitable compensation payable by the Minister would be left to the Court, absent agreement between the parties, is also recorded in the minutes of a pre-trial telephonic conference held on 2 November 2018. The Minister, in the unexplained failure of Mr. Notshe to partake in the conference, was represented by the State Attorney, Mr. Mathebula, who has been seized with this matter from its inception.

[21] There can, therefore, be no doubt that, in the light of the aforementioned Orders and the contents of the minutes of 2 November 2018, the amount of the just and equitable compensation would be determined by this Court.

[22] Unless a Court Order has been set aside or has been rescinded, such an Order remains valid and binding on all the parties. See *Moraitis Investments (Pty) Ltd v Montic Dairy* 2017 SCA ZA 54, where it was held that:

> *"For so long as the order stood it could not be disregarded. The Constitutional Court has repeatedly said that court orders may not be ignored. To do so is inconsistent with Section 165(5) of the Constitution which provides that an order issued by a court binds all people to whom it applies."*

[23] Having failed to set aside the Order of 24 May 2018, it is in my view, not up to the Minister to now contend that her hands are tied by the provisions of the PVA Act, as submitted by Mr. Notshe. At best for the Minister, the argument advanced on her behalf would have warranted closer attention by this Court had same been made during the contemplated application.

[24] In the light of the above, the Court is of the view that the Minister (and the Commission as well as the Valuer General) has either abandoned such an application or, as has been submitted by Mr. Roberts, acquiesced in that Order. The Minister (and the Commission and Valuer General) is estopped from relying on the provisions of the PVA Act and is therefore bound by the previous Orders and directives issued by this Court in respect of which forum will determine the amount of just and equitable compensation payable to the landowner defendants in this matter.

Does the PVA Act oust the jurisdiction of this Court to determine the amount of just and equitable compensation?

[25] It is insufficient, in my view, for Mr. Notshe, to merely present the Notice and, then to argue, without any authority as a crutch for the argument, that the provisions of the PVA Act trumps the Court's jurisdiction when it comes to the determination of the amount of just and equitable compensation where same has been determined by the Valuer General on the instructions of the Minister.

[26] There is nothing in the PVA Act which supports the argument that section 12 of that Act is authority for the fact that the Notice has overtaken the relevant Orders granted in this matter. The mere fact that the Valuer General is empowered by the aforesaid section of the PVA Act to determine the compensation, does not, *per se,* oust the jurisdiction of this Court to do so. Had that been the intention of the Legislature, it would have done so in specific terms or by implication. See

Robinson v BRE Engineering CC 1987 (3) SA 140 (C) at 141 G-J, where the Court held that:

> *"It is furthermore a well-established rule of statutory construction that there is a strong presumption against legislative ouster or interference with the jurisdiction of courts of law and that a clear legislative provision is required to displace this presumption. Consequently, the curtailment of a court's powers by statutory enactment is not to be presumed in the absence of an express provision or a necessary implication to the contrary therein and any provisions purporting to do so will be stringently construed."*

[27] In the light of the fact that the Court has found that the previous Orders in this matter bind all the parties, it is not necessary, in this judgment, to examine the PVA Act and its impact on the Court's jurisdiction to determine just and equitable compensation, where the Valuer General has also done so.

[28] The argument raised on behalf of the Minister in this regard is disposed of simply on the basis that, there not being *"an express provision or a necessary implication to the contrary", "the curtailment of a court's powers by statutory enactment is not to be presumed"* [3] in this matter, as Mr. Notshe sought to persuade the Court to do.

COSTS

[3] See Robinson, referred to in para [26] above.

[29] The landowner defendants seek a punitive costs order against the Minister. Mr. Roberts contended that such an order should include the costs of senior counsel and the landowners' attorney of record for two days including traveling time and traveling and accommodation costs, as well as the reservation and attendance fee and accommodation costs of the landowners' expert witness, the valuer for two days.

[30] It is now settled that this Court only makes costs orders where there are special circumstances or where a private litigant has obtained substantial success in proceedings instituted against the State. See *Midlands North Reseach Group and Others v Kusile Land Claims Committee and Others* LCC 21/2007 where the issue of costs orders is set out comprehensively by Gildenhuys J. See also the dictum of Sachs J, in *Biowatch Trust v Registrar, Genetic Resources and Others,* 2009 (6) SA 232 (CC) at 247B-C, where the learned Judge states,

> *"... particularly powerful reasons must exist for a court not to award costs against the State in favour of a private litigant who achieves substantial success in proceedings brought against it."*

[31] Notwithstanding the fact that the amounts reflected in the schedule to the Notice are the same as the offers made by the Minister on 1 December 2017 and which were rejected by the landowners shortly thereafter, the Minister only demonstrated her intention to rely on the Notice, a few days before the hearing to the landowners' attorneys and to the Court at the commencement of the hearing. Regard must also be had to the fact that the PVA Act was promulgated as far back

as 1 December 2017. The Minister therefore had ample time to have raised the defense which her Counsel presented at the last minute to his opponent and the Court. I sympathize with the landowners' suspicions that the Notice is an attempt to frustrate and cause them to incur unnecessary costs.

[32] In addition to the above, it is, in my view, appropriate to cite some of the instances which also reveal the generally unsatisfactory manner in which the State has conducted itself in the defense of this matter.

[33] Approximately eight years have elapsed since this matter has been referred to Court and, mostly for the reasons mentioned above, the dispute been the protagonists has still not yet been resolved.

[34] The minutes of a face-to-face pre-trial conference held on 25 November 2011 record that the State Attorney failed to comply with previous directives which required him to ensure that the Acting Regional Land Claims Commissioner, Mpumalanga and the official from the Commission working on this claim would be present at that conference.

[35] The minutes of a telephonic conference held on 13 February 2012 note that the State Attorney had not filed answering papers to an interlocutory application for costs, including costs *de bonis propriis,* launched by the landowner defendants.

[36] The minutes of a conference held on 11 May 2012 reveal that the Commission failed to supply its supplementary affidavits and supplementary referral

documents. It is instructive to note the Presiding Judge's comments at that conference, following a response from the State Attorney that those documents were far from being complete and ready to file.

[37] The minutes record that:

> *"[He] expressed serious concern about it not only being a delay but being a disregard of deadlines previously stated and now apparently extended unilaterally without being granted any extensions. [He] suggested that the other parties may wish to bring applications regarding this disregard for court orders in their own names."*

[38] The minutes of a telephonic conference held on 28 February 2013 reflect that the Commission would be filing an amendment to the notice of referral and that the matter would be heard between 16 and 20 September 2013. A further telephonic conference was scheduled for 13 August 2013 to assess whether the matter was trial ready.

[39] The matter was presumably not ripe for hearing then, as a conference held on 18 September 2014, approximately a year after the matter was due to be heard, set new dates for the hearing. The hearing would now take place as from 11th to 15th May 2015.

[40] A further conference was held on 3 March 2015. Here it transpired that, notwithstanding that funding for the legal representatives of the claimants had

been approved as far back as 2013, none of their invoices had, at that stage, been paid by the Commission.

[41] It would appear from the minutes of a telephonic conference held on17 May 2016 that the Minister had, during all this time, not yet indicated whether the claimant community's claims had been accepted or whether the claimed properties would be restored to them. The matter was, following discussions amongst the parties, then set down for hearing on the 10th to 14th October 2016.

[42] On 11 October 2016, at a face-to-face conference presided over by Judge President Meer, following an extensive ventilation of the issues, a number of directives were issued, aimed mostly at having the matter finally trial ready. These included the following, namely that:

42.1. the Minister should indicate, by not later than 11 November 2016, whether the property owned by the landowner defendants would be purchased. And, in the event that the properties were to be purchased, a valuation report in respect thereto should be compiled and filed by 15 January 2017;

42.2. the Commission appoints a valuer for the claimant community whose report should also be filed by 15 January 2017; and

42.3. setting down the trial for hearing on 13 to 24 February 2017. And if, for some reason, the matter was still not trial ready on those dates, then, the matter would be heard on 5 to 16 June 2017.

[43] A further conference was held on 30 January 2017 from which the following transpired:

43.1. despite having been directed on 11 October 2016 to appoint valuers for the State and the claimant community, the State failed to do so. This resulted in the matter not being trial ready for the dates set for February 2017.

43.2. the State had failed to pay the plaintiff's expert witness timeously (and that it had taken the State more than two years to pay the fees of the claimant communities' legal representatives) despite numerous directives over the past years for the State to ensure that there was adequate funding in place.

[44] As can be seen, this matter has a long and rather unfortunate history which has been characterized by several postponements, various instances of non-compliance by the State with directives issued by the Court and, generally, a disturbing display of hubris by the State's officials.

[45] The Court is, in the light of all of the above, persuaded that the costs sought should be awarded. Moreover, the landowner defendants have achieved success insofar as the issues for adjudication in this hearing are concerned. I find that a costs order, in the manner sought against the Minister, is justified.

[46] In the result, I order as follows:

1. The Court Order dated 24 May 2018 remains binding on the first defendant and has not been negated by the contents of the Notice filed at Court on 26 November 2018.

2. The first defendant is ordered to pay the taxed attorney and client costs of the second, fifth, sixth, ninth, tenth, twelfth, fifteenth, sixteenth and seventeenth defendants ("the landowner defendants"). Such costs are to include the costs of senior counsel and those of the landowners' attorney for two days, including traveling time and traveling and accommodation costs, and the reservation and attendance fee and accommodation costs of the expert valuer, Mr. Ebersohn, for two days.

MP Canca,

Acting Judge, Land Claims Court

I agree.

G van Wyk,

Assessor

Appearances:

For the first defendant: Mr. V. Notshe SC.

Instructed by: The State Attorney, Pretoria (per Mr. S. Mathebula)

For the second to

Seventeenth defendants: Mr. G. Roberts SC.

Instructed by: Cox & Partners, Vryheid (per Mr. B. Van der Merwe)