**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**
**JUDGMENT**

**Reportable**
Case No: 52/2016

In the matter between:

**MINISTER OF RURAL DEVELOPMENT AND LAND REFORM** **FIRST APPELLANT**

**THE REGIONAL LAND CLAIMS COMMISSIONER, EASTERN CAPE** **SECOND APPELLANT**

and

**IVOR LEROY PHILLIPS** **RESPONDENT**

**Neutral citation:** *Minister of Rural Development and Land Reform v Phillips* (52/2016) [2017] ZASCA 1 (22 February 2017)

**Coram:** Leach, Tshiqi and Zondi JJA and Makgoka and Schippers AJJA

**Heard:** 21 November 2016

**Delivered:** 22 February 2017

**Summary:** Award of financial compensation made to redress a dispossession of a right in land under the Restitution of Land Rights Act 22 of 1994 : principles applicable to the determination of redress : no reasonable prospect of another court finding the Land Claims Court had erred in its determination.

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**ORDER**

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**On appeal from:** Land Claims Court of South Africa, Randburg (Meer AJP and assessor sitting as court of first instance):

1 The application for condonation of the late filing of the record of the proceedings in the court a quo and reinstatement of the appeal is dismissed, and the appeal is struck from the roll.
2 The applicants are to pay the respondent's costs, such costs to include the costs of two counsel.

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**JUDGMENT**

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**Leach JA (Tshiqi and Zondi JJA and Makgoka and Schippers AJJA concurring)**

[1] The applicants sought and obtained leave to appeal to this Court against an order made by the Land Claims Court that the respondent be paid R14 785 000 under the Restitution of Land Rights Act 22 of 1994 (the Restitution Act) pursuant to his having been dispossessed of certain farming properties in the Eastern Cape under a past racial law for which he had not received just and equitable compensation. They also sought to appeal against an order that they pay costs on the scale as between attorney and client.

[2] The applicants, however, allowed their appeal to lapse by failing to file the record timeously, and on 27 October 2015 the Registrar of this Court addressed a letter to that effect to the parties.[1] As a result, the respondent served a letter on the applicants (respectively on 30 November and 1 December, 2015) demanding satisfaction of the judgment. The same letter was served on the State Attorney, Mthatha on 15 January 2016. This eventually appears to have provoked a reaction as, on 22 January 2016, the applicants launched the present application seeking an order condoning their failure to lodge the appeal record timeously and re-instating their appeal. The primary exculpatory factor they relied upon was a professed difficulty in obtaining a record from the company charged with its transcription.

[3] This relief was opposed by the respondent. In doing so he drew attention to various correspondence that had passed, as well as an affidavit from the transcribers, in support of an argument that there had been dilatoriness on the part of the applicants and the State Attorney. That may well have been the case but this matter may be determined without any decision on that issue. Indeed the matter was argued essentially on the merits of the proposed appeal, it being the respondent's contention that there was no reasonable prospect of success in the appeal and, consequently, on that ground alone the application ought to be dismissed. In this way, the merits of the appeal were ventilated in this Court in order to determine whether the appeal, which had been provisionally enrolled, should be heard or struck from the roll.

[4] I therefore turn to deal with the merits of the respondent's claim that was upheld in the court a quo. It was based on an allegation that he had been dispossessed of his rights in land as a result of a past racial law, namely, the

[1] Rule 8(3) of the Rules of the Supreme Court of Appeal provides: 'If the appellant fails to lodge the record within the prescribed period or within the extended period, the appeal shall lapse.'

Development Trust and Land Act 18 of 1936 (the Development Act). The land in question were the farms Thibet Park 346, Otterford 347, Portion 1 of Keys Poort 149 and the remainder of Keys Poort 149, situate in the division of Queenstown and Tarkastad, in the Eastern Cape. Although registered as four separate entities, the first two were historically treated as the farm Thibet Park whilst the latter two were known as the farm Keys Poort. They were referred to collectively by the court a quo as 'the subject properties' and, for convenience, I intend to use this collective nomenclature as well.

[5] The subject properties were farmed as if they were a single unit, the respondent having stated in a memorandum of 29 April 1977 that 'there is not even a fence on the boundary between my said two farms' and that this had been the position for several generations. Indeed, the Otterford portion was acquired by an ancestor of the respondent in November 1891 while the remainder of Thibet Park and Keys Poort were purchased by the respondent's father in 1955. They were held in the respondent's name by way of a Deed of Transfer No 19325 of 1971.

[6] It was the respondent's case that in 1977 he had sold the subject properties under duress to the South African Development Trust for R475 000, a sum which he contended did not constitute just and equitable compensation as envisaged in s 2 of the Restitution Act. The farms were acquired from him for subsequent incorporation into the so-called 'Republic of Ciskei' after the area in which they were situated had been declared to be a 'released area' for occupation solely by black persons under the terms of the Development Act. They were indeed later incorporated into Ciskei and, today, form part of what is known as the Tsolwana Game Reserve.

[7] The respondent claimed that he had sold under duress and that, in all the circumstances, he had been dispossessed of the subject properties. He therefore lodged a claim under the provisions of s 2 of the Restitution Act on 28 December 1998, seeking equitable redress in the form of financial compensation for this dispossession. This was the beginning of a long and drawn-out process which eventually culminated in the order of the court a quo against which the applicants seek to appeal.

[8] A period of almost six years elapsed before the second applicant, in a letter dated 16 August 2004, accepted the respondent's claim as valid. On 8 November 2006, negotiations between the second applicant and the respondent resulted in an offer to pay the respondent R6,9 million. This was rejected and no further progress was made until 18 August 2010, when the Land Claims Court granted a mandamus compelling the second applicant to refer the respondent's claim for adjudication. It was only pursuant to this that, on 13 November 2010, the second applicant referred the claim to the Land Claims Court under the provisions of s 14(1) of the Restitution Act. In doing so, the second applicant disputed that a valid claim had been lodged under s 2 of that Act. The basis for it doing so was its contention that the compensation the respondent had received at the time of his dispossession constituted just and equitable compensation as contemplated under s 2(2). However, the merits of the claim, namely, that the respondent had suffered a dispossession when he had sold the farms under duress, remained undisputed.

[9] The matter was set down for trial on 6 May 2013. As appears from what I have said, at that stage the sole issue was whether the respondent had received just and equitable compensation at the time of his dispossession, such dispossession being at that stage common cause. Shortly before the trial, however, the second applicant delivered a notice of amendment seeking to

withdraw the admissions contained in the referral; in particular, the admission that the respondent had been dispossessed. After a pre-trial conference, the respondent agreed to the amendment and to the trial proceeding solely on the question of whether there had been a dispossession of his rights in land when he sold the subject properties in 1977.

[10] Accordingly, the Land Claims Court then proceeded to decide as a separate issue whether there had been a dispossession as envisaged by the Restitution Act. After hearing evidence, it held in favour of the respondent and, on 9 May 2013, granted an order declaring that the respondent had indeed been dispossessed of rights in land in respect of the subject properties. Subsequently, on 30 July 2013, the Land Claims Court dismissed an application for leave to appeal against that order.

[11] The applicants, however, persisted in disputing that the respondent had been dispossessed, and petitioned this court for leave to appeal. In doing so they contended, inter alia, that the respondent, as a white person, did not fall within the category of those who are entitled to restitution under the Restitution Act and that the Land Claims Court had erred in finding to the contrary. They went on to allege that even if the respondent was within the class of persons entitled to restitution, he had not been dispossessed of rights in land in that the sale under coercion or duress could not be regarded as a dispossession. All of this flew in the face of a long list of judgments, unnecessary to mention in this judgment, but which the applicants argued were merely obiter.

[12] In any event, the application for leave to appeal to this court was refused, as was a subsequent application for leave addressed to the Constitutional Court. That brought finality in the respondent's favour on the issue of whether there had been a dispossession. Accordingly only the issue of compensation remained

to be determined. In this convoluted way the matter returned to the court a quo, in mid-June 2014, for it to determine what compensation the respondent should be paid as equitable redress.

[13] In determining what redress would be appropriate, the court a quo undertook as its starting point an assessment of the financial loss suffered by the respondent at the time of the dispossession. This was in accordance with the decision of the Constitutional Court in *Florence*.[2] Consequently the primary issue between the parties in the court a quo was the value of the subject properties in 1977, and whether the respondent had been under-compensated when he sold them.

[14] Turning to the question of value, it should be recorded that the subject properties are situated to the north of the Winterberg range. They are blessed with sweetveld grazing which remains palatable and nutritious throughout the year and provides a relatively low cost, but high quality, food source for livestock. Together with that of the Smaldeel (a region I shall mention later) the subject properties fall within an area generally regarded as being one of the best livestock areas in the country, known to be tick-free and, importantly, largely disease-free. They also enjoy a high average rainfall of 450-500mm per annum, falling mainly during the summer and autumn. Moreover, unlike most of the properties nearby where water is not perennial, the subject properties are transected by the Swart Kei River which runs through them. Not only is the river perennial but it is additionally fed by the Limietskloof and Thrift irrigation dams. Their soils are inherently fertile, there being deep, irrigable soils straddling the Swart Kei. As a result, drought, that constant enemy of South African farmers, was not as serious a problem for the respondent as it was to

[2] *Florence v Government of the Republic of South Africa* 2014 (6) SA 456 (CC) paras 129-134.

many others, not only as there was water for stock but fodder was produced from irrigated lands to provide feed.

[15] By reason of the way the argument developed in this Court, it is not necessary to deal in any further detail with the improvements on the subject properties or the benefits Mother Nature had bestowed upon them. Suffice it to say that they formed an integral part of the assets used by the respondent and his three brothers with whom he farmed in partnership. The partnership conducted a flourishing enterprise. It ran in excess of 1 000 cattle and 10 000 sheep. It had both a race horse stud and a Dorper sheep stud as well as a dairy herd of some 560 Jersey cows. Three hundred hectares of lands, more than a third of which which were located on the subject properties, were under irrigation and provided mainly lucerne at a yield of some 15 tons per hectare per annum. The subject properties were thus magnificent farms of considerable value.

[16] The respondent was paid R475 700 for the subject properties in 1977, being R321 500 in respect of the farm Thibet Park and R154 100 in respect of the Keys Poort. These were the amounts reflected in a valuation report prepared by a valuer employed by the State at the time, a Mr Prinsloo. Neither side relied upon his valuation which was justifiably and stringently criticised by the court a quo. However, despite the glaring inconsistencies that it contained, and Mr Prinsloo's apparent failure to appreciate the value of the abundance of water on the subject properties (factors which the court a quo found justified the rejection of his valuation), both the applicants and the valuers who testified on their behalf steadfastly maintained during evidence that the amount the respondent had been paid had amounted to adequate compensation.

[17] However during the course of argument the applicants changed their stance, and the court a quo recorded:

'Whilst the [appellants'] valuers and their counsel maintained throughout that the [respondent] had been adequately compensated, surprisingly in their heads of argument they advocated that the sum of R3,209,000 be determined as just and equitable compensation. I shall attempt to explain the calculation leading up to this as was explained to me. Mr Notshe said that they had arrived at this figure by adding a *solatium* of R28,375 calculated in accordance with s 12 of the Expropriation Act No 63 of 1975 to the market value of R467,500 as of date of dispossession determined by them, resulting in a shortfall of R20,175 adjusted to a present value of R605,250. They then arrived at a shortfall of 3 to 5 million rand between the current value of R467,500 which they estimated to be R14,025,000, and the sum of R17 million, to R19 million which they estimated (without any explanation or motivation) to be the value of the subject properties, had they remained in the plaintiff's possession. They thereafter estimated (once again without explanation) that R2,6 million would be just and equitable compensation, and added R605,250 to this figure to arrive at R3,209,000 as a final just and equitable compensation figure. It is of grave concern that the [applicants] saw fit to provide such random and unmotivated figures unsupported by evidence only at the stage of argument.'

[18] The applicants changed their stance again in this Court. They reverted to contending that the amount paid to the respondent at the date of dispossession had been adequate and that no further redress under the Restitution Act was justified. But as is apparent from what is set out below, the basis of this contention changed from that adopted during the trial and in respect of which leave to appeal to this court had been granted – namely that the respondent had in fact been paid more than the subject properties were worth – to an argument that even if there had been a substantial under-payment, no further financial compensation should be paid to the respondent.

[19] In advancing his case that he had been paid substantially less than he ought to have been, the respondent relied upon the expert testimony of

professional associated valuers, Mr Henderson and Prof Tainton, the latter being a professor emeritus at the University of KwaZulu-Natal. In their valuations of the subject properties, they relied upon what has become known as 'the Smaldeel norms' for land values. Produced by a committee of agricultural and property experts, these norms were based on the market value of a broad spectrum of agricultural properties in the so-called 'Smaldeel'. This is a high rainfall area situated between the Keiskamma and Kat rivers, south of Alice and in the vicinity of Fort Beaufort, and renowned for the high quality of its livestock grazing. The Smaldeel norms were designed to achieve a measure of uniformity of land values in the area as the government of the day was determined to incorporate a number of farms in the Smaldeel region into Ciskei, and needed an empirical basis to assess compensation for the farmers whose land was to be acquired for this purpose. This led to the appointment of a committee of experts in the field of pastoral science and agriculture who were mandated to determine an acceptable set of norms which could be used to value these properties. Although these norms were only finally agreed upon in 1981, a few years after the respondent had been dispossessed of the subject properties, they were regarded by Mr Henderson and Prof Tainton to be appropriate for use in the present case. This was as they took into account market transactions that had occurred at a similar time and as the grazing and rainfall of the Smaldeel are similar to that of the subject properties.

[20] Whilst the court a quo did not slavishly follow the evidence of the respondent's valuers, it did accept the use of the Smaldeel norms as a means to determine market value. On the other hand, it rejected the evidence given by the valuers who testified for the applicants, Messrs Voges and Taylor, who had relied for their valuation of the subject properties upon a list of sales provided by a firm of accountants as possible comparable transactions, and had then merely done a so-called 'desktop' valuation without even inspecting the various

properties. The only relevance of the 12 transactions they had relied upon came from a similarity of veld types and did not take account of any of the other important features of the subject properties.

[21] In dealing with this evidence, the court a quo stated, quite correctly, that 'it is trite that a comparable transaction which has not been properly investigated affords little assistance and that our courts have rejected valuations on the grounds that valuers have not investigated sufficiently the transactions on which they have relied'. It went on to say:

'The fact that the defendants' valuations of the subject properties and the 12 transactions were compiled on a desktop basis without visiting the properties led to inaccuracies in the recordings of the extent and nature of the irrigation on both the subject properties and the 12 transactions. Crucially in respect of the subject property the defendants' reports largely ignored the existence of 110 hectares of irrigated land. It is difficult to comprehend how the defendants' valuers could have considered that a desktop valuation could suffice for the purposes of the determination of value in a complex restitution claim. It is disquieting that they saw fit to rely on this method especially in a disputed claim. A desktop valuation is a procedure which flies in the face of accepted valuation practice requiring proper investigation.

Then too in respect of the alleged comparable properties the defendants' initial report contains no reference to arable, irrigable or irrigated land. In the table subsequently filed irrigated land is indicated on some of the properties, but without explanation. The discrepancies between the desktop valuation and the schedule is a cause for criticism, as is the failure to provide the requested supporting maps, photographs, collateral evidence and the failure to access relevant historical documents. Simply to have based the valuation and analysis of the subject properties on the deeds of transfer, topo-cadastral maps and aerial photographs was conduct unbefitting of a diligent valuer. So too, the failure to do their own research and the acceptance without more of the instruction not to inspect the subject properties. All things considered, the basic data that the defendants' valuers had was insufficient to do a reliable valuation based on the comparable sales method or to determine if the sales were arm's length transactions.'

[22] In the light of these findings, the court a quo rejected the valuations of the applicants' experts. Guided by certain of the evidence of the respondent's experts, it donned its mantle of 'super valuator'[3] and, after having closely analysed various other sales of properties which it held were comparable in various respects with the subject properties, concluded that when dispossessed in 1977, the respondent had been under-compensated by an amount of R568 909 (being R315 653 in respect of Thibet Park and R253 256 in respect of Keys Poort).

[23] That sum, when transposed in terms of an agreed index to the current value of money under s *33(eC)* of the Restitution Act, is equivalent to an amount of R16 427 889. To that figure the court a quo made a downward adjustment, following the approach laid down by Moseneke ACJ in the majority judgment in *Florence* where it was said:

'[124] Equitable redress must be sufficient to make up for what was taken away at the time of dispossession. The amount of compensation has to be just and equitable reflecting a fair balance between public interest and the interest of those affected after considering relevant circumstances listed in s 33 of the Restitution Act. For instance, a history of hardship caused by the dispossession may entitle a claimant to a higher compensation award in order to assuage past disrespect and indignity.

[125] But compensation within the scheme of the Restitution Act is neither punitive nor retributive. It is not to be likened to a delictual claim aimed at awarding damages that are capable of precise computation of loss on a "but-for" basis. It is a constitutionalised scheme paid out of public funds in order to find equitable redress to a tragic past. Ultimately, what is just and equitable must be evaluated not only from the perspective of the claimant but also of the State as the custodian of the national fiscus and the broad interests of society, as well as all those who might be affected by the order made.'

[3] As to which see *Southern Transvaal Buildings (Pty) Ltd v Johannesburg City Council* 1979 (1) SA 949 (W).

[24] In the light of this dictum, the court a quo felt that the requirements of justice and equity dictated that a downward adjustment of 10% would be equitable to take account not only of the respondent's perception, but to also take into consideration the concerns of the national fiscus in a strained economy and as the interests of a society in which many land claims still have to be settled. Applying such a deduction to the current value of the respondent's calculated 1977 loss, it arrived at the sum of R14 785 00 ultimately awarded.

[25] The court a quo's determination of the value of the subject properties in 1977 was the essential finding which the applicants sought to impugn in their application for leave to appeal. They contended that the court a quo had erred both in rejecting their expert witnesses and accepting the evidence of those of the respondent. They also contended that the punitive costs order granted against them was not justified. In granting leave to appeal, the court a quo stated that it was mindful of the fact that valuation is not an exact science and it felt that another court could come to a different decision relating to its valuation. It was thus apparent to the court a quo that, save for the costs issue, the only relevant issue was that of the value of the subject properties in 1977.

[26] That it was indeed the relevant issue is borne out by the applicants' heads of argument filed in this court. They were devoted almost entirely to the question of the value of the subject properties in 1977, and traversed the appropriateness of the use of the Smaldeel norms, the comparable transactions, the rainfall capacity of the properties and allegedly inconsistent and unreliable information which was taken into account – before concluding that the respondent's experts as to value ought to have been rejected and that the evidence of their valuators, that the subject properties had not been under-valued, ought to have been accepted.

[27] However, at the outset of the hearing before this Court, no sooner had the difficulties which the court a quo had with the applicants' experts been put to him, leading counsel for the applicants promptly conceded that the applicants' experts had been correctly discredited and that their evidence could not be relied upon, and that the court a quo had been entitled to have regard to the respondent's evidence as to value. Not only was this a correct concession that had to be made, but it was one that ought to have been obvious and made before the trial in the court a quo. And to all intents and purposes, it effectively abandoned the cardinal issue raised in the appeal.

[28] In addition, the applicants' counsel further conceded that the amount determined by the court a quo could be regarded as being just and equitable financial compensation for the dispossession the respondent had suffered. However, he argued that it was not proper 'redress' as referred to in s 25(7) of the Constitution and s 33 of the Restitution Act.

[29] On this issue, it was contended that the court a quo had misdirected itself by approaching the matter on the basis that it was bound to compensate the respondent, which is not the same as determining redress. In this regard it was argued that there had been a failure to distinguish between just and equitable compensation payable in term of s 27(3) of the Constitution and equitable redress assessed in terms of s 25(7) of the Constitution (this being a ground of appeal inserted into the applicants' notice of appeal by way of a purported amendment dated 17 May 2016). Moreover, in considering what redress was appropriate, it was argued that the court a quo had also erred in deciding that any amount at all should be paid to the respondent in that (a) he had been able to procure another farm with what he had been paid for the subject properties ─ albeit in Molteno a hundred kilometres away ─ and (b) if the respondent had built up his new farm, its current value should be taken into account as he might

well be in at least as good a position today as he may have been had the dispossession not taken place.

[30] There is no merit in these contentions. It is quite clear from the judgment of the court a quo, and its reference to the judgment in *Florence*, that it was fully aware that although the land values were an important factor, it was not the sole criterion relevant to what was appropriate redress. And in regard to the second leg of this argument, it is now well established that what a dispossessed person does with whatever compensation is received from the dispossession has little to do with whether that compensation was adequate or not.[4] As Moseneke ACJ said in *Florence*:[5]

'This means that the scheme of the Restitution Act makes the time of dispossession the critical starting point of an assessment of financial compensation. The government is right that the purpose of the financial compensation is to provide relief to claimants in order to restore them to a position as if they had been adequately compensated immediately after the dispossession. It must be correct that just and equitable financial compensation does not aim to restore claimants in current monetary terms to the position they would have been in had they not been dispossessed, but rather the financial loss they incurred at the time of dispossession. The Land Claims Court was correct to set the loss at the time of dispossession of the market value of the property less the amount of compensation the applications had received at the time of dispossession.'[6]

This is precisely what the court a quo did in the present case, and the argument that it erred or misdirected itself in doing so cannot be sustained.

[31] Counsel for the applicants also argued that no redress ought to have been awarded as, when the respondent had been dispossessed, he was not obliged to sell and could have remained in possession until the subject properties were

[4] *Haakdoornbult Boerdery CC & others v Mphela & others* 2007 (5) SA 596 (SCA) para 43 referred to with approval in *Florence* para 132. See further *Ndebele-Nolzun dza Community v The Farm Kafferskraal* 2003 (5) SA 375 (LCC) para 29.
[5] Para 132.
[6] See further *Florence* para 148.

expropriated. Had that occurred he would have had the right to challenge the amount at which the subject properties were expropriated and thereby recover adequate compensation. It would therefore be wrong, so the argument went, to allow him to obtain compensation now for what he had lost when he had failed to avail himself of that opportunity in the past.

[32] This overlooks the fact that the threat of expropriation was indeed one of the factors that led to the dispossession as it would have entailed a long drawn-out process without certainty as to the amount the respondent would receive and without any certainty as to his future. But even more importantly, the argument in this regard is merely an echo of that which was made by the applicants in their unsuccessful applications both to this court and to the Constitutional Court. It was then alleged that there had been no dispossession as the respondent's rights in land had been taken in exchange for compensation which he had the right to challenge. Indeed, the applicant's argument that it would not be just and equitable to afford relief in the circumstances amounts in essence to an argument that there was no dispossession, an issue which has already been finally determined against the applicants. The present matter must therefore proceed on the basis that there was a dispossession. The sole issue in these proceedings is the amount of financial compensation to be paid as redress, and it ill behoves the applicants to argue that no redress should be paid despite there having been a dispossession.

[33] As was held by the Constitutional Court in *Mphela*,[7] and reiterated by that court in *Florence*,[8]the Land Claims Court has a strict and true discretion and enjoys wide adjudicative remedial powers conferred on it, inter alia, under

[7] *Mphela & others v Haakdoornbult Boerdery CC & others* 2008 (4) SA 488 (CC) paras 25-26.
[8] *Florence* para 112.

ss 33 and 35 of the Restitution Act.[9] Consequently, the power of an appellate court to interfere with the exercise of discretion by a Land Claims Court is not without restraint but is limited by whether the discretion invested in that court had not been judicially exercised or had been influenced by wrong principles or a misdirection of the facts or was one that could not reasonably have been made. Bearing that in mind, in the light of what I have set out above the discretion exercised in the court a quo in this matter in regard to the financial compensation to be awarded, appears to me to be immune from appellate interference.

[34] So too does the award of costs on a punitive scale. It was argued on the applicants' behalf that costs on a punitive scale was unjustified. However in dealing with the question of costs, the court a quo correctly emphasized that the second applicant, the Regional Land Claims Commissioner, is tasked by the Restitution Act to support claimants and to assist them.[10] The court went on:

'From the protracted history of this matter it would appear that the [respondent] received very little support from the second [applicant]. In fact the Regional Land Claims Commissioner, who is supposed to play a mediatory role, sided completely with the State as a defendant and opposed the claim vehemently. It is also extremely disconcerting that the Regional Land Claims Commissioner changed its stance so drastically from 2007 when a settlement offer was made to the [respondent], presumably on the basis that he did not receive just and equitable compensation, to the stance that the [respondent] was over compensated, and thereafter once again changed to ultimately arrive at its current stance. The various valuation reports obtained by the Regional Land Claims Commissioner are also suggestive of an attempt to thwart the [respondent's] claim and not to assist. I note also my concern that despite repeated attempts by the Court to get the parties to settle, the stance of the [applicants] was intransigent in this regard.'

Then after referring to authorities in which it had been held that officials such as the second applicant are 'functionaries who have to receive and investigate

[9] *Florence* paras 116-117.
[10] See in this regard s 6(1) of the Restitution Act which sets out the general functions of the Commission.

the . . . claim in an objective, fair and responsible manner'[11] and that the second applicant's conduct in particular had been untenable, the court a quo concluded that costs on a punitive scale was merited.

[35] Counsel for the applicants sought to criticise this reasoning in the light of the facts of the present case. However, at first blush, the second applicant in particular certainly did change its stance from offering to settle the claim by paying millions of rand to contending that in fact no amount at all should be paid. Indeed she has since persistently shown a lack of objectivity and has relied on clearly fallacious reasoning and allegedly comparable transactions which in truth were nothing of the sort.

[36] Moreover, the court a quo also exercised a judicial discretion in regard to the costs. In this instance too, interference with that discretion can only be justified in instances where it is found that the court of first instance did not act judicially, or acted upon a wrong principle, or was influenced by wrong principles or a misdirection of the facts, or reached a decision which could not reasonably have been made by a court properly directing itself to all the relevant facts and principles.[12] In the light of what I have already mentioned, there is no reasonable prospect of the applicants succeeding in establishing a basis to interfere with the discretion exercised by the court a quo in regard to costs.

[37] In any event, as for the reasons already given the applicants have no prospect of success in regard to the merits of the dispute, it also becomes relevant that it is trite that leave to appeal to this court need not be given where the issue relates solely to the question of costs. That is a longstanding policy,

[11] *Hlaneki & others v Commission on Restitution of Land Rights & others* [2006] 1 All SA 633 LCC para 30.
[12] See *Dobsa v Dlamini Advisory Services*; *Dlamini Advisory Services v Dobsa* (050/2016) [2016] ZASCA 131 (28 September 2016) para 14 and the authorities therein cited.

now fortified by s 16(2)(a)(ii) of the Superior Courts Act 10 of 2013. There are no exceptional circumstances present which justified departure from this rule and there is thus no reason to allow an appeal solely in regard to costs.

[38] For these reasons there is in my view no reasonable prospect of an appeal succeeding. That being so, the application for condonation and the reinstatement of the appeal must fail.

[39] It is therefore ordered:

1 The application for condonation of the late filing of the record of the proceedings in the court a quo and reinstatement and the appeal is dismissed and the appeal is struck from the roll.

2 The applicants are to pay the respondent's costs, such costs to include the costs of two counsel.

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L E Leach

Judge of Appeal

Appearances:

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|---|---|
| For the Appellant: | V S Notshe SC (with him T Seneke) |
| Instructed by: | State Attorney, Mthatha |
| | State Attorney, Bloemfontein |
| For the Respondent: | H S Havenga SC (with him O H Ronaasen SC) |
| Instructed by: | Roelofse Meyer Incorporated, Port Elizabeth |
| | Honey Attorneys, Bloemfontein |