THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case No: 116/2014
Not Reportable

In the matter between

CHRISTOPHER CHARLES DE MOWBRAY NIEHAUS	**APPELLANT**
and	
THE REGIONAL LAND CLAIMS COMMISSIONER	**FIRST RESPONDENT**
THE CHIEF LAND CLAIMS COMMISSIONER	**SECOND RESPONDENT**
THE MINISTER OF RURAL DEVELOPMENT & LAND REFORM	**THIRD RESPONDENT**
MOSIMA COMMUNITY	**FOURTH RESPONDENT**
MAJADIBODU COMMUNITY	**FIFTH RESPONDENT**
MABULA-MOSIMA COMMUNITY	**SIXTH RESPONDENT**

Neutral citation: *Niehaus v The Regional Land Claims Commissioner & others* (116/2014) [2015] ZASCA 51 (27 March 2015)

Coram: Mpati P, Maya, Cachalia and Bosielo JJA and Van der Merwe AJA

Heard: **12 March 2015**

Delivered: **27 March 2015**

Summary: Restitution of Land Rights Act 22 of 1994 – registered owner of two farms seeking a declarator that there are no land claims lodged with the Land Claims Commissioner in respect thereof – court a quo ordering the Commissioner to publish a notice in terms of s 11(1) of the Act – whether court competent to make such an order.

ORDER

On appeal from: Land Claims Court, Randburg (Loots AJ sitting as court of first instance):

1 The appeal is upheld with costs which shall include the costs of two counsel.

2 Paragraphs 1 and 3 of the order of the court below are set aside.

2.1 The notice, published pursuant to paragraph 3 of the order of the court below, under Government Notice 1044, on 25 October 2013 in *Government Gazette* in respect of the appellant's properties Star 567 LR and Onschuld 568 LR, forming part of Onschuld 551 LR ("the properties") is declared invalid.

3 The matter is referred back to the Land Claims Court for it:

3.1 to afford all the respondents an opportunity to address the court on the question of whether or not the fifth respondent (or any other person) had, prior to 31 December 1998, lodged any valid claims in terms of s 10 of the Restitution of Land Rights Act 22 of 1994 against the properties;

3.2 and consider any other issues properly raised in the papers before court;

4 The first and second respondents are ordered to pay the costs of the hearing on 25 April 2013.

JUDGMENT

Bosielo JA (Mpati P, Maya, Cachalia JJA and Van der Merwe AJA concurring):

[1] This is an appeal against a judgment by Loots AJ in the Land Claims Court, Randburg granted on 6 September 2013. The appeal is with the leave of the court below. The order of judgment which is the subject of this appeal reads:

'1. The application is dismissed.

2. The notice published by the first respondent in terms of s 11A(4) [the Restitution of Land Rights Act 22 of 1994 (Restitution)], being Government Notice No. 343 in *Government Gazette* 36307 dated 5 April 2013, is hereby set aside.

3. The first respondent is ordered to publish, within 30 days of the date of this order, notice in terms of s 11(1) of the Restitution of Land Rights Act 22 of 1994 of the fifth respondent's claim in respect of the applicant's two farms and to give notice that Government Notice No. 343 in *Government Gazette* 36307 dated 5 April 2013 has been set aside by this court.

4. No order is made as to costs.'

[2] This matter has had a long and chequered history, depicting a sad picture of administrative ineptitude on the part of first respondent. The background facts which led to this protracted litigation can be broadly set out as follows. The appellant is the registered owner of two farms, to wit, Star 567 LR and Onschuld 551 LR, a consolidation of Portion 3 of Eyzerbeen 553 LR and Onschuld 568 LR as disputed on consolidated title deed number T146587/02. He conducts game farming on the two farms in Limpopo (the properties).

[3] During or about February 2006, the appellant obtained a copy of Notice 411 of 2005, published in GG 27352, 11 March 2005 to the effect that the Majadibodu Community (the fifth respondent) had lodged land

claims over certain property in Limpopo. The properties did not appear in that notice. As the appellant had received an unconfirmed report that there may be land claims over the properties he instructed a firm of attorneys to seek confirmation in writing from the Regional Land Claims Commissioner. But despite repeated requests, no reply was forthcoming. As a result, the appellant served a request for information on the Commissioner in terms of the Promotion of Access to Information Act 2 of 2000 (PAIA) on 10 August 2006. The Commissioner responded on 1 November 2006 saying that '… we have checked our land-base and there is currently no information regarding any land claims on these two farms.'

[4] Furthermore, an undertaking was made that in the event that new information suggesting that there were any claims in respect of the properties, the appellant would be notified. As no information was forthcoming from the commissioner, the appellant assumed that there were no claims in respect of the properties and abandoned his investigations.

[5] To his utter astonishment, the appellant received notification during December 2009 that restitution claims had been lodged against the properties by the fifth respondent. So, the appellant again instructed his lawyers to investigate this matter further with the Commissioner. When the Commissioner failed to give any meaningful reply, the appellant's attorneys filed another formal request for information under PAIA at appellant's request. In response to many repeated reminders, a bundle of documents were delivered to appellant's attorneys on 1 April 2010, but

none of the documents furnished contained any information pertaining to the properties.

[6] Despite this, the commissioner maintained that there were claims in respect of the properties on its computer database. Faced with this situation, the appellant demanded that the properties be removed from the Regional Land Claims Commissioner's database. Except for an acknowledgment of receipt, there was no substantive response to this demand, and the appellant was not able to find any acceptable proof that legitimate claims existed over either of his properties.

[7] The appellant therefore had no alternative but to institute proceedings in the Land Claims Court (LCC) primarily for an order declaring that there were no valid claims, as defined in s 1 of the Restitution Act, which had been lodged against his properties including any claims by the Mosima Community, the Majadibodu Community and the Mabula – Mosima Community, together with some ancillary relief.

[8] The first and second respondents filed opposing papers. They answered through Mr Tele Alfred Maphoto (Maphoto), who described himself as the Acting Chief Land Claims Commissioner, Chief Director for Land Restitution Support in Limpopo, and the former Regional Land Claims Commissioner for Limpopo. Maphoto responded by a letter as follows:

'We still do not know how and why the farms appear on the systems but we cannot rule out the possibility of a supporting document until the restitution process has been finalised.'

He proceeded to state that:

'Having regard to the proximity of the two farms to the other farm claimed by the Majadibodu Community, it may be that the Fifth Respondent may have claimed them. This aspect can only be decided once the Majadibodu claim has been finalised.'

[9] When the matter came before Gildenhuys J he ordered the Commissioner to report on whether it was possible and feasible to identify from its records if any land claims had been lodged over the properties. Maphoto responded that the first respondent's office had checked all their records and found in its hard copy files relating to the three communities no evidence of claims having been lodged in respect of the properties. However, its electronic database showed that they were affected by the claims. Curiously, his report then concluded:

'It would seem that the farms were erroneously or fraudulently captured on the electronic land claim database as they do not appear anywhere in the hard copies and therefore our office will take the corrective measures by removing the farms from the database.'

However, the first respondent never removed the properties from the database.

[10] The matter came before Loots AJ on 4 December 2012. She issued an order by consent of the parties in terms of which the first to third respondents were, amongst others, required to deliver a status report in respect of the claims lodged by fifth respondent in the Waterberg area by 15 February 2013.

[11] In response hereto, a status report was delivered by the State Attorney. The applicant's properties appeared last in a schedule attached to the status report with the caveat 'farms still to be researched'. There was a further explanatory note that the properties had not been researched

and gazetted as they did not appear on the Commission's database at the time of the research. The note ended that they would be researched in the 2013/2014 financial year.

[12] In its attempt to comply with the further order by Loots AJ to publish notice of the claims in respect of the properties in terms of s 11(1) of the Restitution Act by not later than 31 March 2013, the first respondent published a notice purporting to amend the notice of 11 March 2013 by adding the applicant's two forms. This was published in terms of s 11(A)(4) as Government Notice 343, GG 36307, 5 April 2013.

[13] The appellant attacked both the status report and the notice published in the *Government Gazette*. Regarding the status report, it was contended that as the report reflected that no investigations had been made in respect of the properties, it did not comply with the court order. But the court a quo found, correctly in my view, that the attack was without merit as the court order did not go so far as to instruct the respondents to undertake any investigation.

[14] However, regarding the notice, the court below found that it was not in accordance with the court order as it was issued in terms of s 11A(4) instead of s 11(1) of the Restitution Act. Accordingly, it set the notice aside. The court below then ordered the first respondent to publish within 30 days of the date of the order, a notice in terms of s 11(1) of the Restitution Act of the fifth respondent's claim in respect of the properties and to give notice that Government Notice No 343 had been set aside by the Court.

[15] Regarding the main claim, the court below found that it could not grant an order declaring that there are no claims lodged against the properties as one of the communities had come forward asserting that it had lodged a claim and providing evidence thereof. As the court found this to be an insuperable obstacle to the relief claimed it dismissed the application.

[16] Before us the appellant submitted that, as the fifth respondent, the community asserting a claim in respect of the properties, did not participate in the proceedings, it was premature and impermissible for the court below to have dismissed the application on the papers. It was submitted further that as no evidence has been tendered as proof that a claim has been registered properly in terms of s 11(1) in respect of the properties, the appropriate order was for the matter to be remitted to the court below for further hearing, in particular to afford the respondents the opportunity to address the court on the question of whether or not the fifth respondent (or any other person) had, prior to 31 December 1998, lodged any valid claims in terms of s 10 of the Restitution Act against the two properties. I agree.

[17] Regarding the order to publish a notice in terms of s 11(1), it was contended that it was not competent for the court below to make such an order as, first, none of the parties had sought such a relief and, secondly, there was no evidence that the first and second respondents had met the jurisdictional requirements in s 11(1).

[18] It is clear that the question whether any claim has been registered in terms of s 11(1) against the appellant's two properties is still not

answered. The respondents have not been able to give a clear and unequivocal response to the appellant's numerous enquiries. This is notwithstanding the undisputed fact that the appellant's enquiries span a period of not less than 10 years. What is worse is that the respondents have proffered contradictory versions on the status of the claim. The appellant's position has been compounded by the un-cooperative attitude and unexplained failures by the respondents to respond to his concerted enquiries. Regrettably, this uncertainty is still persisting to date.

[19] There should be no doubt that this uncertainty over the properties has caused the appellant anxiety. For instance, in terms of s 11(7) of the Restitution Act, once a notice has been published in respect of any land, no person may deal with that land either by way of sale, exchange, donation, lease, subdivision or development, without having given the regional land claims commissioner one month's written notice of his or her intention to do so. Furthermore s 11(7)(*b*) and (*c*) also place onerous restrictions on the owner and other persons to deal with his or her property. The prejudice suffered by the appellant is, in my view, self-evident as he is at present effectively hamstrung. Any further delays in finalising this matter will exacerbate his prejudice.

[20] Counsel for the respondents conceded, correctly in my view, that the notice issued in terms of s 11(A) was improper and was correctly set aside by the court below. Furthermore, he accepted that the new notice in terms of s 11(1) which was issued whilst this appeal was still pending, was improperly issued and conceded its invalidity. This concession was properly made. Regarding the dismissal of the declarator, counsel for the respondents capitulated and accepted that no acceptable proof had been

presented to date that there are claims which have been properly lodged in terms of s 11 in respect of the properties. In order to cure this defect, he agreed that the matter be referred back to the Land Claims Court and that the Commissioner be afforded a period of 1 calendar month to enable him to publish a proper notice in terms of s 11(1) of the Restitution Act.

[21] I interpose to state that the history of this case proves that the appellant has done everything humanly possible to investigate this matter to get acceptable proof that his properties are subject to valid claims. This he did because the lodging of claims in terms of s 11(1) against the properties has serious legal consequences. Quite correctly, he sought the assistance of first respondent as the person responsible for the receipt and processing of the claims. Regrettably, the first respondent was more obstructive than helpful.

[22] Section 11(1) places the following obligations on the first respondent: once a claim has been lodged, the first respondent must satisfy himself first, that it is lodged in a prescribed manner – s 11(1)(*a*); that the claim is not precluded by the provisions of s 2 – s 11(1)(*b*) and further that the claim is not frivolous or vexatious – s 11(1)(*c*) he or she shall cause a notice of the claim to be published in a *Government Gazette*. The first respondent has failed to do that.

[23] Furthermore, the section directs that the first respondent shall take steps to make it known in the district in which the land in question is situated that such a claim has been lodged and published. Importantly, s 11(6) requires the first respondent, immediately after publication of the s 11(1) notice in the *Government Gazette*, to advise the owner of the land

and any other party which in his or her opinion might have an interest in the claim in writing of the publication of the notice, and to refer the owner and such other party to the provisions of s 7. To date there has been no proof of a valid s 11(1) notice, nor a copy of the claim form allegedly lodged by fifth respondent. Furthermore, there is no evidence that the owner has been notified in writing of any claim as is required by s 11(6).

[24] Given the uncertainty regarding the correct status of the properties, I have no doubt that it is in the best interests of the appellant as well as the fifth respondent or any other interested persons that the question whether there is a valid claim lodged by fifth respondent in respect of the properties be expeditiously and finally determined. The potential prejudice caused to both parties by this uncertainty is self-evident.

[25] The conduct of the first respondent warrants comment and censure. It is important to emphasise the duties, responsibilities and obligations of the first respondent. Undoubtedly, the first respondent is pivotal to the entire process that is, the lodgement of claims to land, their registration, the issuing of notices, publications of claims in the *Government Gazette*, including informing the land owner in respect of whose property a claim has been lodged and any other party which might have an interest in the property. This includes investigations of claims lodged culminating in their finalisation, which might be through mediation or referral to the Land Claims Court, in appropriate circumstances. Self-evidently claims to land can never be properly processed without the co-operation and assistance of the first respondent.

[26] Sadly, this case demonstrates that the first respondent did not appreciate the crucial role which he is expected to play in processing land claims. So far he has succeeded to stymie persistent efforts by the appellant since May 2006 to get clarity regarding the status of the claim in respect of his properties. What exacerbates the situation is that even after the court order of 6 September 2013 by Loots AJ, the first respondent has still not produced any proof of the lodgement of any claims against the properties. Evidently this conduct is unacceptable.

[27] In the circumstances, I make the following order:

1 The appeal is upheld with costs which shall include the costs of two counsel.

2 Paragraphs 1 and 3 of the order of the court below are set aside.

2.1 The notice, published pursuant to paragraph 3 of the order of the court below, under Government Notice 1044, on 25 October 2013 in Government Gazette in respect of the appellant's properties Star 567 LR and Onschuld 568 LR, forming part of Onschuld 551 LR ("the properties") declared invalid.

3 The matter is referred back to the Land Claims Court for it:

3.1 to afford all the respondents an opportunity to address the court on the question of whether or not the fifth respondent (or any other person) had, prior to 31 December 1998, lodged any valid claims in terms of s 10 of the Restitution of Land Rights Act 22 of 1994 against the properties;

3.2 and consider any other issues properly raised in the papers before court;

4 The first and second respondents are ordered to pay the costs of the hearing on 25 April 2013.

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L O BOSIELO
JUDGE OF APPEAL

Appearances:

For the Appellant : BE Leech SC (with him AC Botha)
Instructed by:
Werksmans Attorneys, Johannesburg
Symington & De Kok, Bloemfontein

For the 1-3rd Respondents: P Nonyane (with him G Mothibi)
Instructed by:
The State Attorney, Pretoria
The State Attorney, Bloemfontein

For the 5th Respondent: Mr Makhambeni
Instructed by:
M Magigaba Inc., Durban
Matsepes Inc., Bloemfontein