THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 220/13

Reportable

In the matter between

THE MANOK FAMILY TRUST	**APPELLANT**
and	
BLUE HORISON INVESTMENT 10 (PTY) LIMITED	**FIRST RESPONDENT**
CRANBROOK PROPERTY PROJECTS	**SECOND RESPONDENT**
THE REGIONAL LAND CLAIMS COMMISSIONER, MPUMALANGA	**THIRD RESPONDENT**
THE REGIONAL LAND CLAIMS COMMISSIONER, LIMPOPO	**FOURTH RESPONDENT**
THE COMMISSION ON RESTITUTION OF LAND CLAIMS	**FIFTH RESPONDENT**
THE MINISTER OF RURAL DEVELOPMENT AND LAND REFORM	**SIXTH RESPONDENT**

Neutral citation: *The Manok Family Trust v Blue Horison Investments 10 (Pty) Ltd* (220/13) [2014] ZASCA 92 (13 June 2014)

Coram: Mpati P, Maya, Bosielo and Leach JJA and Mocumie AJA

Heard: 06 March 2014

Delivered: 13 June 2014

Summary: Land – Land reform – Restitution of Land Rights Act 22 of 1994 – land claim – regional commissioner deciding claim precluded by provisions of section 2 – whether decision final and regional commissioner thereafter *functus officio*.

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ORDER

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

The appeal is dismissed. No order is made as to costs.

JUDGMENT

MPATI P (MAYA, BOSIELO and LEACH JJA and MOCUMIE AJA concurring):

[1] Section 2 of the Restitution of Land Rights Act 22 of 1994 (the Act) entitles a person or community dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws and practices, to restoration of that right. A claim for restitution is directed to the Commission on Restitution of Land Rights (commission), which is required, among other things, to investigate its merits and make a determination as to whether it is not precluded by the provisions of section 2 of the Act[1] and whether it is not frivolous or vexatious (s 11(1)). Where it is satisfied that a claim has been lodged in the prescribed manner; is not precluded by the provisions of s 2 and is not frivolous or vexatious, the commission, through the Regional Land Claims Commissioner having jurisdiction (regional commissioner), will 'accept' the claim and, thereafter, 'cause notice of the claim to be published in the *Gazette* and shall take steps to make it known in the district in which the land in question is situated' (s 11(1)). The claim is then investigated further (s 12) and either mediated, with a view to reaching a settlement (s 13), or referred to the Land Claims Court (LCC) for adjudication (s 14).

[1] Where there was no dispossession there can be no restitution. Section 2(2) reads:
'No person shall be entitled to restitution of a right in land if –
(a) just and equitable compensation as contemplated in section 25 (3) of the Constitution; or
(b) any other consideration which is just and equitable, calculated at the time of any dispossession of such right, was received in respect of such dispossession.'

[2] In terms of s 11A of the Act a regional commissioner may reconsider his or her decision to 'accept' a claim and may withdraw the notice published in the *Gazette* on the strength of representations made for the withdrawal or amendment of that notice. This appeal concerns the question whether a regional commissioner, having determined that a claim for restitution is precluded by the provisions of s 2 because there had been no dispossession of the land in issue, may subsequently reconsider that decision and re-open the investigation into the claim.

[3] On 17 December 1998 Kgoshi Mafemane Hendrik Manok (Kgoshi Manok) lodged a land claim with the regional commissioner for the Northern Province (now Limpopo) and Mpumalanga, claiming restitution of the right of the descendants of one Jacobus Manok to the farm Aapiesdoorndraai 258 KT, situated in the Lydenburg district, Mpumalanga (the farm). Kgoshi Manok describes himself in the prescribed land claim form as a descendant of Jacobus Manok and 'representative of the Manok clan'. He states that he is 'also operating as a tribal chief for the Manok Tribal Authority'.

[4] It appears that in 1915 Jacobus Manok owned a three-eighths undivided share in the farm**.** The rest was owned by Messrs H J Neethling and R Schurink. In November 1912 the farm had been surveyed by a government land surveyor, on behalf of the three owners. It was sub-divided into three parts in 1915, apparently with the consent of the three owners, and Jacobus Manok received title to a portion of the farm. He died in 1920. In a letter dated 14 June 2000 the regional commissioner, after setting out the history of the farm as revealed in the course of research conducted through his office, advised Kgoshi Manok that 'it is clear that neither [Jacobus] Manok, nor his descendants, were ever dispossessed of any rights in the farm as a result of past racial laws or practices'. The penultimate paragraph of the letter reads:

'You are advised, therefore, that your land claim has been precluded in terms of the Restitution of Land Rights Act.'

[5] Following a letter received from the acting regional commissioner, Mpumalanga dated 6 June 2005 confirming that the commission had no record of land claims against the farm, the first and second respondents in this appeal embarked on a process of consultation with the relevant stakeholders in and around the farm, including Kgoshi Manok and his community, on the proposed development of residential and industrial erven within the townships of the nearby town of Burgersfort.[2] Kgoshi Manok died on 2 June 2008. The first respondent purchased two portions of the farm for a purchase price of R40 million and, together with the second respondent, proceeded with development projects at a risk and cost in excess of R400 million. But, from the contents of a letter addressed to a Mr Moses Modise of the office of the regional commissioner dated 14 June 2005, it appears that the author, Mr Tumi Moleke, had held a meeting with Mr Modise on 11 June 2005, where findings of a further research on the farm and its history were discussed. According to the letter, Mr Moleke was acting 'on behalf of the Manok family'. It was stated in the letter that the decision of the commission 'to dismiss the original claim submitted by the Manok Family' had been noted. The second paragraph of the letter reads:

'In the light of the meeting and the findings of our research we hereby request the commission to reopen the investigation into our claim. We reiterate our willingness and availability to cooperate with the commission on this matter.'

I shall assume, for purposes of this judgment, that Mr Moleke was duly authorised by the appellant and the Manok family to pursue the land claim even though it would appear that Kgoshi Manok and his community had accepted the decision of the regional commissioner. Mr Moleke, it must be mentioned, did not lodge a new claim, but in effect revived the claim that was lodged by Kgoshi Manok.

[6] The Department of Agriculture and Land Administration of the Mpumalanga

[2] The townships had been established on two portions of the farm.

Provincial Government somehow became involved in the matter and, on 23 February 2007, the regional commissioner wrote to certain stakeholders, including the Manoke Family Trust (referred to as the Manok Family Trust in this appeal) represented by Mr Moleke. *Inter alia*, the following was conveyed to the addressees;

'The lodged land claim by the Manoke Family over the whole farm, described as [Aapiesdoorndraai] 298 KT, has been dismissed by the [regional commission] but due to [Department of Agriculture and Land Administration] MEC's intervention the [regional commissioner] did reverse such decisions and commenced a review process of this case in its totality.'

The addressees were further advised in the letter that the Manok Family Trust claim 'is valid in terms of [the Act] as amended, and processes towards claims settlement options are underway'. On 26 October 2008 the regional commissioner gave instructions to 'proceed to gazette' and the land claim was accordingly published in the *Gazette* on 19 September 2008. This meant that the regional commissioner was now satisfied that the land claim was not precluded by the provisions of s 2 of the Act as he had previously concluded.

[7] On 10 December 2008 representations were made to the regional commissioner, on behalf of the first respondent, in terms of s 11A, in which it was submitted that certain facts placed before the commission relating to the history of the farm were false. The regional commissioner was accordingly requested to withdraw the notice gazetted on 19 September 2008, alternatively to amend it 'so as to make it clear that the claimant's claim is . . . limited to "equitable redress"'. When these representations did not yield the desired result, the first and second respondents launched an application in the LCC seeking, inter alia, an order setting aside the decision of the regional commissioner 'to reconsider and/or to accept and/or to reinstate the Manok Land Claim in respect of [the farm] previously dismissed by him' as well as the publication of the claim. Although seventeen respondents were cited in the notice of motion, the order sought would implicate

only the regional commissioner (cited as first respondent) and those who would benefit from the land claim, if successful. These were Kgoshi Koos Manok, the son of the deceased Kgoshi Manok; the appellant in this appeal and the Manok Community Trust (cited as the second to fourth respondents).

[8] The court below mentions in its judgment that 'the [regional] commissioner filed a notice of opposition to this application but subsequently withdrew it and decided to abide the decision of [the court]'**.** Although the court also stated that the sixth to ninth and the twelfth respondents did not oppose the application, it appears from the opposing papers that only the appellant opposed it. In addition, the appellant brought a conditional counter-application, seeking the following order (contained in a document deposed to by Mr Moleke, which served both as an answering affidavit and a founding affidavit in respect of the counter-application):

'4.1 Declaring that the correspondence dated 14 June 2000, purporting to be signed on behalf of the first respondent, does not constitute a decision in terms of the [Act], read with the regulations made in terms thereof.

4.2 In the event that it is decided that the communication dated 14 June 2000 does constitute a lawful decision in terms of the [Act], an order declaring that such decision did not in law preclude a later decision to the contrary made by the first respondent on 26 October 2008, accepting such land claim.

4.3 In the further event that it is also found that the decision of 14 June 2000 constitutes a final decision not subject to *mero motu* review, then reviewing and setting aside that decision, and ordering the first respondent to take all necessary steps to accept the land claim filed by the descendants of Jacobus Manok in respect of Aapiesdoorndraai 298 KT.

. . . .'

[9] The court below, in an amended order, set aside the decision of the regional commissioner 'to publish the notice in the *Government Gazette* on 19

September 2008 that the claim has been lodged in terms of the [Act] by [Kgoshi Manok] on behalf of the Manok Community, save insofar as it relates to portions 2 and 3 of the [farm]' and directed the regional commissioner to withdraw the notice 'save insofar as it relates to portions 2 and 3 of the [farm]'. The court also ordered the appellant to pay the costs of the application. It dismissed the counter – application, with costs. This appeal is with the leave of this court, the court below having refused leave to appeal.

[10] The third to sixth respondents have taken no part in this appeal. I shall accordingly refer to the first and second respondents, collectively, as 'the respondents'. The basis upon which the court below reached its decision was that the regional commissioner, '[h]aving made the decision to reject the claim on 14 June 2000, . . . was indeed *functus officio'* and, consequently, could not reverse his first decision. In this court counsel for the appellant submitted that the court below perpetuated the confusion between a preclusion of a claim in terms of s 11(1)(b)[3] and a dismissal in terms of s 11(3), which provides that a 'frivolous or vexatious claim may be dismissed by the regional land claims commissioner'. He contended that the court incorrectly interpreted the provisions of the Act and failed to appreciate the true nature of the regional commissioner's decision of 14 June 2000; that it failed to appreciate the investigative nature and function of the regional commissioner; that it would be overly burdensome for investigative bodies, wherever they may find themselves within the broader state administration, to have to approach a court every time they believe a previous decision was incorrect and that, for the sake of efficacy and justice, such investigative bodies should be at liberty to change their stance should other facts come to their attention.

[3] Section 11(1) reads: 'If the regional land claims commissioner having jurisdiction is satisfied that-
'(a) the claim has been lodged in the prescribed manner;
(b) the claim is not precluded by the provisions of section 2; and
(c) the claim is not frivolous or vexatious
he or she shall cause notice of the claim to be published in the *Gazette* and shall take steps to make it known in the district in which the land in question is situated.'

[11] It is not surprising that counsel did not refer to any authority for the propositions he advanced. Section 11(4) of the Act provides that '[i]f the regional land claims commissioner decides that the criteria set out in paragraphs *(a)*, *(b)* and *(c)* of subsection (1) have not been met, he or she shall advise the claimant accordingly, and of the reasons for such decision'.[4] Counsel correctly accepted in his heads of argument, and before us, that the regional commissioner's decision - to the effect that the criteria set out in subsec 1 of s 11 had not been met, ie that there had been no dispossession of the claimed land, which decision was conveyed to Kgoshi Manok in the letter of 14 June 2000 - constituted administrative action (See *Gamevest v Regional Land Claims Commissioner* 2003 (1) SA 373 (SCA) para 7), capable of being reviewed. In *Oudekraal Estates (Pty) Ltd v City of Cape Town & others* 2004 (6) SA 222 (SCA) a case which concerned the question whether, or in what circumstances, an unlawful administrative act might simply be ignored, this court said the following:

'Until the Administrator's approval (and thus also the consequences of the approval) is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked. The proper functioning of a modern State would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always been that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside.'[5]

When deciding to re-open the process upon the revival of the land claim brought by Mr Moleke on behalf of the appellant, the regional commissioner simply ignored his previous decision to not process it for the reason given by him.

[4] For the criteria referred to see fn 3 above.
[5] Para 26.

[12] The Act makes provision for the withdrawal or amendment of a notice of claim that had been published in the *Gazette* in terms of s 11(1). This the regional commissioner is empowered to do where, following investigations conducted upon receiving representations from a person affected by the publication, he or she 'has reason to believe that any of the criteria set out in paragraphs *(a)*, *(b)* and *(c)* of section 11(1) have not been met' (s 11A). The regional commissioner thus has the power, conferred by the Act, to change his or her original decision that the criteria set out in s 11(1) had been met. But the Act makes no provision for a reversal by the regional commissioner of a decision, taken in terms of s 11(4), that the criteria set out in paragraphs *(a)*, *(b)* and *(c)* of s11(1) have not been met, thereby, in effect, declining to process the claim any further.

[13] It has been held that the exercise of all public power must comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law.[6] *In Affordable Medicines Trust and others v Minister of Health & others* 2006 (3) SA 247 (CC) Ngcobo J, writing for a unanimous court, said:

'The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of pubic power is regulated by the Constitution. It entails that both the Legislature and the Executive "are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law". In this sense the Constitution entrenches the principle of legality and provides the foundation for the control of public power.'[7] (Footnotes omitted)

As I have mentioned above, the Act does not contain any provision that empowers a regional commissioner to reverse a decision made in terms of s 11(4). It follows that in the present matter the regional commissioner, in reversing his initial decision - and deciding to re-open investigations into the land claim at the instance of Mr Moleke and the interference of the MEC: Department of Agriculture Land

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[6] *Pharmaceutical Manufacturers Association of SA & another: In re Ex Parte President of the Republic of South Africa & others* 2000 (2) SA 674 (CC) para 20.
[7] Para 49.

Administration, Mpumalanga – acted in a manner that is inconsistent with the Constitution and his conduct was invalid (see *Affordable Medicines*, *supra*, para 50).

[14] The absence, in the Act, of a provision that empowers a regional commissioner to reverse a decision made in terms of s 11(4), ineluctably leads one to the conclusion that that decision, though not a dismissal of a claim, is final. Of course finality 'is a point arrived at when the decision is published, announced or otherwise conveyed to those affected by it',[8] and a decision is revocable before it becomes final.[9] In the present matter the decision of the regional commissioner that the land claim lodged by Kgoshi Manok on behalf of the Manok clan 'has been precluded in terms of the [Act]' was conveyed to the claimant as required by s 11(4) by way of the letter dated 14 June 2000. All indications are that Kgoshi Manok and his community became aware of the decision. There is no suggestion to the contrary. That that is so is also clear from the letter from Mr Moleke addressed to the Mpumalanga Land Claims Commissioner for the attention of Mr Modise, the first sentence of which reads:

'We had noted the decision by the commission to dismiss the original claim submitted by the Manok Family.'

The regional commissioner's decision therefore became final when it was conveyed to Kgoshi Manok.

[15] About the reversal of administrative decisions Baxter says the following:

'Indeed, effective daily administration is inconceivable without the continuous exercise and re-exercise of statutory powers and the reversal of decisions previously made. On the

[8] Cora Hoexter *Administrative Law in South Africa* (2nd ed) (2012) at 278, referred to with approval in *MEC for Health, Eastern Cape, & another v Kirkland Investments (Pty) Ltd t/a Eye and Laser Institute* 2014 (3) SA 219 (SCA) para 15.
[9] Compare *President of the Republic of South Africa & others v South African Rugby Football Union & others* 2000 (1) SA 1 (CC) para 44.

other hand, where the interests of private individuals are affected we are entitled to rely upon decisions of public authorities and intolerable uncertainty would result if these could be reversed at any moment. Thus when an administrative official has made a decision which bears directly upon an individual's interests, it is said that the decision-maker has discharged his office or is functus officio.'[10]

In *Kirkland Investments*,[11] one of the issues this court had to consider was the validity of two administrative decisions taken by the superintendent-general of the Department of Health in the Eastern Cape to revoke approvals granted to Kirkland Investments to establish two private hospitals which were given during his absence from office by the person who acted in his stead, Plasket AJA said:

'I therefore conclude that Boya could not validly take the view that because the decisions taken by Diliza were invalid, he could treat them as nullities and formally revoke them. For as long as the decisions taken by Diliza had not been set aside on review they existed in fact and had legal consequences. As Boya had no authority arising from the empowering legislation to revoke final decisions already taken – much less in the absence of a hearing being granted to Kirkland Investments – he was, in relation to the decisions taken by Diliza in her capacity as acting superintendent-general, functus officio.'[12]

[16] One of the grounds of review validly raised for the review and setting aside of the regional commissioner's later decision to publish the land claim was that that decision was procedurally unfair as is contemplated in s 6(2)(c) of the Promotion of Administrative Justice Act 3 of 2000. It was alleged, in the founding affidavit, that '[a]fter having dismissed the Manok Land Claim on 14 June 2000 . . . and with the knowledge that the developers had embarked upon the various development projects, the [claim] was unlawfully resurrected to the prejudice of the developers and without affording them an opportunity to be heard on this matter'**.** The allegation was not denied in the opposing papers.

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[10] Lawrence Baxter *Administrative Law* (1984) at 372.
[11] Reference at fn 8 above.
[12] At para 22.

[17] I have mentioned above that a regional commissioner has no power, sourced from the Act, to reverse a decision made in terms of s 11(4) and that his decision to preclude Kgoshi Manok's land claim was final. He was therefore *functus officio* and could not reverse or ignore the decision he had already made. Until set aside by a court in proceedings for judicial review, which could have been instituted by the regional commissioner himself (see *Municipal Manager: Qaukeni Local Municipality & another v FV General Trading CC* 2010 (1) SA 356 (SCA) para 23 and the cases there cited) the decision exists in fact and has legal consequences. It could not simply be overlooked or reversed (*Oudekraal, supra,* para 26). It follows that the regional commissioner's subsequent decision to publish the notice of the land claim in the *Gazette* on 19 September 2008 was invalid and fell to be set aside.

[18] As to the conditional counter-application, although a number of so-called review grounds were set out in the opposing papers, there were only three grounds upon which leave to appeal against its dismissal was sought and granted. The first was that 'the decision of 14 June 2000 was made without affording the claimants any opportunity to bring facts to the attention of the [regional commissioner] which they may have believed to be relevant'. This was never part of the appellant's case in its combined answering and founding affidavit in respect of the counter-application. Nothing further needs be said on this point. The second ground, which was alluded to in the combined affidavit, was that the regional commissioner was 'not competent to decide to reject a claim on the basis that it was "precluded"' and that on a proper interpretation of s 2 of the Act 'this would only be relevant in a case where the claim was lodged before the cut-off date or where the claimant had received just and equitable compensation'. Apart from the fact that no argument was advanced in this court in respect of this ground, the decision made by the regional commissioner in terms of s 11(4) of the Act does not amount to a dismissal or rejection of the Manok family's land claim. A regional commissioner is empowered to dismiss a claim only if it is frivolous or vexatious (s

11(3)). A decision that a land claim is precluded by the provisions of s 2 simply means that the regional commissioner was not satisfied that the criteria set out in paragraphs *(a)*, *(b)* and *(c)* of subsec (1) of s 11 have been met, and that the claim would not be published in the *Gazette*, investigated further and either mediated or referred to the LCC for adjudication.

[19] But the decision of a regional commissioner in terms of s 11(4) does not necessarily mean that a claimant has reached the end of the road. A claimant may, in certain circumstances, pursue a claim by approaching the LCC directly in terms of s 38B of the Act[13] (see *Mahlangu NO v Minister of Land Affairs & others* 2005 (1) SA 451 (SCA) para 5). Whether or not the appellant would qualify to approach the LCC in terms of s 38B is not an issue for this court to consider.

[20] The third ground was that the land claim 'had sufficient merits to pass the low threshold for acceptance' and that the fact that Jacobus Manok 're-arranged his ownership at the same time as when the 1913 Native Land Act came into force, must raise warning lights by itself'. The alleged re-arrangement of his ownership by Jacobus Manok relates to the 1915 sub-division of the farm by agreement between its three owners at the time. We were not directed, nor was there any reference made in the heads of argument, to any evidence in the papers substantiating the submission that the land claim had sufficient merits to pass the low threshold for acceptance by the regional commissioner. The only contention in the heads of argument, which was not really pursued in argument in this court, is that if it is found that the decision to publish the notice of the land claim on 19 September 2008 'was invalid for some or other reason, and stands to be set aside,

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[13] Section 38B(1)reads: 'Notwithstanding anything to the contrary contained in this Act, any person who or the representative of any community which is entitled to claim restitution of a right in land and has lodged a claim not later than 31 December 1998 may apply to the Court for restitution of such right: Provided that leave of the Court to lodge such application shall first be obtained if –

(a) an order has been made by the Court in terms of section 35 in respect of a right relating to that land; or

(b) a notice has been published in the *Gazette* in terms of section 12 (4) or 38D (1) in respect of that land and the period specified in the said notice has expired.'

then it is similarly submitted that the decision of 14 June 2000 should also be set aside, as the land claim was clearly not precluded by [s 2] of the Act'. Preclusion, so the contention went, cannot relate to a scrutiny of the merits. There is no merit in this submission. The Act requires a regional commissioner to be satisfied that the threshold is passed and if he or she is not so satisfied, the Act maps out the course he or she must take in relation to the land claim. That is what the regional commissioner did in this case.

[19] In the result, the following order is made:

The appeal is dismissed. No order is made as to costs.

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L MPATI
PRESIDENT

APPEARANCES

For appellant	C R Jansen (with him M A Dewrance)
Instructed by:	Ledwaba Mazwai Attorneys, Pretoria
	Webbers Attorneys, Bloemfontein
For First and Second Respondents	H S Havenga S C (with him J A Venter)
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