IN THE LAND CLAIMS COURT OF SOUTH AFRICA
HELD AT RANDBURG

CASE NO: LCC 07/2012

Date argued: 8 May 2014

Judgment delivered: 4 July 2014

DELETE WHICHEVER IS NOT APPLICABLE

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

....
DATE SIGNATURE

In the matter between:

BHARAT KUMAR BHANA NO	First Applicant
BHARAT KUMAR BHANA	Second Applicant

and

DIPAK GIHWALA	First Respondent
REGISTER OF DEEDS	Second Respondent
CHIEF LAND CLAIMS COMMISSIONER	Third Respondent
THE MINISTER OF LAND AFFAIRS	Fourth Respondent
THE MASTER OF THE HIGH COURT (DECEASED ESTATES)	Fifth Respondent
THE CITY OF TSHWANE	Sixth Respondent

MANOO GIHWALA Seventh Respondent

JUDGMENT

CANCA AJ
INTRODUCTION

1. This is an application under the Restitution of Land Rights Act No. 22 of 1994 (the "RLRA"). It is a hybrid of a review application for setting aside the sale and transfer of land known as Erf 394, Marabastad, Pretoria (the "property") entered into for the purpose of restoring the property to the first respondent, and an application in terms of sections 38B and 38E of the RLRA (a Chapter 111A application) which enables claims to be brought directly to the court instead of through the Land Claims Commission and which empowers the court to set aside the sale of property to which the application relates. The applicants seek an order restoring the property to the first applicant on the grounds that there was a dispossession of a right in land in respect of the property occasioned by the Group Areas Act No. 36 of 1966.

2. It was common cause during the hearing that the sale and transfer of the property to the first respondent took place in error. The relief applied for by the applicants is opposed by the first and seventh

respondents on different grounds, as I will set forth later in this judgment.

THE PARTIES

3. The first and second applicants are the same person. Bharat Kumar Bhana brings this application both as the executor in the estate of his late mother, Mrs Jelli Bhana and in his personal capacity as the sole heir of the estate.
4. The first respondent, Dipak Gihwala, is the nephew of Bharat Kumar Bhana(the first and second applicant) and the son of Manoo Gihwala, the seventh respondent. Bharat Kumar Bhana and Manoo Gihwala, brother and sister respectively, are the children of Mr and Mrs Chunilal and Jelli Bhana.

5. The second, third, fourth and sixth respondents, the Registrar of Deeds, Pretoria, the Chief Land Claims Commissioner, the Minister of Land Affairs, the Master of the High Court, Johannesburg (Deceased Estates) and the City of Tshwane respectively, do not oppose this application.

6. The Registrar of Deeds, Pretoria, is the nominal head of the Deeds Office and the person in charge of the deeds registry. It is this office that will have to bring about certain endorsements to the records in the deeds registry in the event that the applicants are successful in this matter.

7. The Chief Land Claims Commissioner is the nominal head of the Commission on Restitution of Land Rights. The Commission is tasked, under the RLRA, to investigate claims for the restitution of rights in land, and the feasibility of settling such claims.

8. The Minister of Land Affairs (now known as the Minister of Rural Development and Land Reform) represents the State and it is the State against whom claims for land restitution are brought. As such, the Minister has an interest in restitution claims and is cited herein in his official capacity.

9. The Master of the High Court, Johannesburg (Deceased Estates), may also have an interest in the outcome of the application as the subject of the dispute involves property allegedly forming part of a deceased estate.

10. The City of Tshwane (the "Municipality") is the successor to the City Council of Pretoria, the original owner of the property forming the subject matter of this application.

11. It is convenient to now turn to the facts which I set out hereunder in some detail.

FACTUAL BACKGROUND

12. The property at the centre of this dispute is Erf 394, Marabastad, Pretoria, hereinafter called "the property". Marabastad was originally

known as the Asiatic Bazaar and was set aside for occupation by persons known as Asiatics in or during 1903. For racially discriminatory reasons, the occupants of land in Marabastad were, purely by reason of their race, prohibited from obtaining ownership thereof. This prohibition was in terms of Law No. 3 of 1885 passed by the Volksraad of the Zuid-Afrikaansche Republiek.

13. A translation of the relevant portion of Law No.3 of 1885 is as follows:

> "1. This law shall apply to the persons belonging to one of the native races of Asia, including the so-called Coolies, Arabs, Malays and Mahomedan subjects of the Turkish Empire.
> 2. With regard to the persons mentioned in Article 1, the following provisions shall apply:
> (a) They cannot obtain burgher right of the South African Republic.
>
> (b) They cannot be owners of fixed property in the Republic. This provision has no retrospective effect.
> (c) …
> (d) The government shall have the right to assign to them certain streets, wards and locations to live in."

14. In 1905, the Lieutenant – Governor of the Transvaal passed the Municipal Amending Ordinance No. 17 of 1905 which allowed a municipality to lease property to persons designated as Asiatics. The relevant portion of this Ordinance provided as follows:

> "10. (1) The Council may with the approval of the Lieutenant – General set apart, maintain and carry on bazaars or other areas exclusively for

occupation by Asiatics and control and supervise the same in accordance with Regulations made from time to time by the Lieutenant –Governor and may lease the land and buildings to the Aiatics upon such terms and at such rents as may be prescribed from time to time by such Regulations aforesaid.

(2) The sites of any bazaars or other places pointed out under the Provisions of Law No. 3 of 1885 or any amendment thereof may be transferred by the Lieutenant – General to any council of a Municipality subject to existing leases there over and every such transfer shall be free of transfer duty, stamp duty and registration or other charges and such bazaar or site so transferred shall be deemed to be a bazaar or area set apart under sub-section (1) of this section."

15. The Asiatic Bazaar, Pretoria, having been pointed out under Law No.3 of 1885, was duly transferred to the Municipality of Pretoria in terms of section 10(2) of the Ordinance.

16. The property consisted of a trading and a residential section and had been in the Bhana family since approximately 1935. The family acquired leasehold rights to the property when Mrs Bai Lakhmi, the grandmother of Bharat Kumar Bhana (the first and second applicant) and Manoo Gihwala(the seventh respondent), bought the right, interest and title to the property from a Veera S. A. Pillay in terms of a deed of sale dated 13 May 1940. The basis of the Bhana family's occupation of the property prior to May 1940 is not clear from the papers.

17. Mrs Bai Lakhmi then sold her right, title and interest in the property to her son, Mr Chunilal Bhana, the father of the second applicant and

the seventh respondent, in July 1944. Mr Chunilal Bhana was married in community of property to Mrs Jelli Bhana, and by reason of that marriage, the leasehold rights in respect of the property fell into their joint estate.

18. It is common cause that as a result of the Group Areas Act No. 36 of 1966, a racially discriminatory law, Mr and Mrs Chunilal Bhana were dispossessed of their right of residency on the property when they were forced to leave the residential component of the property in 1976 and move to Laudium, an area designed for persons of the Asiatic race group. However, they retained the leasehold rights in the property and continued to use it for trading purposes.

19. On 16 June 1995, Mr Chunilal Bhana passed away having made a joint will with Mrs Jelli Bhana in which the whole of their estate was left to the survivor of them. All right, title and interest in and to the land then vested in Mrs Jelli Bhana by virtue of the provisions of the will. On 15 December 1998, the second applicant, acting on the instructions of his mother, Mrs Jelli Bhana, lodged a claim with the third respondent for the restitution of land rights in respect of the property. The basis of the claim was a dispossession of the right of residence under the Group Areas Act No. 36 of 1966.

20. On 23 August 2001, Mrs Jelli Bhana, executed a new will in terms of which she appointed the second applicant

> "to be sole and universal heir to my estate and effects movable, or immovable, whether the same be in possession, reversion, remainder or expectancy, nothing excepted."

The second applicant was also appointed the executor of the will. Mrs Jelli Bhana then executed a deed of sale on 1 September 2001 in terms of which she sold her leasehold rights in and improvements to the property to her grandson, the first respondent, for the sum of R170,000-00. Following upon the conclusion of this sale agreement, Mrs Jelli Bhana ceded her right, title and interest in and to her land claim to the first respondent, approximately a year later in terms of a deed of cession dated 18 November 2002.

21. Mrs Jelli Bhana passed away on 20 February 2004 before her claim was finalised and was survived by 6 children, the second applicant and six daughters, one of whom is the seventh respondent. When the first respondent failed to recover rental from the property's tenants as a result of a magistrate's mistaken view that he could only sue if he was the owner of the property, he become disenchanted with his purchase. He then approached the first applicant and sought cancellation of the sale and cession agreements as well as repayment of the R170,000-00 paid in terms of the sale agreement. The agreements were duly cancelled in terms of memoranda of agreement dated 17 May 2005 entered into between the first applicant and first respondent and the purchase price of R170, 000-00 repaid. Both the third and sixth respondents were notified of the cancellations.

22. During the period between the conclusion of the sale and cession agreements and their cancellation in May, 2005, the following developments with respect to the property occurred ;

22.1 On 4 September 2001, the third respondent confirmed that Mrs Jelli Bhana's claim was the only one against the property;

22.2 On 5 September 2002, Mrs Jelli Bhana, in response to a request from the third respondent that she signal whether she preferred compensation or land, elected restoration of the land as opposed to compensation;

22.3 As a result of land claims within its boundaries, and in particular those relating to Marabastad, the Municipality entered into an agreement with the third respondent during May 2003 in terms of which the Municipality undertook to facilitate the restitution of land rights to persons or communities who had lost such rights by transferring land it owned to the successful claimants. The claims were to be received, processed and finalised by the third respondent who also undertook to bear the costs of transferring the land to the successful claimants. It is not clear from the papers whether or not the successful claimants, apart from ensuring that they were up to date with the rates and taxes owing on their properties, had to pay any consideration for those properties.

22.4 On 11 September 2003, at a meeting convened by the third and sixth respondents, it was announced that a process of restitution of land rights in Marabastad was underway;

23. During July 2007, whilst attending a Marabastad land handover ceremony, to which both the second applicant and the first respondent were invited, the third and the sixth respondents announced that the property was awarded to the first respondent. Then there followed numerous interaction by way of correspondence and meetings between the second applicant and the first respondent, their respective attorneys and the third and sixth respondents' officials aimed at resolving the matter.

During this period, the third respondent's officials at various times expressed the opinion that: (1) the property should be restored to the second applicant; (2) the property should be awarded to the second applicant and the seventh respondent jointly; (3) all the descendants of the late Mrs Jelli Bhana should receive the property, and finally, (4) that the first respondent should receive restoration of the property. The upshot of these developments was receipt on 10 October 2011 by the attorney of the second applicant of a letter from the first respondent's attorney, advising that the transfer of the property in favour of the first respondent had been registered on the 6 October 2011. It would seem that the property was transferred to the first respondent without any consideration having been paid but merely through an administrative process.

24. On 14 November 2011, the third respondent's Deputy-Director: Restitution Litigation sought consent from his superiors to, *inter alia,* approach the State Attorney with instructions that a court application be launched to reverse the registration of the property to the first respondent.

    No such application was launched by the third respondent.

A SHORT HISTORY OF THE LITIGATION

25. These proceedings were launched on 18 January 2012. The first respondent filed a Notice of Appearance signalling his intention to participate in the matter on 1 February 2012 and on the same day, the third respondent served a Notice to Abide the court's decision.

26. Towards the end of March 2012, the applicants, by consent with the first respondent, filed a supplementary affidavit, the purpose of which was to convert the application to a hybrid of a review application for setting aside the sale and transfer of the property to the first respondent, and in addition, an application in terms of sections 38B and 38E of the RLRA for an order restoring the property to the first applicant.

27. The applicants then filed an Amended Notice of Motion in accordance with Rule 22(1), in which they sought, *inter alia,* to incorporate the review related relief properly and to incorporate the relief sought for direct access to this court and restoration of the

property to the first applicant by the court. The Amended Notice of Motion was also served on the non-participating parties. They did not object to the amendment.

28. The first respondent then filed his answering affidavit to both the founding and supplementary affidavits on 31 May 2012 in which he disputed the applicants' entitlement to the relief sought. The applicants, acting in terms of Rule 35, then filed another Amended Notice of Motion and a Supplementary Affidavit.

29. The first respondent filed a further answering affidavit. The seventh respondent then joined these proceedings by agreement and filed an answering affidavit in which she advised, *inter alia*, that she, as a daughter and therefore a direct descendant of the late Mrs Jelli Bhana, had an interest in the matter and challenged the second applicant's right to claim exclusive ownership of the property. Thereafter, the applicants filed another affidavit replying to the first respondent's answering and further answering affidavits as well as the seventh respondent's answering affidavit.

THE FIRST APPLICANT'S CASE

30. The first applicant's case is founded on the fact that he, as the executor of Mrs Jelli Bhana's estate, became entitled, in terms of section 2(3)(a) of the RLRA[1], to be substituted as claimant in her

[1] Section 2(3) of the RLRA reads as follows: If a natural person dies after lodging a claim but before the claim is finalised and (a) leaves a will by which the right or equitable redress claimed has been disposed of, the executor of the deceased estate, in his or her capacity as the representative of the estate, alone or, failing the

stead. He therefore denies that either the first or seventh respondent or any other of his siblings have any claim to the property, whether in terms of section 2(3)(b) of the RLRA or otherwise. Consequently, he prays for an order that : (1) the decisions taken by the second, third, fourth and sixth respondents and/or their officers or officials to, *inter alia*, have the property transferred to the first respondent be declared unconstitutional, invalid and be reviewed and set aside; (2) the agreement to effect transfer of the property from the sixth respondent to the first respondent be declared unconstitutional and invalid; (3) the Deed of Transfer whereby the transfer of the property in the first respondent's name was executed and registered by the second respondent be set aside and cancelled; (4) the second respondent be authorised and directed to cancel the Deed of Transfer mentioned in (3) above and to endorse his records accordingly; (5) the first applicant be substituted as claimant in the place of the late Mrs Jelli Bhana in terms of section 2(3)(a) of the RLRA; (6) the first applicant be declared to be entitled to restitution of the rights in the property as contemplated in section 2 of the RLRA; (7) the second, third, fourth and sixth respondents be directed in terms of section 35 (1)(a) of the RLRA to take all the requisite steps to transfer the property to the first applicant within a specified period; (8) the second, third, fourth and sixth respondents be ordered to sign all the documents and do all things necessary in order to give effect to the relief prayed for; (9) the nature of the right to be held in the property by the first applicant be adjusted to a right of full ownership in accordance with section 35(4)of the RLRA.

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executor, the heirs of the deceased alone; or (b) does not leave a will contemplated in paragraph (a), the direct descendants alone, may be substituted as claimant or claimants.

THE FIRST AND SEVENTH RESPONDENTS' RESPONSE

31. The first respondent has attacked the applicants' case from a number of fronts. I now deal with these individually.

ARE THE APPLICANTS TIME BARRED?

32. Mr Erasmus, for the first respondent, as a point *in limine*, submitted that the applicants are time barred in that they unreasonably delayed instituting this application and, in the alternative, argued that the application was brought outside the time limit imposed by section 7(1) of the Promotion of Administrative Justice Act No. 3 of 2000 (PAJA). The relevant portion of section 7(1) of PAJA states that

> " Any proceedings for a judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date - (a) subject to subsection (2)(c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2)(a) have been concluded; or (b) where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons."

According to Mr Erasmus, a review application brought within the 180 day period can constitute an unreasonable delay requiring explanation and condonation. For this contention, Mr Erasmus relied on *Lion Match Co Ltd v Paper Printing Wood and*

Allied Workers' Union and Others (2001) 11 BLLR 12O2 (SCA) at para 29.

32.1 Mr Dodson, for the applicants, retorted by arguing that, for purposes of PAJA, if the application is brought within the 180 day period, it was not necessary to apply for condonation. In support of this argument, Mr Dodson referred me to the Constitutional Court case of *Brümmer v Minister of Social Development and Others* 2009 (6) SA 323 at 350A.

32.2 Mr Dodson also argued that the *Lion Match Co Ltd* case *supra* predated PAJA and was decided in the context of labour relations where expeditious referral and resolution of disputes is vital. In support of this argument, he contended that the delay in that case was 5 months and had prejudiced the employees. By contrast, this matter had dragged on for years and the 99 day delay in instituting these proceedings included the Christmas/New Year period during which it is generally recognised that no steps are taken in litigation. He also argued that the first respondent has not identified any prejudice that he has suffered as a result of the delay in launching these proceedings. Mr Dodson's arguments were persuasive. I agree that the *Lion Match Co Ltd supra* is not on point and consequently does not assist Mr Erasmus.

32.3 However, in *Brümmer supra*, the court was concerned with a challenge to the validity of the 30 day time period for bringing court proceedings in section 78(2) of the Promotion of Access to Information Act No.2 of 2000. Here the court held that the 30 day period was unconstitutionally short given that Parliament had the option open to it of following the 180 day period in PAJA. In deciding whether the proceedings in that matter had been brought late, the court applied PAJA and stated that because the application was launched within the period of 180 days, condonation was not necessary.

32.4 In view of the above and in the light of the decision reached in *Brümmer*, I am satisfied that the 99 day delay in launching the application was not unreasonable.

32.5 Mr Erasmus' second submission was that the decision to award the property to the first respondent was communicated to the applicants via email on 28 June 2011 by an official in the department of the third respondent, Mr Deon Theron. This, he contends, is the date which triggered the start of the 180 day countdown period. Therefore the applicants were outside the 180 day period and consequently time barred, he contended. Mr Theron's e-mail read as follows:

> "Mr Bhana, Based on the information I have, Stand 394 should go to Giwala Dipak..... Any other party should look at an alternative stand or take the matter to the Land Claims Court. The RLCC cannot resolve any other disputes between the parties. Deon Theron."

32.6 In response, Mr Dodson submitted that this terse and cryptic email from Mr Theron was not in itself evidence of a final decision constituting administrative action nor did it meet the definition of administrative action in PAJA and the criteria set out in case law, as the email did not give reasons for the decision.

32. 7 Before I decide whether or not the application was launched outside the 180 day period, I first have to ascertain when that period commenced.

32.8 The Constitutional Court, in *Camps Bay Ratepayers' and Residents Association v Harrison and Another* 2011 (4) SA 42 (CC) at 66B-C, observed that:

> "...the 180-day period starts to run when the person concerned …became aware of the action and the reasons for it. Before' the action 'nothing happens. In the final analysis it is awareness of the "action" that sets the clock ticking. That raises the question: what "action" did the legislature have in mind? The answer, I think, is the "administrative action", and, according to the definition of that term in PAJA, "the decision" that is challenged in the review proceedings. What that

> decision entails is a question that cannot be answered in the abstract. It must depend on an evaluation of the facts."

and administrative action is defined in section 1 of PAJA as

> "any decision taken, or any failure to take a decision, by (a) an organ of state, when (i) exercising a power in terms of the Constitution or a provincial constitution; or (ii) exercising a public power or performing a public function in terms of any legislation; or (b) … which adversely affects the rights of any person and which has a direct, external legal effect…"

32.9 Mr Theron's email of 28 June 2011, referred to in paragraph 32.5, clearly did not serve to make the applicants aware, as required by section 7 (1) of PAJA, that administrative action, adversely affecting their rights, had finally been taken nor can it be said that it complied with the criteria set out in *Camps Bay Ratepayers supra.* It also does not meet the test set out by Schultz JA in *Minister of Enviromental Affairs and Tourism v Phambile Fisheries (Pty) Ltd* 2003 (6) SA 407 (SCA) at 428C-D. Here the learned Judge described adequate reasons for administrative action as follows:

> "the decision-maker should set out his understanding of the relevant law, any findings of fact on which his conclusions depend (especially if those facts have been in dispute), and the reasoning process which led him to those conclusions. He should do so in clear and unambiguous language, not in vague generalities or the formal language of legislation."

Regard is also had of the fact that the words "should go..." in that email, as contended by Mr Dodson, does not suggest the reaching of a final, binding conclusion. I agree with his contention that the earliest date upon which the applicants could have been aware that administrative action, with a direct external legal effect, had been taken against them, was when they were informed of the registration of transfer of the property in the first respondent's favour by the first respondent's attorney on 10 October 2011.

32. 10 I am consequently not persuaded by Mr Erasmus that the clock started ticking on receipt by the applicants' attorney of the email from Mr Theron on 28 June 2011 but rather that the 180 day period started on 10 October 2011 as contended for by applicants. I therefore find that the application was brought within the 180 day period and that the applicants are not time barred.

33. CORRECT INTERPRETATION OF SECTION 2(3) OF THE RLRA

33.1 Mr Erasmus also challenged the applicants' entitlement to the relief sought on the basis that Mrs Jelli Bhana's will did not have the effect of bequeathing to the second applicant his mother's right to restitution pursuant to the land claim. He argued that the will of Mrs Jelli Bhana did not constitute a will as contemplated in section 2(3)(a) of the RLRA because the will did not expressly dispose of the right or equitable redress claimed in the land claim.

Bequeathing her whole estate to the second applicant did not turn the will into one contemplated in section 2(3)(a), Mr Erasmus contended. Therefore, in his view, all of Mrs Jelli Bhana's direct descendants as contemplated in section 2(3)(b) of the RLRA and not the first applicant, as executor of the estate, or the second applicant, as sole heir, stand to be substituted in place of Mrs Jelli Bhana as claimants.

33.2 In support of this argument, Mr Erasmus put forward the following contentions:

33.2.1 In interpreting any canon of legislation, the ordinary meaning of the language used must be given effect to. The only conclusion an ordinary reading of section 2(3)(a) leads one to, according to Mr Erasmus, is that the legislature had required that the will must specifically dispose of the right to restitution or equitable redress because any other interpretation of the words

> "…by which the right or equitable redress claimed has been disposed of …"

would render that phrase superfluous. If the legislature had intended an heir to whom the right or equitable redress has not been specifically disposed of, then, according to Mr Erasmus, section 2(3)(a) would not have contained the words

> "…by which the right to equitable redress claimed has been disposed of…"

33.2.2 Mr Erasmus further contended that the court should adopt a generous interpretation of the RLRA in order to promote the spirit, purport and objects of the Bill of Rights as provided for in section 39(2) of the Constitution. This, he argued, would then lead to maximising the number of claimants in a restitution claim.

33.2.3 The next argument was that if it was not a requirement that the will must specifically dispose of the right to restitution or equitable redress, then it would not have been necessary for the legislature to have included section 2(3)(b) of the RLRA. If the claimant who had lodged a claim in terms of section 2(1) of the RLRA passed away after doing so, and but for the provisions of section 2(3)(b), the intestate heirs then could have been substituted as claimants, rendering the provisions of section 2(3)(b) again superfluous.

33.2.4 Mr Davies, for the seventh respondent, supported Mr Erasmus' argument that the will must dispose of the right or equitable redress specifically and that, given that it did not do so, the court should give expression to section 2(3)(b). Relief should therefore be afforded to all the direct descendants of Mrs Jelli Bhana as opposed to only the second applicant.

33.2.5 I now turn to consider the merits of the respective arguments.

It is convenient to remind ourselves that Mrs Jelli Bhana's will, as contended by Mr Dodson, is cast in very broadly inclusive terms and framed in a way to include assets that may only come into possession at a future date, contingent on certain events, as can be gleaned from the use of the words, *"revision, remainder or expectancy"* in the will. I agree with Mr Dodson that, from an ordinary reading of the relevant portions of the will, it is difficult not to conclude that the use of the words *"revision, remainder or expectancy"* point to a desire to include in the estate assets, a claim forming the subject matter of this application. A will worded in nearly an identical way, albeit in Afrikaans, was considered by the court in *Heymans v Van Tonder 1983 (2) SA 242 (O) at 246G-H.* The clause

> *"gehele gesamentlike boedel en bate, roerend en onroerend en waar ook gelee en of ons dit nou besit en of wel in die toekoms mag besit deur terugvalling, verwagting of toeval"*

was held by the court to

> *"dui na my mening duidelik en ondubbelsinnig daarop dat die testateurs bedoel dat alle bates insluitende voorwaardelike vorderingsregte in die gesamelike boedel moet val."*

33.2.6 The difficulty with the arguments advanced on behalf of the first and seventh respondents, as correctly submitted by Mr Dodson, is that, apart from the legislature not having inserted the word “expressly” in between the words “has” and “been” in section 2(3)(a) of the RLRA, the interpretation they contend for would require a departure from the common law. Mr Dodson also submitted that if one were to accept their interpretation then that might have the result that a testator who bequeaths his entire estate to an heir but does not bequeath a land claim or the right to restoration or equitable redress pursuant thereto, that asset will not form part of the estate, notwithstanding that the testator had intended to include it. That interpretation, according to him, would also run counter to the presumption that legislation does not alter the common law unless the statute does so expressly or by necessary implication. In support of this, I was referred to the Constitutional Court case of *S v Nabolisa* 2013 (8) BCLR 964 (CC) at 972 B-C where this presumption was recently confirmed. This presumption has also been applied in this court in the interpretation of legislation falling within its jurisdiction. See *Van Zyl NO v Maarman* (2000) 4 SA 212 (LCC) at 216 h-i.

33.2.7 A further argument advanced on behalf of the applicants was that the effect of specific reference to a particular asset in a will would ordinarily be to create a legacy in favour of a

particular legatee in respect of that asset. Section 2(3)(a) of the RLRA refers to an "heir" and not a legatee. Heirs generally succeed to an entire estate or the balance thereof after disposition of specific property to a legatee. Therefore, it was contended that the use of the word "heirs" in the section and not legatee or legatees was inconsistent with the argument put forward on behalf the two respondents.

33.2.8 Two further difficulties with the argument advanced on behalf of the two respondents, is that their interpretation, as correctly submitted by Mr Dodson, runs counter to the presumption against intestacy and partial intestacy in that, unless specific reference is made in the will to the right to restitution pursuant to a land claim, that asset will not form part of the estate but will, instead, be dealt with in terms of section 2(3)(b) of the RLRA which is akin to succession on the basis of intestacy. I also agree with the applicants that, that interpretation is contrary to the principle of freedom of testation as it prevents a testator who intends to leave his entire estate to his or her heir from doing so unless express provision is made for the inclusion of the right to restitution or equitable redress.

33.2.9 Does the applicants' interpretation of section 2(3)(a) of the RLRA render the words:

> "… by which the right or equitable redress claimed has been disposed of…"

superfluous?

33.2.10 *Corbett, Hofmeyer and Khan's The Law of Succession in South Africa, 2nd Ed,* recognises partial intestacy. At page 507 the learned authors state that

> "Partial intestacy may arise through an omission, deliberate or inadvertent, on the part of the testator to dispose in his or her will of the whole of the estate or through some unforeseen change of circumstance, for example the death of a co-heir."

Therefore, it is not always the case that a will automatically include the entire estate. In view of the phenomenon of partial intestacy, it is open to a testator to deliberately choose to omit the right to restitution from his or her will so that section 2(3)(b) could apply to the right to restitution. Those words are consequently not superfluous.

33.2.11 Mr Erasmus also argued that, if it was not a requirement that the will must specifically dispose of the right to restitution or equitable redress, it would not have been necessary for the legislature to have included section 2(3)(b) in the RLRA. I do not agree with Mr Erasmus that the interpretation contended for by the applicants would render section 2(3)(b) superfluous. Rather, I am persuaded

by Mr Dodson's submission that section 2(3)(b) makes it possible for the heirs in an intestate estate to proceed with prosecution of a restitution claim without having to wait for the appointment of an executor dative as the direct descendants are directly substituted. I agree with the applicants that this was especially important for large claims involving significant numbers of rural claimants as it is often the case that, where an elderly claimant has died, the appointment of an executor dative becomes a major impediment to the rapid processing of the claim. The substitution of the direct descendants as claimants significantly enhances the prospects of a speedy processing of the claim.

33.2.12 Mr Dodson also correctly, in my view, submitted that the corollary of Mr Erasmus' interpretation of section 2(3)(b) is that, where the right to restitution is not expressly disposed of in terms of the will, it does not form part of the testate estate. The testator is then partially intestate and the right to restitution is then disposed of according to the Intestate Succession Act. The interpretation contended for on behalf of the first and seventh respondents, if accepted, would be disruptive to the law of succession.

33.2.13 The argument that I have to interpret the RLRA so as to maximise the number of claimants, loses traction where there are more testamentary heirs than descendants. It was

correctly submitted on behalf of the applicants that an additional flaw in the respondents' argument was that the right to restitution might be undermined by maximising the number of claimants for a single asset as this risked rendering the claim insignificantly small for all of them.

33.2.14 It is instructive that the courts have found that a purposive interpretation does not necessarily mean a generous one. See *Minister of Land Affairs v Slamdien & Others* (1999) ALL SA 608 at 617b where it is stated that

> "…the observation needs to be made that the adoption of a purposive approach will not always mean the adoption of a wide or literal interpretation of the words concerned. It may well be that, upon a proper analysis of the purpose of the provision, a meaning which is narrower than the ordinary, literal meaning of the provision is arrived at. The goal is to ascertain the proper ambit of the provision…."

I am not persuaded that the legislature intended the RLRA to be given the generous interpretation contended for by Mr Erasmus.

33.2.15 In the light of the above, I find no merit in the arguments advanced on behalf of the first and seventh respondents regarding the interpretation of section 2(3)(a) of the RLRA.

34. **SUBSTITUTION AS CLAIMANT**

34.1 Mr Erasmus also attacked the application on the basis that the first applicant had not applied to be substituted as claimant in place of Mrs Jelli Bhana. According to counsel, absent substitution, the applicants had no *locus standi* to have brought the application.

34.2 Mr Dodson countered this by stating that the third respondent is not afforded any form of discretion or power to decide or to adjudicate an application to be substituted either in terms of section 2(3)(a) or (b) of the RLRA. Therefore, such an application to the third respondent would have been inappropriate. I agree.

34.3 As contended for by Mr Dodson, a person relying on section 2(3) of the RLRA to secure substantive relief in a land claim merely has to prove, as part of his or her claim, that he or she falls within the scope of section 2(3)(a) or (b).The executor of Mrs Jelli Bhana is one of the applicants and the fact that the executor does not appear in the records of the third respondent is of little or no consequence. The first applicant manifestly falls within the scope of section 2(3)(a) of the RLRA.

34.4 I therefore find that the first applicant does have *locus standi.* Consequently, there was no need for him to apply for substitution as claimant in Mrs Jelli Bhana's stead.

35. **THE SALE AND CESSION OF THE LAND CLAIM**

35.1 Mr Davies, although it was not pleaded, launched two additional attacks on the applicants' case. There was no objection to this and I will accordingly deal with these arguments hereunder. The first being that at the time of her death, Mrs Jelli Bhana, did not have a land claim to bequeath as she had validly sold the leasehold rights to the property and had ceded her land claim to the first respondent. Consequently, she did not leave

> "a will by which the right or equitable redress claimed has been disposed of".

35.2 Mr Dodson's response is simply that a land claim cannot be ceded. It is only transferable to another person in circumstances expressly or impliedly contemplated in section 2(3) of the RLRA. Therefore, according to Mr Dodson, the purported cession to the first respondent was invalid and thus, the land claim remained part of the estate when Mrs Jelli Bhana died.

35.3 Can a land claim be validly ceded?

35.3.1 Nicholas J in *Clifford Harris (Pty) Ltd v SGB Building Equipment (Pty) Ltd 1980 (2) SA 141 (T) at 150* states that

> "a statutory right will ordinarily be capable of cession, unless the terms of the statute show that the Legislature did not intend it to be cedable."

Generally, the courts take into account the particular nature of a claim in deciding whether such a claim is capable of cession. See *Regering van die Republik van SA v Santam Versekeringsmaatskappy Bpk* 1970 (2) SA 41 (NC) at 43 where it was held that a statutory claim under the Motor Vehicle Insurance Act no 29 of 1942 could not be ceded because a component of the claim was for damages for pain and suffering. Another factor used in determining whether a particular claim can be ceded is public policy. In Government *of the Republic of South Africa v Ngubane* 1972 (2) SA 601 (A) at 609A Holmes JA held that

> "…It seems to be desirable as a matter of public policy to have some curb against the risk of trafficking in essentially personal claims …"

Here the court was concerned with a delictual claim for damages arising from an assault.

35.3.2 In order for me to find whether or not there is merit in Mr Dodson's argument, I have to, *inter alia*, take a closer look at the RLRA, which I now proceed to do.

35.3.3 A claimant is defined in section 1 of the RLRA as

> "any person who has lodged a claim".

Prima facie, this definition excludes from the operation of the RLRA and the relief it provides, any person who did not himself lodge a claim, save where the RLRA provides otherwise. I agree with Mr Dodson that section 2(3) is the only other place where someone other than the one who lodged the claim is identified and even then, in the limited instances of having the claim transferred to him or her and to be substituted as a claimant. This section does not provide for a cessionary and claimant is used throughout the RLRA as the person entitled to claim the benefits which it confers. The only person entitled to relief in terms of section 35 of the RLRA is the claimant, namely, the person who lodged the claim or whom the RLRA allows to be substituted as claimant.

35.3.4 I agree with the contention that, if regard is had to section 2 of the RLRA, which is headed "*Entitlement to restitution*", as a whole, it is clear that it seeks to lay down in detail each of the different categories of persons who or entities which would be entitled to restitution of a right in land, namely a remedy under the RLRA. There is no indication in the section that a person who has received cession of a land claim may benefit.

35.3.5 It was also submitted on behalf of the applicants that, in view of the personal nature of a land claim, seeing that claims of this nature are aimed at remedying historic hurt, it

would not be appropriate that they be capable of being freely ceded but rather that they should be confined to the person dispossessed and his or her heirs or descendants. In support of this contention, I was referred to *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (10) BCLR 1027 (CC) at 1051D-E where the nature of a land claim was described as being

> "…to make good the ample hurt, indignity and injustice of racial dispossession of rights or interests in land … The claim … has a reparative and restitutionary character. It is neither punitive in the criminal law sense nor compensatory in the civil law sense. Rather, it advances a major public purpose and uses public resources in a manifestly equitable way to deal with egregious and identifiable forms of historic hurt."

35.3.6 Given that restitution pursuant to a land claim is a remedy afforded to victims of apartheid and colonialism, which victims tend to come from the poor and disadvantaged, I am persuaded by the applicants' contention that public policy dictates that land claims should not be capable of being ceded. Mr Dodson correctly contended that poor and disadvantaged claimants could have their claims attached for sale in execution if they had had debt and judgments against them and that unscrupulous persons could encourage such claimants to part with potentially valuable claims for less than their true value because of their circumstances.

35.3.7 In view of the above, I find merit in the argument advanced by Mr Dodson and accordingly find that the purported agreement of cession was unenforceable and void. The land claim remained part of Mrs Jelli Bhana's estate.

In any event, as I have noted in paragraph 21 *supra*, the purported cession of the claim was cancelled together with the sale of the leasehold rights by the first respondent and therefore the claim reverted to the estate.

35.4 Did Mrs Jelli Bhana intend to exclude the claim?

Mr Davies also submitted that, because the leasehold rights were sold soon after execution of the will, and that thereafter Mrs Jelli Bhana ceded her land claim, the will should be interpreted to mean that the testatrix intended to exclude the land claim from her estate. Given my finding that a land claim cannot be ceded, this argument stands to be rejected.

36. THE RELIEF SOUGHT BY APPLICANTS

36.1. Should the decisions of the second, third, fourth and sixth respondents or their officers or officials, on their behalf, be declared unconstitutional and invalid?

36.1.1 The effect of the award the property to the first respondent and its consequential transfer to him was, finally to adjudicate the merits of the applicants' land claim.

The third respondent has not been clothed with power to adjudicate the merits of a claim for restitution. See *Mahlangu NO v Minister of Land Affairs and Others* 2005 (1) SA 451 (SCA) at 455 where Nugent JA quoted with approval *Farjas (Pty) Ltd v Regional Land Claims Commisioner, KwaZulu – Natal* 1998 (2) SA 900(LCC) at para 41, where it is stated that:

> "It is not the function of a regional commissioner – and that applies also to the Commission – to adjudicate upon the merits of a claim for restitution."

36.1.2 If regard is had to the contents of the third respondent's Deputy – Director's Memorandum to his superiors wherein he sought permission for a court application to reverse the registration of the transfer to the first respondent, the inference to be drawn from that is that the third respondent realised that its official, Mr Theron, was not authorised by the RLRA to award the property to the first respondent and that the decision itself contravened the RLRA. The award and consequential transfer of the property was clearly influenced by an error of law.

36.1.3 Whilst the conduct of Mr Theron and the third respondent would also appear to offend the principle of legality in that it breached the first applicant's constitutional right not to be expropriated of property without just and equitable compensation, it is not necessary for purposes of this

judgment to deal with the constitutionality of their actions. The actions of the administrators, for the reasons set out in the previous paragraphs, were influenced by an incorrect understanding of the law. That is sufficient for me to find that their actions were incorrect and need to be reviewed and set aside.

36.1.4 In the light of the above, I find that the decisions of the third, fourth and/or sixth respondents and/or those officers or officials, who were acting on their behalf, were incorrect administrative actions resulting in consequences for the applicants, and stand to be reviewed and set aside.

37.1 Given my finding above, it follows then that the award of the property by the sixth respondent to the first respondent was also invalid. Consequently, the Deed of Transfer, with number T70900/2011, whereby transfer of the property in the name of the first respondent was executed and registered must be set aside and cancelled by the second respondent.

37.2 The first respondent has argued that the effect of the substantive final relief sought by the applicants would be to substitute the decision of this court for that of the third respondent in circumstances where exceptional circumstances have not been shown as is required by section 8(1)(c)(ii)(aa) of PAJA. The seventh respondent, on the other hand, argued that the matter should be remitted to the third respondent with an order that the second

applicant and the seventh respondent be substituted as claimants in terms of section 2(3)(b).

37.3 In response, the applicants submitted that the substantive relief sought was justified by the fact that the application is a hybrid of a review application and an application in terms of Chapter 111A of the RLRA and that therefore there was no need to proceed in terms of section 8(1)(c)(aa) of PAJA.

37.4 Chapter 111A, and in particular, section 38B (6)(a), of the RLRA empowers this court to make any order in terms of section 35. The applicants are therefore, as of right, entitled to bring this application. However, if I am wrong and the order prayed for will have the effect of usurping any function of the third, fourth and sixth respondents and, thus require justification in terms of section 8(1)(c)(aa) of PAJA, the applicants have, in my opinion, made out a sufficiently strong case in the pleadings that the exceptional circumstances envisioned in PAJA do exist in this matter to warrant this court to substitute the decisions of the administrators with that of its own.

37.5 The delays, vacillation and errors in law which characterised the actions of the administrators in this matter constitute such exceptional circumstances and make this manifestly a case that requires the court to substitute its decision for that of the administrators. As no further investigations or reporting is to be done, given that the facts are fully pleaded and are largely

common cause, no real purpose will be served by remitting the matter to the third, fourth and sixth respondents. To do so would merely cause further delay which, in the circumstances, cannot be justifiable. This court is, in view of the particular circumstances of this matter, eminently better qualified than then the third, fourth and sixth respondents to make the decision.

37.6 The applicants are therefore, in view of the above, entitled to the relief prayed for.

COSTS

38. The applicants have argued that because the first respondent refused to co-operate with the third respondent who, on attempting to rectify its error, sought the first respondent's assistance, he, together with the seventh respondent in opposing this application, ought to be mulcted with a punitive costs order as their actions have driven up the costs of rectifying the error. It was also contended by the applicants that the defences of the first and seventh respondents were ill-founded and that they had been given ample opportunity of considering their position before forcing the applicants to resort to litigation. For this, the applicants seek an order that the first respondent pay their costs on an attorney and client scale and the seventh respondent to do so on the party and party scale.

39. It is trite that this court will not usually make an order of costs in litigation for the restitution of land rights as such litigation is of public

interest. The court has, however, departed from this general rule where special circumstances have existed. See *Hlatshwayo and Others v Hein* 1999 (2) SA 834 (LCC) at 849G.

40. In this case, it would appear that the actions of the first and seventh respondents were, in the main, given oxygen by what appears to be a family feud between the second applicant, his sister, the seventh respondent and his nephew, the first respondent. Glimpses of the bad blood can be gleaned from the first respondent's answering affidavit where, for instance, it is said that the second

> "applicant has over the years viewed the property in question as his private domain, personally collected all rental income therefrom without any right to do so and without rendering any account thereof to the late Jelli Bhana or her direct descendants".

The seventh respondent states in her affidavit that:

> "For a number of years my brother…. has collected rental for his own account, pertaining to a lease of the said property;"

41. Whilst it is conceivable that the seventh respondent genuinely thought that she had a credible defence to the applicants' case given that she was a direct descendant of Mrs Jelli Bhana, the same cannot be said of the first respondent. His refusal to co-operate in having the error rectified and his opposition to the application despite the third respondent's admission of its error and non-opposition to the application, signify, in my view, that his opposition to the application

was not reasonably justified. I therefore find that an order for costs against the first respondent must follow. I do not believe, though, that such an order should be on the scale of an attorney and client.

ORDER

42. I accordingly grant the following order:

1. The following decisions of the third, fourth and/or sixth respondents and/or their officers or officials taken on their behalf are reviewed and set aside.

1.1 The decision to award Erf 394 Marastad, Pretoria to the first respondent;

1.2 The decision to nominate the first respondent as the purchaser of Erf 394 Marabastad, Pretoria;

1.3 The decision to cause execution and registration of transfer of Erf 394 Marabastad, Pretoria to be effected into the name of the first respondent;

1.4 The decision to authorise Arlene Imelda McNamara and Francois van Wyk, on behalf of the sixth respondent, to pass transfer of Erf 394 Marabastad, Pretoria to the first respondent.

2. The Deed of Transfer, with number T70900/2011, whereby transfer of Erf 394 Marabastad, Pretoria in the first respondent's

name was executed and registered by the second respondent, is set aside and cancelled.

3. The second respondent is hereby authorised and directed to cancel the Deed of Transfer with number T70900/2011 and to endorse the records in the deeds registry accordingly.

4. The first applicant is substituted as claimant in the place of the late Mrs Jelli Bhana in terms of section 2(3)(a) of the Restitution of Land Rights Act No. 22 of 1994.

5. Erf 394 Marabastad, Pretoria is hereby awarded to the first applicant in terms of section 35(1)(a) of the Restitution of Land Rights Act No. 22 of 1994.

6. The nature of the right to be held in Erf 394 Marabastad, Pretoria by the first applicant is adjusted to a right of full ownership in terms of section 35(4) of the Restitution of Land Rights Act No. 22 of 1994.

7. The fourth respondent is directed to acquire or to expropriate Erf 394 Marabastad, Pretoria in terms of section 35(1)(a) the Restitution of Land Rights Act No. 22 of 1994 and thereafter, to transfer Erf 394, Marabastad, Pretoria to the first applicant in terms of section 42A of the Restitution of Land Rights Act No. 22 of 1994, within 12(twelve) months from the date of this order.

8. The second, third, fourth and sixth respondents are ordered to sign all documents and to do all things as may be necessary in order to give effect to this order, and in the event of any of the said respondents failing or refusing to do so, the sheriff having jurisdiction is authorised and directed to sign all documents and to do all things necessary in order to give effect to this order.

9. The first respondent is ordered to pay the applicants' costs on a party and party scale.

10. The Applicants may apply to court on the same papers, duly supplemented, for such directives or orders as the court may consider appropriate in the event that any part of the order has not been fully or timeously complied with.

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M P CANCA

Acting Judge

Land Claims Court

APPEARANCES:

For applicants:	Advocate A. Dodson SC
Instructed by:	JJS Manton Attorneys, Johannesburg
For first respondents:	Advocate M. C. Erasmus SC
Instructed by:	Ron Lippi Attorneys, Pretoria
For seventh respondent:	Advocate S. W. Davies
Instructed by:	M. E. Eybers Attorneys, Pretoria