THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 305/2011

In the matter between

STEPHANUS JACOBUS MEINTJES **Appellant**

and

THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA **Respondent**

Neutral citation: *Meintjes v The Government of the Republic of South Africa* (305/2011) [2012] ZASCA 172 (28 November 2012)

Bench: LEWIS, PONNAN, MHLANTLA and SHONGWE JJA and ERASMUS AJA

Heard: **2 NOVEMBER 2012**

Delivered: **28 NOVEMBER 2012**

Summary: Restitution of Land Rights Act 22 of 1994 – s 2(1) – right in land – dispossession of.

ORDER

On appeal from: Land Claims Court (Mia AJ sitting with an assessor as court of first instance):

The appeal is dismissed.

JUDGMENT

PONNAN JA (LEWIS, PONNAN, MHLANTLA and SHONGWE JJA and ERASMUS AJA concurring)

[1] The appellant, Mr Stephanus Jacobus Meintjes, and his business associate since the early 1960s, Mr Phillip Jooste – both of whom are now octogenarians – shared an interest in the development of nature reserves. Having established a successful game reserve in Letaba, they turned their attention to other properties with similar potential in the Lowveld. They identified three farms belonging to H L Hall and Sons Ltd (Hall & Sons), namely, Andover 210KU, Leamington 207KU and Burlington 217KU, which were situated in a released area immediately adjacent to the Kruger National Park. The effect of their inclusion in a released area is that they were liable to be expropriated in terms of s 13(1) of the Bantu Trust and Land Act 18 of 1936 for the settlement of Black people in furtherance of the State's racially discriminatory land policies.

[2] On 11 March 1971 the appellant wrote to Hall & Sons:

'… I hereby in my capacity as Chairman of a syndicate wish to make you an offer of R70.00 (seventy rand) per morgen for the farms in question.

Should this offer be acceptable to you I would require a three months option period to enable us to make the necessary arrangements.'

The response that the offer elicited from the managing director of Hall & Sons was:

'I have to advise that your offer is acceptable to us and I enclose herewith an option for the period of 90 days duly signed.'

The option was not exercised within the stipulated 90 days. The parties thereafter concluded what they termed an 'agreement for extension of option'. In terms of that agreement Hall & Sons agreed, against payment of the sum of R10 000, to extend the option until 5pm on 30 September 1971.

[3] Whilst the option was in place, the appellant and Mr Jooste actively went about finding what they described as potential '*medekopers*'. In this respect two others who were initially identified as being interested in the transaction were Dr P W A Pieterse and Mr L D J Erasmus. And through their efforts four additional persons, namely, Mr Albert Wessels, Mr J H Smit, Mr W J Krös and Mr T J P Ebersohn were also identified. Written commitments were obtained from those persons. In giving those commitments they made it clear that: they would not be taking transfer of the properties in question in their own names but in the names of companies; and, the written undertakings which they gave did not constitute deeds of sale in themselves but that the arrangement would be formalised in later written agreements.

[4] On 30 September 1971 and as foreshadowed in the option the parties concluded a deed of sale. In that agreement the purchaser was described as 'STEPHANUS JACOBUS MEINTJES − on behalf of a Company or companies to be formed or as the duly authorised representative of an existing company or companies − (hereinafter referred to as the Purchaser)'. Because the farm Burlington provided a place to which the workers of the farms Andover and Leamington could be forcibly removed without disturbing the labour arrangements of Hall & Sons, it was decided that it was not desirable at that stage to acquire it. The deed of sale was thus restricted to only two of the three farms mentioned in the option, namely Andover and Leamington.

[5] To the extent here relevant the deed of sale provided:

'1.

It is a condition precedent of this agreement that the sale of the aforesaid properties shall be one and indivisible.

2.

The purchase price will be the sum of R580 343.00 (FIVE HUNDRED AND NINETY THOUSAND THREE HUNDRED AND FORTY THREE RAND) payable free of bank exchange, as follows:

a) Against signing of this Deed of Sale, an amount of R58 055.00. The sum of R10 000.00 already paid by the purchaser as option money, will be refunded to the purchaser forthwith;

b) The balance of R522 308.00 will be paid by the purchaser to the sellers against registration of transfer of the aforesaid properties in the name of the purchaser and for this amount a suitable and acceptable banker's guarantee will be furnished to the sellers within 10 days from date hereof.

. . .

11.

This sale will be subject to all the terms and conditions as set out in the sellers' title deeds of the properties concerned.

. . .

13.

During the subsistence of this agreement the purchaser shall not cede, assign, transfer or make over any of his rights under this agreement, nor shall he sell, alienate, lease or in any other way deal with the property hereby sold without the written consent of the sellers, which consent shall not unreasonably be withheld.

14.

Should the purchaser decide to take transfer in the name of a company to be formed, such company or companies shall be registered within 30 days from the date hereof. The company or companies shall have as one of its or their objects the adoption and ratification of this agreement

and all members of the company shall bind themselves jointly and severally towards the seller for the due implementation of the obligations of the purchaser under this Deed of Sale. The requirement of personal guarantees by members of companies shall also apply in the event of transfer being taken in the name of companies already registered.

15.

Inasmuch as the purchaser has given the assurance that the aforesaid properties are not situate in a controlled area as envisaged by the Physical Planning Act, he may, if he so decides, take transfer of the properties in undivided shares in the name of various transferees. The risk in this regard will be the risk of the purchaser and the sellers give no guarantee whatsoever that the purchaser will be entitled to take transfer in undivided shares.

The purchaser binds himself to advise the sellers' attorneys before the 15th October 1971 of the names of the transferee companies.

16.

In regard to the farm Burlington No. 217, K.U., district Pilgrims Rest, measuring 3974 morgen 542 square roods, the sellers undertake to refer any future bona fide offer for the purchase of this farm to Mr S.J. Meintjes personally who will be entitled to a right of first refusal on any future sale of this farm. Should he decide to buy the farm on the same terms and conditions offered by an interested buyer, he will be entitled to do so.

This right of first refusal in favour of Mr S.J. Meintjes will be valid for a period of three years from date hereof.

17.

The parties finally agree that no variation of, or addition to, the terms of this agreement shall be binding on either of them, unless first reduced to writing above their respective signatures, or the signatures of their duly authorised representatives.'

[6] In the meanwhile the appellant, who was well-connected to members of the then political elite and a major contributor to the coffers of the Nationalist Party, had been making representations to amongst others the Deputy Minister of Bantu Administration and Development, Mr A G Raubenheimer, to secure permission for the subdivision of the farms. The appellant's intention, so it was asserted, was to divide the farms and transfer those subdivided portions to four other interested parties. On the very day that the deed

of sale was signed by the parties, the appellant was informed by the administrative secretary of the Ministry of Bantu Administration and Development that a subdivision of the farms would not be favourably considered by Mr Raubenheimer.

[7] During May 1971 and in order to ensure that there were companies in place to take up the rights provided for in the deed of sale three of the companies were formed and further necessary steps were taken with the Registrar of Companies to reserve names for the remaining five companies. And in order to ensure that the rights and obligations of the respective companies *inter se* were properly regulated Attorneys Werksmans were instructed to prepare draft agreements to give effect to the transaction as between the participating companies and their shareholders. Mr Jooste, who was a registered surveyor, prepared a sketch plan of the farms. And in accordance with that sketch plan, the two companies to be formed by Mr Smit and Mr Wessels were to be allocated the western portion of Andover and the companies of which Mr Krös and Mr Ebersohn were to be shareholders, the western portion of Leamington.

[8] On 19 October 1971 and in purported compliance with clause 15 of the deed of sale Olivier & Van Vuuren, who had been appointed the conveyancing attorneys in terms of the deed of sale, wrote to Hall & Sons:

'With reference to the above matter, we have to advise you that the purchasers have now decided in which companies the properties are to be registered.

We have drawn an addendum to the Deed of Sale and we enclose it herein in triplicate for your signature and return to us'.

I say purported compliance because in terms of clause 15 of the deed of sale Hall & Sons ought to have been advised before 15 October 1971 of the names of the transferee companies.

[9] The draft addendum provided:

'1.

a) The farm Andover No. 210, K. U., district Pilgrims Rest, measuring 4226 morgen 320 square roods are hereby sold to Stephanus Jacobus Meintjes as trustee for the following four companies namely:

Tussen Bome (Eiendoms) Beperk

Botent Investments (Proprietary) Limited

Vaalbos Beleggings (Eiendoms) Beperk

Waterbok Beleggings (Eiendoms) Beperk.

…

c) This farm Andover will thus be registered in the names of the four abovementioned companies, each company to have an undivided one-quarter share in the property.

2.

a) The farm Leamington No. 207, K. U., district Pilgrims Rest, measuring 4064 morgen 55 square roods is sold to Stephanus Jacobus Meintjes as trustee for a company to be registered under the name of Eberwil Wildplaas (Eiendoms) Beperk, and to Raasblaar Beleggings (Eiendoms) Beperk, Wildevy Beleggings (Eiendoms) Beperk, and Boerboon Beleggings (Eiendoms) Beperk.

b) The purchase price will be R280 343.00 of which amount the seller acknowledges that it has received R28 035.00 and the balance of R252 308.00 will be paid and guaranteed to the seller as indicated in paragraph 2(b) of the Deed of Sale of the 30th September 1971.

c) The farm Leamington will thus be registered in the names of the four abovementioned companies, each company to have an undivided one-quarter share in the property.

3.

Until such time as the properties have been transferred to the various purchasers who hereby purchase the said properties, Stephanus Jacobus Meintjes will remain personally responsible towards the seller for the due implementation of the Deed of Sale of the 30th September 1971, read with this Addendum thereto.'

[10] On 22 October 1971 the appellant had yet a further meeting with Deputy Minister Raubenheimer. After that meeting and apparently to avoid paying more for the properties in due course should the sale be finalised, Mr Raubenheimer took a decision to expropriate all three farms. Mr Pine Pienaar, a junior official in the employ of the Department drove to Nelspruit with the expropriation notice. The expropriation notice, which had been drafted earlier that day, was served on Hall & Sons that evening. The expropriation was effected in terms of s 13(1) of the Bantu Trust and Land Act 18 of 1936 read with the Expropriation Act 55 of 1965. Thus although the draft addendum was signed on behalf of Hall & Sons on 21 October 1971 the expropriation intervened and it never came to be signed on behalf of the purchasers.

[11] The farms, after the expropriation, were registered in the name of the South African Bantu Trust. Although no offer for compensation was made at the date of the expropriation, the State later offered Hall & Sons an amount equivalent to the purchase price that had been fixed in the deed of sale, namely R70 per morgen, as compensation. On 23 May 1972 Hall & Sons issued summons against the State. Prior thereto, on 12 February 1972, Hall & Sons ceded to the appellant any claim that it may have had against the State in excess of the amount of R877 689.23 arising from the expropriation of the three farms. On 6 May 1974 the expropriation claim was settled with the State agreeing to pay to Hall & Sons the amount of R1 000 580. It is common cause that of that sum an amount of R120 500 was paid to the appellant's then attorney, Dyason, on 9 May 1974.

[12] Fast forward two decades to a changed political landscape based upon the supremacy of the Constitution, which envisaged in s 25 a restitutionary land reform design and ushered in its wake the Restitution of Land Rights Act 22 of 1994 (the Act) which provides for the restitution of rights in land to persons or communities dispossessed of such rights after 19 June 1913 as a result of past racially discriminatory laws or practices. Asserting that he was such person, the appellant launched a claim with the Commission on the Restitution of Land Rights on 14 August 1995.

[13] As required by the provisions of s 14 of the Act, on 18 April 1999 the Regional Land Claims Commissioner referred the claim to the Land Claims Court (LCC) for adjudication. In his amended statement of claim filed with the LCC, the appellant alleged:

'10.

The effect of the aforesaid expropriation was to dispossess plaintiff of his rights in the property, being the right to take transfer of the property upon payment of the purchase price, and the right to occupy and develop the property, including the right to proceed with the sales of undivided shares in the property referred to in paragraph 5.4 above.

11.

11.1 Plaintiff received no compensation or other consideration in respect of the dispossession of his rights as aforesaid;

…

13.1 The plaintiff no longer claims restoration of the two farms, but claims equitable redress in the form of financial compensation. Any competing claims that may have been lodged in respect of the same property are therefore irrelevant to the adjudication of the plaintiff's claim and any remaining claimants whose claims have not been rejected by the Commission, are no longer interested parties in the present action.

13.2 The rights (property) of which the plaintiff was dispossessed as a result of the expropriation, were not registered or recorded against the title deed thereof and the State was accordingly not obliged to pay any compensation for such rights at the time of dispossession.

13.3 Had section 25 of the Constitution been enacted at the time of the dispossession, the applicable legislation at the time would have been unconstitutional and the plaintiff would have been entitled to full compensation for the dispossession of his rights in land.

13.4 Neither the definition of a right in land in the Restitution Act nor section 25(2) and (3) of the Constitution, distinguish between registered and unregistered rights in land.

13.5 The compensation to which the plaintiff would have been entitled at the time of dispossession, was the value of those rights in the hands of the plaintiff compared to the price paid by the State upon expropriation, plus the direct losses suffered by the plaintiff as a result of the expropriation.

…

13.8 Had just and equitable compensation been paid to the plaintiff at the time of dispossession, he would have been entitled to payment of the amount of R525 382.50.'

[14] The appellant accordingly sought an order against the respondent, the Government of the Republic of South Africa, that he is entitled to: (i)'restitution of his rights in land in terms of the provisions of section 2(1)*(a)* of the Act as a result of the dispossession during October 1971 of his rights in land in respect of the farms Andover 210 KU and Leamington 207 KU'; and, (ii)'equitable redress in the form of financial compensation in the amount of R525 382.50 as at the time of dispossession, adjusted to present day value, being R19 890 981,45'.

[15] The appellant claimed compensation under the Act. To found such a claim he had to prove that: (a) he had a right in land; (b) of which he was dispossessed; (c) after 19 June 1913; (d) as a result of a past racially discriminatory law or practice; (e) where the claim for restitution was lodged not later than 31 December 1998; and (f) no just and equitable compensation was received (*Department of Land Affairs & others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC) para 28).

[16] It was common cause before the LCC that there had been an expropriation of land in terms of a past racially discriminatory law or practice and that a claim for compensation had been lodged prior to 31 December 1998. Moreover, at a pre-trial conference the parties had agreed:

'3 The questions of –

3.1 whether the appellant received just and equitable compensation at the time of the alleged dispossession (in which event a claim is excluded by section 2(2) of the Restitution Act); and,

3.2 if not, how much should be paid to him now, have been separated for later determination.'

The hearing before the LCC (per Mia AJ sitting with an assessor) thus focussed on whether the appellant by virtue of the expropriation had indeed been dispossessed of a right in land and whether as a consequence he therefore had a valid claim under s 2(1) of the Act. Mia AJ concluded that he had not. She accordingly dismissed the appellant's claim and made no order as to costs but granted leave to the appellant to appeal to this court.

[17] Clause 1 of the deed of sale provided that: 'It is a condition precedent of this agreement that the sale of the aforesaid properties shall be one and indivisible'. That clause accordingly required that where, as here, a number of companies were to take equal and undivided shares in the farms the conditions required for each company to be bound would have had to have been fulfilled in the case of each and every one of those companies. Clause 14 required, in addition, the fulfilment of the following further conditions before the contract became binding: (a) the companies yet to be formed had to be registered within 30 days of the date of signature of the deed of sale; (b) upon registration the companies had to have as one of their objects the adoption and ratification of the deed of sale; (c) the members of each of the companies were required to bind themselves jointly and severally in favour of the seller for the due implementation of the obligations of the purchaser under the deed of sale; and (e) personal guarantees had to be provided by the members of the companies already in existence. At the time of the expropriation on 22 October 1971 none of these conditions had been fulfilled. Five of the companies had not yet been registered. Nor had any of the guarantees been provided.

[18] It follows that the agreement was inchoate and pending fulfilment of those conditions the exigible content of the contract was suspended (*Mia v Verimark Holdings (Pty) Ltd* [2010] 1 All SA 280 (SCA) para1). That, one may have thought, would have been the end of the matter. But, as I understood the argument advanced on behalf of the appellant, notwithstanding the fact that no agreement of sale there and then came into existence, the agreement nevertheless created 'a very real and definite contractual relationship between the parties' (*Palm Fifteen (Pty) Ltd v Cotton Tail Homes (Pty) Ltd* 1978 (2) SA 872 (A) at 887C-D), which, but for the expropriation, would have ripened into

a contract of sale in terms of which the appellant would have acquired a ‘right’ to the properties.

[19] In *Gardner v Richardt* 1974 (3) SA 768 (C) at 769H-770A, which was approved by this court in *Nine Hundred Umgeni Road (Pty) Ltd v Bali* 1986 (1) SA 1 (A) at 6D-E, Friedman AJ stated:

'In *McCullogh's* case the Appellate Division held that a contract by a trustee for a company in the course of formation is in essence a contract for the benefit of a third party, namely the company. That being so, until such time as the company on its formation accepts the contract so concluded for its benefit, the trustee is entitled, in his personal capacity, to exercise such rights as are necessary in order to hold the other contracting party to the contract and to keep intact the rights of the company as the ultimate beneficiary. Thus the trustee could in his own name obtain an interdict, preventing the other party to the contract from doing anything which has the effect of nullifying his undertaking pending the decision of the company (see *African Universal Stores Ltd v Dean* 1926 CPD 360 at p 395).'

[20] Whether in addition to those rights a person in the position of the appellant also acquires the right to sue for specific performance on the contract in his personal capacity – an issue to which I presently turn − must be answered by reference to the terms of the particular contract under consideration (*Nine Hundred Umgeni Road* at 6D-F). For, as Friedman AJ later observed (*Gardner v Richardt* at 772 E-F):

'… it does not follow as a matter of law that, because a trustee incurs obligations under a contract such as this, he therefore has the right to sue on the contract for specific performance. If he had such a right and exercised it, it could result in the company for whose benefit he so contracted, being deprived on its formation of the benefit intended for it. (CF *Mutual Life Insurance Co of New York v Hotz* 1911 AD 566; *Byworth v Stevenson* (1902) 19 SC 18.)'

[21] In my view the deed of sale is perfectly straightforward. Neither it nor the earlier option to purchase or the subsequent draft addendum provides for a sale from Hall & Sons to the appellant in person and thereafter a subsequent sale or sales from the appellant to any of the other individuals or juristic entities. Instead they provide for a sale

directly from Hall & Sons to companies formed or to be formed, with each company to receive an equal undivided one-quarter share in either Andover or Leamington. The identificatory heading of the deed of sale does not refer to the appellant personally as the purchaser but to third parties who were to benefit under the agreement. In signing the agreement the appellant did so on behalf of two categories of potential transferees: the first, being companies already in existence; and, the second, notional entities that were to be created in due course. That description of the purchaser thus left no room for the appellant to nominate himself or any other natural person to benefit under the agreement.

[22] The words 'hereinafter referred to as the purchaser' determined that whenever the word 'purchaser' is employed in the agreement it must be read as referring to the appellant in his representative capacity on behalf of the two categories of potential transferees. And any reference to 'the purchaser' can thus only be a reference to that term as defined in the identificatory heading. That this must be so is strengthened when regard is had to clause 16 where reference is made to 'Mr S J Meintjes personally'. The purpose of clause 16 is to confer upon the appellant an option in respect of the farm Burlington. It also refers to a 'right of first refusal in favour of Mr S J Meintjes'. Accordingly, where the agreement wishes to confer additional rights upon the appellant personally, beyond those designed to keep the agreement alive for the benefit of the ultimate beneficiaries, it does so.

[23] Both clauses 14 and 15 of the agreement make plain that the potential categories of transferees in terms of the agreement were companies either formed or to be formed. The initial part of clause 14 regulates the position where transfer is to be taken by the purchaser in the name of that notional abstraction a company (or companies) to be formed. It stipulates that such company shall be registered within 30 days and that it shall have as its objects the adoption or ratification of the agreement and that all members of that company shall bind themselves jointly and severally in favour of the seller for the implementation of the obligations of the purchaser. The latter part of clause 14 regulates the position in the event of the purchaser deciding to take transfer in the name of existing companies. In that event personal guarantees are required to be furnished by members

of those companies. There are thus only two scenarios catered for in the deed of sale. Neither of these contemplates the appellant taking transfer in his own name.

[24] Plainly what was envisaged is that once the companies in due course accepted the benefits under the agreement, the appellant personally would have fallen out of the contract completely. Pending the decision by those companies to either accept or reject the contract, there is nothing in the agreement to suggest that the appellant personally acquired the rights or incurred the obligations that had been reserved for those companies. Nor, as *Gardner v Richardt* (at 773 H) points out, is there any: 'rule of law entitling a person who contracts as trustee for a company to be formed, to claim transfer of property into his own name, merely by reason of the fact that the company has not been formed'. It follows that the appellant was not personally entitled to exact the performance which was stipulated for those companies and that the LCC was correct in its conclusion that the appellant had failed to prove that he had any right in land of which he was dispossessed by the expropriation. Absent any right in land he failed to satisfy the requirements for a valid claim set out in s 2(1)*(a)* of the Act. In the result the appeal must fail.

[25] That leaves costs: Mia AJ made no order as to costs in the LCC. Nor was any order sought on behalf of the Government in that regard on appeal in this court. No doubt that approach was informed by the general principle laid down by Harms JA in *Haakdoornbult Boerdery CC & others v Mphela & others* 2007 (5) SA 596 (SCA) para 76 that 'in cases such as this there should not be any costs orders on appeal absent special circumstances'. I baulk at the generosity displayed by the Government to the appellant. For, as Moseneke DCJ explained in *Goedgelegen Tropical Fruits* (para 68), a claim such as this, is reparative and restitutionary in character. The learned Deputy Chief Justice added: 'It is neither punitive in the criminal law sense nor compensatory in the civil law sense. Rather, it advances a major public purpose and uses public resources in a manifestly equitable way to deal with egregious and identifiable forms of historic hurt.' Viewed holistically I cannot discern any 'egregious' or 'historic hurt' suffered by the appellant and thus cannot fathom why the national fisc should have to bear these costs. On the contrary, to my mind the claim of the appellant, who appears on the evidence

before us to have benefitted from the past race-based spatial development policies of the State because he was well-connected politically, may well be cynical and opportunistic. Thus if the evidence were to be scrutinised with a critical eye the facts encountered here may indeed bring the matter within the purview of the expression ‘special circumstances’ as employed in *Haakdoornbult Boerdery*. Whether that be so is fortunately not necessary for me to decide. For although I entertain grave misgivings as to whether the core character of the claim is truly restorative in purpose, I can hardly refrain from endorsing the approach (namely, that no order as to costs would be sought in the event of it succeeding) that the Government has adopted since the inception of the matter.

[26] In the result the appeal is dismissed.

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V M PONNAN
JUDGE OF APPEAL

APPEARANCES:

For Appellant:	H S Havenga SC
	Instructed by: Erasmus Jooste Incorporated c/o Pieter Moolman Attorneys Bryanston Symington & De Kok Bloemfontein
For Respondent:	A D Dodson SC
	Instructed by: The State Attorney Johannesburg The State Attorney Bloemfontein