IN THE LAND CLAIMS COURT OF SOUTH AFRICA

HELD AT RANDBURG

CASE NO: LCC54/2018

Before: The Honourable Kollapen J
Heard on: 26 November 2018
Delivered on: 20 March 2019

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED: YES / NO

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DATE SIGNATURE

In the matter between:

DISTRICT SIX COMMITTEE **1st Applicant**

MYMOENA CLASSEN **2nd Applicant**

ANNIE BAM **3rd Applicant**

MARIAM SIMONS **4th Applicant**

CEDRIC ADAMSON **5th Applicant**

MARIAM MOSEVAL **6th Applicant**

AMIENA KRIEL **7th Applicant**

CYRIL SAMUEL WAGENER **8th Applicant**

And

MINISTER OF RURAL DEVELOPMENT & LAND REFORM	**1st Respondent**
COMMISSION ON RESTITUTION OF LAND RIGHTS	**2nd Respondent**
CITY OF CATE TOWN	**3rd Respondent**
THE PREMIER OF THE PROVINCE OF WESTERN CAPE	**4th Respondent**
GOVERNMENT OF THE PUBLIC OF SOUTH AFRICA	**5th Respondent**
THE TRUSTEES FOR THE TIME BEING OF THE DISTRICT SIX BENEFICIARY AND REDEVELOPMENT TRUST	**6th Respondent**

JUDGMENT

KOLLAPEN J

[1] This is an application that relates to the attempts by the former residents of District 6 to resolve and to bring to finality their claims to restitution, which arose out of the forced dispossession of their homes and properties in District Six in the 1960's.

[2] District Six was a thriving community where people lived, dreamed, and made a life for themselves even in the face of what appeared to be insurmountable obstacles. In an affidavit filed in these proceedings, Professor Shamiel Jeppie associate professor in the Department of Historical Studies describes it as follows:-

> "*District 6 at the turn of the century may have been poor, but it was undoubtedly a vibrant place. It was, arguably, one of the most cosmopolitan areas in the Cape, if not the whole of sub-Saharan Africa. Yet there were no examples of wide-scale racial or ethnic antagonisms. Bickford-Smith states that even if it cannot be said that working-class or community solidarity was ever achieved, the General strike Workers Union (G.W.U). and the District Six rate payers association (which eventually elected a Jew, Morris*

Alexander, and a Muslim, Abdhulla Abdurahman, to the Town Council) are just two examples of non-racial organisation that united residents across the potential divide of colours"

[3] Sadly, such a vibrant and cosmopolitan community was torn apart in more ways than one by the inhumane policy of forced removals implemented with such great efficiency and insensitivity by the apartheid State.

[4] Professor Jeppie describes this process and its aftermath in the following terms:-

District Six afforded its occupants a deep sense of place and belonging. As the pace of removals was accelerated, it was accomplished by a outburst of embittered literary and vocal response. Although the edifices of District Six have literally been crushed, an inimitable image and identity remain intact – in the words of an ex-resident, "you can take the people out of District Six, ou pe'llie, but you'll never take District Six out of the heart of the people" (Cape Towns, March 8, 1966)".

Whereas some of the economic and social costs of the razing of District Six may be ascertained, its toll upon individual lives and emotions is immeasurable. The inconvenience caused by the physical wrenching of people from long-time homes pales in the face of more prolonged and damaging psychological distress. Oral evidence, literary accounts and decades of newspaper reporting unite in their testimony to the fear, humiliation, bitterness and anger that accompanied the displacement. Not least among the consequences was fragmentation of the identity and heritage of a community, which had profound implications for its social, political and cultural expression.

[5] Our Courts have also recognised the devastating effects of forced removals and in ***Land Access Movement of S A v Chairperson NCOP 2016(5) SA 635 (CC)*** the Constitutional Court described its distressing effect in the following terms :-

"*the ejection from homes; the forcible loss of properties; severing from kin, friends and neighbours; the wrenching of those affected from their beloved connection to place and community; immeasurable emotional and*

psychological trauma; and the searing bitterness of it all. Concomitant to this was an untold assault upon the dignity of those at the receiving end of this distressing treatment."

[6] The advent of constitutional democracy brought with it the hope that, to the extent possible, the suffering caused to this community would be recognised and appropriate mechanisms would be put in place to bring justice to those affected.

[7] How as a society we dealt with our past was important in the psyche of a nation that had to come to terms with its past and chart a way for the future. Mohamed DP in ***Azapo v President of the Republic of South Africa 1996(4) SA 672 (CC)*** which dealt with the Truth and Reconciliation process spoke of the need for victims of human rights violations to come forward , unburden what has happened to them and to receive the collective recognition of a new nation that they were wronged.

[8] To this end and in so far as it relates to the dispossession of property as a result of past discriminatory practises the Constitution provides in Section 25 (7) thereof that :-

"*A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress*."

[9] The Restitution of Land Rights Act No 22 of 1994 in turn creates the legal framework for the submission of claims and the provision of restitution for those who lost rights in property as a result of racial discriminatory practises of the past. It is common cause that the claimants have had their claims recognised by the Respondents and have opted for restitution in the form of the restoration of land in District Six.

It is against this social, historical and legal context that the facts in this matter and the relief sought by the Applicants must be considered.

The facts

[10] Following the coming into operation of the Restitution Act, some 2760 claimants lodged claims in respect of District 6 by the 31 December 1988. Of these some 1380 verified claimants opted for restitution in the form of financial compensation and have received that financial compensation.

[11] 1216 claimants opted for land restoration in the District 6 area and in 2000; the 1st and 2nd Respondents undertook to provide these claimants with a home in District Six.

[12] To date some 139 residential units have been completed while a further 108 residential units are under construction but not completed.

[13] Thus, on a simple arithmetical basis there are some 969 claimants (some 80% of those who were promised a home) who still have no idea of when their home will be available and ready for occupation.

[14] While there is a dispute as to whether the 1st and 2nd Respondents have violated the rights of the Applicants and are in breach of their obligations in terms of both the Constitution and the Restitution Act , there is no dispute that the large majority of claimants still wait in expectation of their restitution claims being satisfied.

[15] It is also so that the manner in which the question of restitution was approached was unique in that it saw the collaboration of the State and representatives of the claimant community in the manner and the mechanics of how restitution was to unfold. Thus, development plans for the area were produced as a result of close interaction between the

State and the representatives from time to time of the claimant community.

[16] In this process, there were difficulties that emerged over time that related to who the representatives of the claimant community were , the kind of development that was desirable to the claimant community and such like matters. I have no doubt that this may have caused some delays along the way and is a matter I will return to later as the Respondents place significant reliance on this process and the difficulties that emerged , in contending that they are not in breach of their constitutional and legal obligations to the claimants .

[17] It is against that background that the Applicants seek the following relief:-

1. *Declaring that the failure of the first, second and fifth Respondents t provide restitution to District Six claimants who lodged valid claims by 31 December 1998 constitutes a violation of the rights of those claimants ("the claimants"), and a breach of the obligations of those Respondents in terms of section 7(2). Section 25(7) and section 237 of the Constitution, and in terms of the Restitution of Land Rights Act;*

2. *Directing the First Respondent to formulate without delay and consultation with the body of claimants and an interested organs of State, a reasonable plan and programme ("the plan") which it will implement in order to satisfy the restitution claims of the claimants, which plan must provide:*

   2.1 *An indicative conceptual layout for the redevelopment of District Six with sufficient detail to determine the number and layout of the residential units to be allocated to claimants;*

   2.2 *Specific details of how the plan is to be funded, including the budget to be allocated by the Respondents for execution of the plan and the precise means by which extrinsic funding is to be secured;*

2.3 *Estimated timeframes for implementation of the plan, broken down into appropriate intermediate milestone; and*

2.4 *The methodology that will be applied in allocating residential units among claimants.*

3. *Directing the First Respondent to deliver the plan to this Court within three months of the date of the order and thereafter to deliver to this Court at three monthly intervals a report stating under oath the steps that have been taken to implement the plan in the relevant period, until such time as the redevelopment of District Six is complete;*

4. *Directing that the Applicants may set the matter done for further hearing of hearings by the Court, on these papers supplemented as the Applicants consider fit, including (but not limited) for determination of whether the plan satisfies the constitutional and statutory obligations of the First, Second and Fifth Respondents;*

5. *The First, Second and Fifth Respondents, are to pay the costs of the application, including the costs of two counsel.*

[18] The First, Second and Fifth Respondents do not oppose the relief sought in paragraphs 2 to 4 of the Notice of Motion and an order was accordingly made on the 26th November 2018 in terms of those paragraphs of the Notice of Motion. The remainder of the relief sought is opposed.

[19] The issues for determination are:-

a) *Whether the Applicants have made out a case for the grant of a declaratory that the Respondents have violated the rights of the Applicants and are in breach of their obligations in terms of the Section 25(7) of the Constitution and the Restitution Act.*

b) *The costs of the application.*

The declaratory relief

The case for the Applicants

[20] The Applicants contend that given that the claimants are still awaiting restitution in the form of a house in District six coupled with the admission by the Respondents that they (the Respondents) do not have a plan in respect of how restitution is to be effected to the claimants must mean that the respondents are in breach of their constitutional and legal obligations.

In addition, they point out that the stance taken by the respondents on the papers is that restitution , by handing over land and payments to the claimants, had occurred in 2002. This they point out is a submission so fatally flawed that it evidences the stance that the Respondents adopt that they owe no legal or constitutional obligation to the Applicants. The Applicants argue that this erroneous conclusion arrived at by the Respondents in itself justifies the need for a declarator that at the very least spells out the legal and constitutional obligations of the Respondents as well as their failure to comply with them.

[21] In argument Mr Rosenberg for the Respondents placed on record that the Respondents no longer took the view that they had fulfilled their restitution obligations in 2002 and in fact conceded that such obligations remained outstanding to the large majority of claimants.

[22] The Applicants also take the view that whatever arrangements were arrived at or entered into between the Respondents and the claimant community , the legal and constitutional obligation that rested on the Respondent's to effect restitution was not and could not in any manner be changed by such arrangements. Commendable as such an approach is, it does not absolve the Respondents from their legal obligation to effect restitution, which is an obligation they have to each

individual claimant who has opted for a house in District Six duty and which simply cannot be discharged by any agreement with a representative body. The Applicants contend that the right to restitution vests in each claimant and it is a right each individual claimant is entitled to assert as against the State.

[23] Finally, the Applicants contend that given the injunction in Section 237 of the Constitution that all constitutional obligations must be performed diligently and without delay, the reality that 20 years after filing their claims the majority of claimants still await restitution, can only lend itself to the conclusion that the Respondents are in breach of their constitutional obligations to the claimants and that such a breach constitutes a violation of the rights of such claimant.

The case for the Respondents

[24] The stance of the Respondents is that even though it consented to the relief that related to the granting of a structural interdict with reporting timelines, it contends that the concession to such relief was not premised on an acceptance that it was in breach of its legal and constitutional obligations to the claimants.

[25] In this regard, it accepts that it continues to carry the obligation of restitution it owes to those claimants who are still without a house in District Six (as opposed to the position it took in the Answering Affidavit that it had fulfilled its restitution obligations by handing over land and paying compensation).

[26] While it accepts that only some 139 residential units have been completed, it states that it has since about 2002 worked closely and diligently with representatives of the claimant community in formulating development plans for District Six and that the slow progress can be attributed to a number of factors including:-

a) Differences among the claimant community and the creation of break- away groups and questions about representatives

b) On-going changes in the needs and desires of the claimant community with regard to the proposed development in District 6 resulting in uncertainty in finalising development plans.

c) While it admits that the Applicants were advised, prior to the launch of this application that there was no program and timeframes for the completion of the project, the Respondents were nevertheless involved in a consultative process with representatives of the claimant community.

[27] In addition, it was argued on behalf of the Respondents that as there was no dispute on the legal issue, there was no need for a declarator to be issued and its granting would in addition not serve any purpose.

Analysis

[28] Section 237 of the Constitution provides that all constitutional obligations must be performed diligently and without delay. That this should be so is self-evident. Compliance with the supreme law affirms and validates the law while dilatory conduct not only undermines that law but also deprives the bearers of constitutional rights of timeous performance of the obligations owed to them. It must follow that a relatively young and fragile democracy such as ours must ensure that the letter and spirit of the Constitution is internalised into the DNA of the State and the rest of society. A strong commitment to performing constitutional obligations without delay, diligently and conscientiously contributes not only to the consolidation of democracy and greater respect for the Constitution but also engenders confidence amongst all that the law can and does indeed work and that the imperatives contained in the Constitution are much more than paper promises but promises of substance that can be enforced. It is in this regard that Courts carry an important duty in respect of Section 237 of the

Constitution in ensuring that there is compliance with the imperatives of diligence and non- delay .

[29] This Court described its powers in respect of the granting of declaratory orders as follows in:- *Transvaal Agricultural Union v Minister of Agriculture and Land Reform and Others (National Land Committee, as Amicus Curiae) (No 1) 2003 (4) SA 397 (LCC).*

> "*In general, a declaratory order may be sought where there is a clear dispute or uncertainty about the validity or the effect of administrative action. The power of this Court to grant declaratory orders under Restitution Act is subject to restrictions. The following are relevant to this case. First, the application must be at the stance of a person who is 'interested' in the question of law, which is at issue in the case. Secondly, all persons on whom the order will have a binding effect must be cited. Lastly, the courts must, by exercising a discretion, be satisfied that it is desirable to grant an order. The courts discretion on whether or not to grant an order sets in only after the other requirements for such an order have been met*.

[30] When exercising its discretion this court considered the applicable general principles and held that:-

> "*The Court would not readily grant a declare order where there is no real dispute on the question of law at issue in the case, or where the legal positon*
>
> *is clearly set out in the applicable statute. It would be reluctant to grant a declaratory order that is not specific to a particular set of facts. The applicant attempted to justify its prayers by setting out, at great length, some examples of actual occurrences. Because the parties involved in those occurrences have been cited, the Court cannot make any orders based on them. Declaratory orders granted in general terms, without reference to particular factual circumstances, could still leave the rights of parties involved in the land restitution process vague and undetermined. It would be difficult, if not impossible, to formulate orders which would cover every conceivable permutation of the restitution process."*

[31] That being the case and leaving aside for a moment whether on the facts a case is made out for a declaratory, it is clear that on the papers the parties were at considerable odds with regard to the question of whether the Respondents owed a legal obligation to the Applicants with regard to restitution after making land for houses available . It will be recalled that the Respondents stance was that it effected restitution in 2002 by making land available and paying compensation while it remained the stance of the Applicants that the Respondents obligations to the claimant community in respect of restitution continued to remain unfulfilled.

[32] While Mr Rosenberg indicated in argument that the Respondents no longer took such a stance, it remains incomprehensible how they could have embraced such a stance in the first instance when it was not in dispute that some 80% of claimants who had opted for a house in District Six, were still without one when the Respondents deposed to their Answering Affidavit. On this basis alone, there is merit in granting a declaratory to at the very least clarify the legal and constitutional obligations owed by the Respondents' to the Applicants. In the absence of any explanation for the change of stance on the part of the Respondents' as well as how they came to adopt such a startling and untenable legal stance on the issue of restitution on the papers I am inclined to grant a declaratory to that effect. Its effect would be to assert unconditionally that each claimant is owed a duty by the Respondents to be provided with a house and until such time that happens the duty of the Respondents remain on going and unfulfilled. It is knowing , understanding and internalising that legal duty in the interventions the Respondents make – something which certainly on the papers appeared to be absent from the approach of the Respondents in responding to the relief claimed in these proceedings .

[33] What then follows is a determination whether a declaratory is also desirable in respect of the contentions that there was a breach by the

Respondents of its constitutional obligation and a violation of the rights of the claimants.

[34] While the collaborative efforts between the Respondents and the claimant community were commendable, it did not and could not have the effect of changing or diluting the legal nature of the obligations the Respondents owed the claimants. The Constitutional Court cautioned that the State cannot contract out of its obligations in AAA Investments v Micro Finance. (*AAA Investments (Pty) Ltd v Micro Finance Regulatory Council And Another 2007 (1) SA 343 (CC*).

> *"[40] Section 8(1) of our Constitution renders the Bill of Rights applicable to the Judiciary, the Legislature and organs of State. An organ of State is, among other things, an entity that performs a public function in terms of national legislation. The applicability of the Bill of Rights to the Legislature and the Executive is unconditional as t function; the Bill of Rights is applicable to it regardless of the function it performs. Our constitution nears, as in Canada and United States, that* government *cannot be released from its human rights and rule of law obligations simply because it employs the strategy of delegating its functions to another entity.*"

[35] That being the case Mr Rosenberg accepted in argument that perhaps in their desire to work collaboratively with the claimant community, the Respondents' may have given up or yielded some of the power and authority they have to others . While this may be understandable, it may also help explain the attitude and the approach of the Respondents in taking a secondary position in relation to the restitution process. Ultimately, the Respondents must deliver on the promise of restitution. They may seek to do so in a collaborative fashion to the extent that that is possible but that does not detract from the on-going duty they carry to each claimant.

[36] It is in the discharge of that duty that they have failed. Their failure lies in the non-delivery of homes to successful claimants some 20 years after claims were submitted ; their failure lies in the reality that even 20

years later there is no plan and no timeline for the adoption of such a plan ; their failure lies in the inability to recognise and to properly respond to the plight of the claimants as opposed to a legal response that says we have complied (retracted during the hearing of the matter).

[37] Given the history of the dispossession and the enormous political and legal imperative to make good on the redress the Constitution promises, the failure becomes even more telling and my view is that a proper case has been made out for the relief the Applicants seek in the form of a declaratory order.

Costs

[38] Given the conclusion I have arrived at in respect of the declaratory relief sought, there is no reason why the Respondents should not be ordered to pay the costs of the Applicants including the costs of two counsels. I intend to make such an order.

Concluding observations

[39] As this judgment noted earlier District Six was place where real people lived – one such person is Mr Mogamat Hanslo who at the age of 76 speaks about his hopes and dreams in the following terms.

"Life in District Six was good. The neighbours cared for each other. It was my experience that there was no racial or religious discrimination among the community.

Life before and after the forced removal are incomparable.

To date, I have received no compensation in any form from the government for the removal. Even if I was compensated, no one could ever fully restore the damage my Family and I had to endure as a result of the forced removals.

I am now 76 years old and my health is not good. In 1998, my doctor told me that I would need a heart transplant. I have a heart problem; my left ventricle is malfunctioning. I also have Meniere's disease, an inner ear disorder that causes episodes of vertigo (spinning), which makes driving dangerous. I therefore need to live closer to a hospital than I currently do. If II were in District Six again, I could utilize the new District Six Community Heath Centre which has recently opened.

It is my desire to return to District Six with my family and be united with my community before I pass away."

[40] It is hoped that Mr Hanslo will be able to experience the dignity of returning in justice to the place he has never stopped calling home.

Order

1. It is declared that the failure of the first, second and fifth Respondents to provide restitution to District Six claimants who lodged valid claims by 31 December 1998 constitutes a violation of the rights of those claimants ("the claimants"), and a breach of the obligations of those Respondents in terms of section 7(2). Section 25(7) and section 237 of the Constitution, and in terms of the Restitution of Land Rights Act;

2. The First, Second and Fifth Respondents, jointly and severally the one paying the other to be absolved, are ordered to pay the costs of the application, including the costs of two counsel.

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N J KOLLAPEN

JUDGE: LAND CLAIMS COURT

Appearances

For Applicants: Adv. G. Budlender SC, Adv. A. Nacerodien & Adv. J Blomcamp – *Instructed by Norton Rose Fulbright*

For Respondents: Adv. SP Rosenberg SC & Adv. Z Titus. – *Instructed by The State Attorney, Cape Town*