THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable
Case No: 1284/16

In the matter between:

RALPH DANIEL JACOBS
(In re: the Farm Uap) **APPELLANT**

and

DEPARTMENT OF LAND AFFAIRS **RESPONDENT**

Case No: 982/2017

And in the matter between:

RALPH DANIEL JACOBS
(In re: Erf 38) **APPELLANT**

and

DEPARTMENT OF LAND AFFAIRS **RESPONDENT**

Neutral citation: *Jacobs (in re the farm Uap) v Department of Land Affairs and Jacobs (in re Erf 38) v Department of Land Affairs* (1284/16) and (982/2017) ZASCA 122 (26 September 2019)

Coram: Ponnan, Swain, Mbha and Zondi JJA and Tsoka AJA

Heard: 19 August 2019

Delivered: 26 September 2019

Summary: Financial compensation as equitable redress under the Restitution of Land Rights Act 22 of 1994 – dispossession of land rights as a result of racially discriminatory laws and practices – amounts awarded as compensation in respect of two immovable

properties correctly computed in accordance with the principles laid down in *Florence v Government of the Republic of South Africa* 2014 (6) SA 456 CC – both appeals dismissed with no orders as to costs.

ORDER

On appeal from: Land Claims Court, Randburg (Ngcukaitobi and Mpshe AJJ sitting as court of first instance):

and

On appeal from: Land Claims Court, Cape Town (Murphy J and assessor sitting as court of first instance):

Both appeals under SCA case number 1284/16 and SCA case number 982/2017 are dismissed.

JUDGMENT

Mbha JA (Ponnan, Swain and Zondi JJA and Tsoka AJA concurring):

[1] These two appeals, emanating in each instance from the Land Claims Court (LCC), were heard together as they both concern the same parties and issue, namely, the determination of the quantum of compensation as equitable redress for a racially discriminatory dispossession of land rights in terms of the Restitution of Land Rights Act 22 of 1994 (the Act). Although the subject land in both cases differ, the parties in both are the same. The first appeal is against the judgment and order of the Land Claims Court of South Africa, Randburg (per Ngcukaitobi and Mpshe AJJ) of 24 October 2016, in terms of which the respondent, the Department of Land Affairs (the Department), was

ordered to inter alia pay the claimants an amount of R10 million as compensation for the dispossession of rights in the Farm Uap, situated in Upington. This appeal is with the leave of the LCC.

[2] The second appeal, which is with the leave of this court, is against the judgment and order of the LCC, Cape Town (per Murphy J sitting with an assessor) of 6 January 2017, which after a trial on quantum, ordered the Department to pay the appellant R780 000 as compensation for the dispossession of rights in Erf 38, also situated in Upington. The argument in both appeals, is that the courts below erred in the determination of the amounts of compensation payable by not taking into account the current market value of the properties in question, together with the value of the past loss of use of the properties. Thus, increased compensation was sought in both appeals.

[3] I now proceed to consider the relevant factual matrix against which both matters arose. I start with the first appeal in respect of the Farm Uap. The appellant, acting personally and as well as in a representative capacity, claimed equitable redress as provided for in s 25 of the Constitution of the Republic of South Africa, 1996 (the Constitution) and the Act in the form of monetary compensation, rather than restoration of the property itself. The claim arose out of the loss of the Farm Uap by Mrs Elizabeth September and her sons, the predecessors in title to the present claimants.

[4] The appellant alleged that during 1907 the Septembers were dispossessed of the Farm Uap through a racist fraudulent transfer of the land, the fraud having been committed by Frederic Coller, an assistant magistrate in his capacity as a Justice of the Peace, and two attorneys, Ernst Schroder and Jan Willem van Coppenhagen. Mrs September and her late husband, Abraham September, had executed a joint will (the joint will). The initial transfer of the farm to their three sons Gert, Niklaas and Abraham junior on 15 July 1907, was contrary to the stipulation in the joint will that the farm would only devolve upon their sons after the death of the survivor of them. Further, contrary to the joint will, the farm was further transferred to one William Robert Brittanicus Thorne, during October 1911, who in turn transferred the property to W J and M G Holmes for a consideration of £5000. Thorne and Holmes were white persons. The appellant further alleged that during 1921 and following the death of Elizabeth September in 1918, the descendants of Abraham and Elizabeth September including Abraham junior, were evicted by mounted police armed with sjamboks without any order of court, resulting in the imprisonment of Abraham junior for a while.

[5] The LCC found that on the facts and evidence, the most probable inference to be drawn was that in order to facilitate the transfer of the farm, the signatures of the Septembers were obtained by forgery which had occurred in the presence of a Justice of the Peace. Furthermore, the public officials had failed to enforce the terms of the joint will. The fraudulent transaction was made possible or facilitated by systemic racism prevalent at the time. Likewise, the exploitation of the illiteracy of the Septembers, aided by Schroder, was only possible because of racially discriminatory practices at the time.

This dispossession accordingly fell within the ambit of section 2(1)*(c)* of the Act and the Septembers were therefore entitled to equitable redress as provided for in the Act.

[6] The appellant claimed R36, 456 million being the alleged present day value of the land and an additional R58, 330 million for the loss of the use of the land. He averred that these amounts were reflective of the current market value of the property and the patrimonial and financial losses suffered as a consequence of deprivation of use of the land as a result of the dispossession. It was common cause that the market value of the Farm Uap at the time of the dispossession was £5000 and escalated by the Consumer Price Index (CPI), was R2, 423 million at the time of the trial. The LCC made an award of R10 million as equitable redress. The issue in this appeal is whether in arriving at the amount awarded, the LCC erred and if so, whether the award of R10 million should be increased.

[7] I now turn to the facts in the second appeal in respect of Erf 38. This was a fairly small residential erf, 929 m² in size. On 15 July 1893 Abraham September had been given a quitrent title in respect of the property. In the joint will, Abraham and Elizabeth September bequeathed the property to their daughter Catharina Beukes (born September) upon the death of the survivor. Abraham and Elizabeth passed away on 5 July 1898 and 1 April 1918 respectively. In terms of the joint will Catharina Beukes acquired ownership of Erf 38, where she lived. The annual quitrent in respect of Erf 38 was paid up to the end of 1919, which in all probability was the year in which Catharina passed away.

[8] After the death of Catharina Beukes, the property was abandoned. Since no quitrent was paid for almost 6 years, the Governor, pursuant to the provisions of the Derelict Lands Act 3 of 1879 (the Derelict Lands Act), resumed possession of the property by endorsement under that Act in September 1925.

[9] On 29 September 2009, the LCC (per Gildenhuys J sitting with an assessor) found, in a trial on the merits, that the requirements of s 1 of the Derelict Lands Act had not been properly complied with and that as a matter of law only the estate represented by the executor, could have formed the intention to abandon, desert and leave derelict the property. The court held that the prevailing colonial practices of racial discrimination that existed at the time, justified the conclusion that the failure of the magistrate and the Master to fulfil their duties to deal properly with the property in that after the death of Elizabeth September, Erf 38 was not placed in her estate, gave rise to an inference that the family had been dispossessed of Erf 38 by a racially discriminatory practice. Accordingly, their descendants were entitled to seek equitable redress in the form of monetary compensation.

[10] The amount that was claimed in the court below for the dispossession of Erf 38 was R4, 965 million made up of two amounts. The first amount was the present day value of the property being R2, 45 million, and the second was R2, 515 million, being in respect of the value of the loss of use of the land since dispossession. The market value of the property at the time of the dispossession, escalated by the CPI to the time of trial,

was R52 817. The LCC awarded R780 000. Like the first, the issue in this appeal is whether the award should be increased.

[11] The approach to an appeal in respect of the amount of compensation awarded by the LCC is trite. This court has explained the approach to be adopted as follows:

'. . . the Land Claims Court has a strict and true discretion and enjoys wide adjudicative remedial powers conferred on it, inter alia, under ss 33 and 35 of the Restitution Act. 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.'[1]

[12] The legal framework for determining compensation as equitable redress in the form of just and equitable compensation has been set out by the Constitutional Court in the case of *Florence v Government of the Republic of South Africa*.[2] The court held that the starting point in the consideration of adequate compensation is the financial loss at the time of the dispossession, adjusted for changes in the value of money over time. This is determined by taking the market value of the property at the time of dispossession, and applying the CPI to convert that loss to the present value.

[13] The majority judgment (per Moseneke ACJ) explained the approach in the following terms:

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[1] *Minister of Rural Development and Land Reform & another v Phillips* [2017] ZASCA 1; [2017] 2 All SA 33 (SCA) para 33, referring to *Mphela & others v Haakdoornbult Boerdery CC & others* [2008] ZACC 5; 2008 (4) SA 488 (CC).
[2] *Florence v Government of the Republic of South Africa* [2014] ZACC 22; 2014 (6) SA 456 (CC).

‘[131] In my view the Land Claims Court was correct in calculating the financial loss at the time of the dispossession and for the purpose of placing the Florence family in the same position they would have been in immediately after the dispossession. The starting point and main plank of the Restitution Act is an acknowledgment of widespread dispossession that occurred since 19 June 1913 and the need for equitable redress in the form of restoration of land or financial compensation. The legislation does not warrant an approach that fixes compensation as if the loss never occurred. Nor does it warrant awarding a full replacement value of the taken subject property.

[132] Section 2(2) of the Restitution Act . . . expressly prohibits relief to any person who received just and equitable compensation or a similar consideration at the time of dispossession. 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 the dispossession as the market value of the property less the amount of compensation the applicants had received at the time of dispossession. . . .

. . .

[148] Ms Florence’s claim in this case was not for the restoration of a right to land but was for equitable redress in the form of compensation. We have already held that the purpose of financial compensation is to compensate the claimant in order to restore them to the position they would have been in immediately after the dispossession. Nothing in the scheme of the

Restitution Act provides that financial compensation shall be an equivalent of restoration in kind. . . .'

[14] The following principles emerge from the judgment: The purpose of financial compensation is to compensate the claimants by placing them in the position they would have been in immediately after the dispossession, if they had not been properly compensated then. The first task is to determine the extent of undercompensation at the time of dispossession, by comparing the compensation that was paid at the time of dispossession, if any, with the value of the property at that time. If there was under compensation at the time of dispossession, the amount of undercompensation is adjusted to its present-day value by the use of the CPI. Just and equitable compensation does not aim to restore the claimants in current monetary terms to the position they would have been in had they not been dispossessed, but rather to address the financial loss they incurred at the time of dispossession. Neither the current market value nor the value of loss of use of the land is the appropriate measure.

[15] The Court explained that this past-loss conversion consideration does not stand alone and that it was located within the evaluative considerations listed in s 33 of the Act. In other words, it is but one of the several factors to which the court must have regard in any particular matter.[3] The court then stated that the amount of compensation has to be just and equitable, reflecting a fair balance between the public interest and the

[3] Section 33 of the Restitution Act lists several factors that must be taken into account in the process of computation of compensation, for example, the history of the dispossession, the hardship caused, the current use of the land and history of the acquisition, and use of the land. In the case of an order for equitable redress in the form of financial compensation, changes over time in the value of money.

interests of those affected, after considering the relevant circumstances listed in s 33 of the Act. For example, a history of hardship caused by the dispossession may entitle a claimant to a higher compensation award in order to assuage past disrespect and dignity.[4]

[16] Importantly, the court made it clear that in determining what was just and equitable, the computation of compensation was fundamentally different and was not to be likened to a delictual claim aimed at awarding damages that were capable of precise computation of loss on a 'but for' basis. It also differed from compensation paid for expropriation, where the person whose property is expropriated would be entitled to compensation for the current market value of property, for any actual financial loss caused by the expropriation, and where the possibility of future loss must be taken into account in determining compensation. [5]

[17] The appellant claimed compensation in respect of the Farm Uap, in the total amount of R75, 345 million as follows: R17, 015 million as half of the difference between the current market value of R36, 450 million, and the updated historical market value of R2, 423 million; and R58, 330 million for the loss of the use of the land. In the alternative, he claimed R46, 180 million as half of the combined sum of the current market value of R36, 454 million and the claimed value of past loss of use of R58, 330 million, totalling R93, 780 million. The motivation was that the current market value stood as a measure to determine higher compensation to assuage past disrespect and

[4] *Florence* fn 2 para 125.
[5] Section 12(1)*(a)(ii)* of the Expropriation Act 63 of 1975.

indignity, including hardship and a gross injustice and violation of the September family's human rights. The suggested apportionment was intended to reflect an equitable balance between the public interest and the interests of the September family.

[18] Clearly, the appellant's attempt to justify an increased award is flawed. The Constitutional Court has held that using the current value of the property and the value of past loss of use of land are not the measure of what is just and equitable. If the LCC had used these measures, this Court would unhesitatingly have held that the discretion vested in that court had not been judicially exercised or had been influenced by wrong principles.[6]

[19] In deciding what would be just and equitable compensation for the dispossession of the Farm Uap, the LCC had due regard to the factors listed in s 33 of the Act and accepted, in particular, that the September family had suffered hardship as a result of being dispossessed and subsequently evicted from their land. This factor justified an upward movement in the award, ultimately arriving at the figure of R10 million as just and equitable compensation.

[20] In rejecting the appellant's claim, the LCC correctly found that the appellant's approach seemed to be at odds with the views of the Constitutional Court in *Florence*, and that such an approach was based on the 'fiction' of undisturbed perpetual ownership and commercial exploitation of the land. Importantly, the LCC held that if that approach were to be adopted, the court would open a vortex of speculative claims

[6] *Phillips* fn 1 para 31.

premised on unknown variables of the trajectory of the land and its use, absent the dispossession. I am unable to fault the reasoning of the LCC. I find, accordingly, that the appeal in respect of the Farm Uap must fail.

[21] With regard to the claim in respect of Erf 38, the appellant persisted with his claim in this Court for R2, 45 million in respect of the current value of the land and R2, 515 million in respect of past loss of use of the land. The appellant's case for increased compensation rested on two bases: the hardship and suffering caused by the dispossession, and the large discrepancy between the adjusted historical undercompensation and the present day value of the property.

[22] As I have pointed earlier, the Constitutional Court has affirmed that the Act does not warrant an approach that fixes compensation as if the loss never occurred.[7] Nor does it warrant, awarding the full replacement value of the subject property. Ineluctably, this is what awarding the current value would do. The Constitutional Court has also made clear that it was not the intention of the Act to provide compensation for the loss of use of the property.

[23] While it can be accepted that there was a sharp increase between the updated historic value and the current market value of Erf 38, it was common cause that this was as a result of three related factors: the lengthy period that had passed since the dispossession; the change in the nature of the property; and the sharp increase in property values in recent years.

[7] *Florence* fn 2 para 131.

[24] The property has changed fundamentally since the Crown resumed possession in 1925. A residential property on the outskirts of a rural *dorp* has become a commercial property in the central business district of a rapidly developing town. It is so that the value of the commercial property has grown exponentially in Upington.

[25] But the Constitutional Court has made clear that such a post-dispossession windfall is not to be attributed to a claimant and be borne by the public purse. If it were, then similarly any post-dispossession loss of value through, for example, market collapse or natural disaster, would also have to be borne by a claimant.[8]

[26] With regard to the appellant's allegation that the dispossession of Erf 38 caused the September family hardship through deprivation of a homestead, deprivation of shelter and being denied access to a home, and that the family had to wander around the country seeking a livelihood and a place to stay, the LCC found, correctly, that this was not borne out by the evidence. The undisputed facts are that Catharina Beukes and her family had a right to Erf 38. The family's occupation ceased in 1919. There was no physical dispossession. None of the appellant's predecessors attempted to occupy the property until the Crown resumed ownership thereof in 1925. The appellant's predecessors abandoned the property and never showed any interest in it. The LCC correctly found that the hardship caused to the September family, was directly attributed to the specific dispossession of their Farm Uap, and not Erf 38.

[8] Ibid para 80. Per Van der Westhuizen J on behalf of the minority, in a passage with which the majority did not express disagreement.

[27] In arriving at the compensatory figure of R780 000, the LCC found the historical market value of R52 817 to be a paltry figure at today's value and that this was hardly just and equitable compensation. The LCC took into consideration the present day value of the land, as one of the factors listed in s 33 of the Act, in arriving at what it considered to be just and equitable redress. I am unable to fault the LCC in its reasoning. For all these reasons, I come to the conclusion that the appeal in respect of Erf 38, must also fail.

[28] It was agreed that in both matters there shall be no order as to costs. In the result, both appeals under SCA case number 1284/16 and SCA case number 982/2017, are dismissed.

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B H Mbha

Judge of Appeal

APPEARANCES:

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