THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no**:** 550/12

NOT- REPORTABLE

In the matter between:

ISABEL JOYCE FLORENCE **APPELLANT**

and

THE GOVERNMENT OF THE
REPUBLIC OF SOUTH AFRICA **RESPONDENT**

Neutral citation: *Florence v The Government of the RSA* (550/12) [2013] ZASCA 104 (13 September 2012)

Coram: Nugent, Malan and Tshiqi JJA

Heard: **27 August 2013**

Delivered: **13 September 2013**

Summary: Section 33(*e*C) – appropriate method to cater for changes over time in the value of money – CPI adequate indicator – LCC exercised discretion judicially.

ORDER

On appeal from: Land Claims Court, Western Cape (Carelse J sitting as court of first instance):

1 The appeal against para 1 of the order of the LCC is dismissed.

2 The appeal against paragraph 2 of the order of the LCC is upheld. That paragraph is set aside and substituted with the following:

'The second defendant is ordered to pay to the plaintiff the cost incurred in erecting a memorial plaque on the building, limited to the sum of R50 000.'

3 Para 3 of the order of the LCC is altered to read:

'The respondent is to pay the costs of the plaintiff insofar as they have not been met by the Land Claims Commission.'

JUDGMENT

TSHIQI JA (NUGENT AND MALAN JJA CONCURRING):

[1] The facts in this appeal are largely common cause. They are contained in a statement of agreed facts signed by the parties prior to the trial in the Land Claims Court (the LCC). This appeal is with the leave of that court (per Carelse J).

[2] The appellant's late husband, Mr Lionel Florence, and his brothers purchased the property known as Sunny Croft in 1957 from its owner, Dr Yeller, in terms of a written instalment sale agreement. Sunny Croft was never transferred into the name of the Florence brothers as a result of racially discriminatory legislation which prohibited the transfer of land to disqualified persons. In 1970 the Florence brothers were compelled to cancel the sale agreement, sell the property back to Dr Yeller and to vacate it following threats to do so from inspectors who were acting in terms of the Group Areas Amendment Act 77 of 1957. The refund they got from Dr Yeller was not

market related and did not constitute just and equitable compensation for the dispossession of their rights in the land.

[3] Mr Lionel Florence launched a claim in December 1995 in terms of the Restitution of Land Rights Act 22 of 1994 (the Restitution Act) in his own right and in a representative capacity on behalf of his brothers. After his death the appellant was substituted as a representative of the Florence family. In light of the fact that the property is presently developed and privately owned, the claim for restoration was abandoned, save to the extent that in addition to compensation, the appellant seeks restoration in the form of the erection of a memorial plaque on the property symbolising the historical fact of the dispossession. The present owner of the property has consented to the erection of the plaque. What remains is the cost of erecting the plaque, which the appellant seeks from the state.

[4] The LCC has wide remedial powers under s 35 of the Restitution Act. As pointed out in *Mphela v Haakdoornbult Boerdery CC*,[1] when exercising those powers the LCC exercises a discretion. In that case, on appeal from the LCC, this court found that the LCC had not properly exercised its discretion, and proceeded to substitute its own decision. In doing so this court was similarly exercising a discretion, in substitution for that of the LCC. Of the nature of that discretion the Constitutional Court (CC) said the following:

'… In coming to its decision on whether or not to order the return of the whole of the land claimed the Supreme Court of Appeal exercised a discretion. The question whether leave should be granted will therefore require a consideration of the circumstances in which this court will interfere with the exercise by the Supreme Court of Appeal of its discretion.

The discretion exercised by the Supreme Court of Appeal in this matter is one in the strict sense, or as was said in *S v Basson*, a "strong" discretion or "true" discretion, in the sense that a range of options was available to it. As such this court, exercising appellate jurisdiction, will not set aside the decision of the Supreme Court of Appeal merely because it would itself, on the facts of the matter before the Supreme Court of Appeal, have come to a different conclusion. It will only interfere where it is shown that the Supreme Court of Appeal had not exercised its discretion judicially, or that it had been influenced by wrong principles or a misdirection on the

[1] *Mphela v Haakdoornbult Boerdery CC* 2008 (4) SA 488 (CC) para 15.

facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles.'

[5] Section 33 sets out various factors the LCC must take account of when considering its decision, which include, when making an order for equitable redress in the form of compensation, 'changes over time in the value of money'.[2]

[6] In this case the LCC was required to determine:

- The amount of compensation to be awarded to the Florence family as a result of the dispossession in 1970, including solatium in respect of the hardship and suffering they experienced as a result of the dispossession.
- The appropriate method to be used when converting the 1970 loss to cater for 'changes over time in the value of money'.
- Whether the state should be ordered to pay the costs of erecting the memorial plaque on the Sunny Croft site.

[7] Relying upon the earlier decision of the LCC[3], confirmed by this court in *Farjas (Pty) Ltd v Minister of Agriculture and Land Affairs,*[4] the LCC applied the CPI for the purpose of determining changes over time in the value of money. The sole question on this part of the appeal is whether that was the appropriate means of determining the issue, the appellant contending that the LCC ought properly to have made its assessment with reference to the present value of the money had it been invested.

[8] That was similarly the argument advanced in *Farjas,* in which the facts were materially indistinguishable. In that case the appellants were investors whose properties had been expropriated in terms of the Expropriation Act 63 of 1975. They were under-compensated and the solatia they were promised was never paid. They approached the LCC seeking equitable redress in the form of financial compensation as well as payment of the solatia they were promised. In support of their claim they led the evidence of expert witnesses who focused mainly on the returns the appellants would

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[2] Section 33 (*eC*).
[3] *Farjas (Pty) Ltd v Minister of Agriculture and Land Affairs & others and another case* [2012] JOL 28584 (LCC).
[4] *Farjas (Pty) Ltd v Minister of Agriculture and Land Affairs & other and another case* [2013] 1 All SA 381 (SCA) para 16.

have made had they received the amounts in 1991 and invested them. They were all opposed to the application of the CPI, emphasising that most investors expect more returns from their investments than those provided by the CPI. The only witness in favour of the CPI was an employee of the Land Claims Commission. He explained to the LCC that the Commission, after conducting research, accepted the CPI as the best method for assessing value of money over time and utilised it to settle all the claims. The LCC accepted the evidence of the Commission and concluded that the CPI adequately catered for changes over time in the value of money and applied it to adjust the amounts of the under-compensation. It made no order for payment of solatia.

[9] On appeal this court was called upon to determine, amongst other things, whether the LCC erred in using the CPI for purposes of translating the 1991 loss. This court dismissed the appeal and stated:

'Having regard to the facts of this matter, the judge considered and evaluated all the evidence. She was faced with conflicting expert evidence and had to determine what would constitute just and equitable compensation, having regard to an equitable balance between the public interest and the interests of the claimants. The evidence of the experts reveals that they prepared their reports from an investor's point of view, whereas restitution has nothing to do with commercial transactions, but with redressing massive social and historical injustice. The experts asserted that the CPI was not appropriate; however, that is not the test. A court, when considering a claim under the Restitution Act, has to determine what is just and equitable, having regard to the factors set out in s 33 of the Restitution Act. The judge analysed the evidence of the experts and, in my view, correctly chose not to accept it. The appellants have not demonstrated that the application of the CPI is inappropriate, or perhaps, more accurately, would on the facts of this case lead to an unjust or inequitable result. None of the experts demonstrated that resort to the CPI would have the effect that the compensation would be unjust and inequitable.

… In *Hoffmann v South African Airways**[5] the Constitutional Court stated that "(f)airness requires a consideration of the interests of all those who might be affected by the order". It follows that the compensation awarded must be just and equitable not only to the appellants, but also to the members of society who have an interest in the manner in which public resources are utilised.

Counsel for the appellants submitted that the court below erred in applying the CPI without any acceptable evidence being produced to support it. This argument is without merit. The CPI is an official government statistic and published monthly in the *Government Gazette*. There was no need for expert evidence in that regard and the court below was entitled to take judicial notice

[5] *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) para [43].

thereof. Furthermore, the courts have for a long time applied the CPI to adjust amounts of financial compensation… .' [6]

[10] The record of the proceedings in the present case runs to 16 volumes comprising mainly the evidence of experts expressing their opinions on the appropriate method to be used to convert the loss into present day monetary value. In view of the finding made in *Farjas* most of that evidence is irrelevant for the purposes of this appeal. It has already been found in *Farjas* that the LCC is entitled to rely upon the CPI to determine changes in the value of money, and we are bound by that decision. In those circumstances it cannot be said that the LCC misdirected itself in adopting the same approach.

[11] Regarding the claim for the erection of the memorial plaque, an agreement had been arrived at between the Florence family and the present owner of the property, allowing the family to erect a plaque. The LCC concluded that because the settlement agreement was a private matter between the land owner and the Florence family it had no jurisdiction to order the state to pay the costs of erecting the plaque. I can see no basis for that conclusion. By concluding the agreement the family did not purport to waive any rights it might have had against the state for the recovery of the cost.

[12] Section 35 of the Restitution Act confers on the LCC remedial powers[7] that include the payment of 'any alternative relief'.[8] The memorial plaque is of a symbolic and spiritual importance and its erection will acknowledge the hurt, indignity and injustice suffered by the Florence family and the other families in the area. It was submitted on behalf of the state that to order the payment of the costs it would be usurping the functions of other state institutions that are concerned with the erection of monuments. We are not concerned in this case with state monuments, but with a plaque to recognise the private hurt and indignity to which the erstwhile members of the

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[6] *Farjas (Pty) Ltd v Minister of Agriculture and Land Affairs* paras [22] – [24].

[7] *Department of Land Affairs and others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 191 (CC).

[8] Section 35 (1)(*e*) of the Restitution Act.

family were subjected. I can see no reason why a plaque designed to fulfil that purpose should not fall within the solatium to which the family is entitled.

[13] As for the costs of the appeal, it concerned two limited issues – whether the LCC was entitled in the exercise of its discretion to apply the CPI, and whether the family should be recompensed for the erection of a plaque. Those limited issues did not call for a filing of the entire record of the proceedings in the court below. Even if we had reached the conclusion that the court below did not properly exercise its discretion, and we had considered the matter afresh on its merits rather than the remitting it to the LCC, a large portion of the record would not have been required.

[14] When parties appeal to this court they may not indiscriminately dump before it the entire record in the court below. Not only does that increase the cost of litigation without warrant, but it also prejudices the proper functioning of this court. That an appellant must exercise judgment when filing a record is expressly provided for in Rule 8(9) of the Rules of this court as follows:

'(9)*(a)* Whenever the decision of an appeal is likely to hinge exclusively on part of the record in the court *a quo*, the appellant shall, within 10 days of the noting of the appeal, request the respondent's consent to omit the unnecessary parts from the record, failing which the respondent shall, within 10 days thereafter, make a similar request to the appellant.

(b) The respondent or the appellant, as the case may be, shall within 10 days agree thereto or state the reasons for not agreeing to the request.

(c) The request and the respondent's response shall form part of the record.

(d) The Court may make a special order of costs if no request was made or if either of the parties was unreasonable in this regard.

(e) If the parties agree to limit the record, only those parts of the record of the proceedings in the court *a quo* as are agreed upon shall be contained in the record lodged with the registrar: Provided that the Court may call for the full record and may order full argument of the whole case.'

[15] The parties agreed upon the omission of selected parts of the record. Many of those documents were required to be omitted in the first place, under Rule 8(6)(*j*). But what remained after documents had been excised was far in excess of what was required for the disposal of the appeal.

[16] We would have given consideration to disallowing the costs of part of the record, but in view of the order we make it is not necessary to do so.

[17] The award of costs is a matter which is within the discretion of the court considering the issue of costs. It is a discretion that must be exercised judicially having regard to all the relevant considerations. The ultimate goal is to do that which is just having regard to the facts and circumstances of the case. In *Biowatch Trust v Registrar, Genetic Resources and others*[9], the CC stated:

'... In litigation between the government and a private party seeking to assert a constitutional right, *Affordable Medicines* established the principle that ordinarily, if the government loses, it should pay the costs of the other side, and if the government wins, each party should bear its own costs… At the same time, however, the general approach of this Court to costs in litigation between private parties and the State, is not unqualified. If an application is frivolous or vexatious, or in any other way manifestly inappropriate, the applicant should not expect that the worthiness of its cause will immunise it against an adverse costs award. Nevertheless, for the reasons given above, courts should not lightly turn their backs on the general approach of not awarding costs against an unsuccessful litigant in proceedings against the State, where matters of genuine constitutional import arise. Similarly, 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.'

[18] The appellant did not achieve success in the appeal on the principal issue, but was nonetheless obliged to appeal to this court in order to reverse the finding regarding the costs of the plaque. In those circumstances I think it is fair and just that each party pay its own costs. In the court below the government submitted that there was no need for an order of costs because the commission was funding the litigation in terms of s 29(4) of the Restitution Act. To avoid any uncertainty, I intend making an order that the commission pays such costs in the court below to the extent they are not paid.

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

1 The appeal against paragraph 1 of the order of the LCC is dismissed.

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[9] *Biowatch Trust v Registrar, Genetic Resources and others* 2009 (6) SA 232 (CC) paras [22] – [23].

2 The appeal against paragraph 2 of the order of the LCC is upheld. That paragraph is set aside and substituted with the following:

‘The second defendant is ordered to pay to the plaintiff the cost incurred in erecting a memorial plaque on the building, limited to the sum of R50 000.’

3 Para 3 of the order of the LCC is altered to read:

‘The respondent is to pay the costs of the plaintiff insofar as they have not been met by the Land Claims Commission.’

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ZLL TSHIQI

JUDGE OF APPEAL

APPEARANCES:

For Appellant:	P Hathorn (with him: F Jakoct and S Harvey)
	Instructed by:
	Legal Resources Centre, Cape Town
	Webbers, Bloemfontein
For Respondent:	B Joseph
	Instructed by:
	The State Attorney, Cape Town
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