IN THE LAND CLAIMS COURT OF SOUTH AFRICA

HELD AT RANDBURG

REGISTRAR OF THE LAND CLAIMS OF SOUTH AFRICA
RANDBURG
Private Bag X10060, Randburg 2125
2019 -05- 31
LCC-002
GRIFFIER VAN DIE GRONDEISEHOF
SUID-AFRIKA
RANDBURG

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

31-05-2019 .....

BEFORE: **CANCA AJ**

CASE NO: LCC 63/2014

In the matter between:

BIENTA MARGARET MWALE (BORN JANSEN) First Applicant

FREDDIE OPPERMAN Second Applicant

and

MINISTER OF RURAL DEVELOPMENT AND LAND REFORM First Respondent

RESTITUTION OF LAND RIGHTS REGIONAL LAND CLAIMS COMMISSION FREE STATE AND NORTHERN CAPE PROVINCES

Second Respondent

OPPERMANSGRONDE
COMMUNAL PROPERTY ASSOCIATION Third Respondent

Heard: 28 February 2019
Decided: 31 May 2019

JUDGMENT

CANCA AJ

Introduction

[1] This is an application for the setting aside of a settlement agreement concluded by the second and third respondents on 26 April 2003 in terms of section 42D of the Restitution of Land Rights Act, 22 of 1994 ("the Restitution Act").

[2] The first applicant, Bienta Margaret Mwale ("Mwale"), who was joined to these proceedings on 28 November 2016, contends that she is entitled to the relief claimed because the settlement agreement referred to above was negotiated and concluded without her knowledge or involvement despite the fact that she is a direct descendant of the original owner of the property which forms the subject matter of this application.

[3] The property alluded to above is known as Oppermansgronde. It includes an area, 25 hectares in extent, presently declared as a Township, namely, portion 1 of the Farm Doornhoek no. 128 and the farms Adamshoop, Droogleegte no. 121, Jakhalsput no. 229, Poortjiesdam no.125, Vogelstruiskooi no.279 and Winkelhaak no. 120 situated in the District of Jacobsdal and Fauresmith, together hereinafter

referred to as ("the subject property"). The subject property measures 34 000 hectares in extent.

[4] The second applicant, Freddie Opperman ("Opperman") also seeks the setting aside of the settlement agreement but on different grounds. He contends that the second and third respondents, the Regional Land Claims Commissioner: Free State & Northern Cape ("the Regional Commissioner") and the Oppermansgronde Communal Property Association ("the CPA") respectively, fraudulently colluded in concluding the settlement agreement thereby preventing him from partaking in the finalization of the agreement. He further contends that the aforesaid fraudulent action has resulted in him and his family being denied that which is rightfully theirs.

[5] The Regional Commissioner and the Minister of Rural Development and Land Reform ("the Minister") have elected to abide the Court's decision and were not represented at the hearing of this application.

[6] The CPA opposes the application. Firstly, it denies that Opperman has *locus standi* to bring this application as he has failed to prove that he is a direct descendent of the original owner of the subject property. Secondly, the CPA denies that any fraud occurred during the conclusion of the settlement agreement. It contends that due legal process was followed in concluding the said agreement and that the process was both transparent and inclusive of the descendants of the subject property's original owner. Finally, the CPA takes issue with the delay of approximately 10 years which Opperman took to institute legal proceedings for the setting aside of the impugned agreement. It contends that Opperman is prevented by the doctrine of acquiescence from obtaining the relief he seeks.

Background facts

The following facts appear from the papers.

[7] Adam Opperman, the original owner of the subject property, drew up a Will on 13 May 1891 which stipulated, *inter alia*, that the subject property was not to be sold, traded, given away or handled by any other person save by his rightful and direct descendants, from generation to generation. The Will also stipulated that the subject property was to be held in trust by the head of the Opperman family and its descendants for the benefit of the rest of the family.

[8] Following the death of Adam Opperman, his grandson, Frederik Salomo Opperman ("Salomo"), succeeded him and was appointed as the head of the Opperman family on 14 December 1907. Salomo was, upon his passing, succeeded by his eldest son, Adam Jacobus Opperman ("Jacobus Opperman") and was appointed as the head of the Opperman family by the Master of the Supreme Court on 30 May 1959. This appointment followed his election as head of the Opperman family by the greater Opperman family.

[9] Jacobus Opperman was the last Opperman to be officially recognized as the head of the family. This was because the Opperman family was dispossessed of their rights in the subject property in 1961 when the Government of the day proclaimed it an area reserved for the occupation of Coloured people in terms of the Preservation of Coloured Areas Act, No. 31 of 1961. Thereafter, the property was transferred to the Minister of Coloured Affairs, as its nominee owner on behalf of the Government.

[10] Following the proclamation of the Restitution of Land Rights Act, No. 22 of 1994 ("the Restitution Act"), two restitution claims in respect of the subject property were lodged with the Regional Commissioner in 1998, one by Opperman and the other by a group represented by Phillip Louis Barnes ("Barnes"), discussed in greater detail below.

[11] Opperman avers that, as Jacobus Opperman's eldest male child and, in his view, the rightful heir to the subject property, lodged a claim for the restitution of the rights in the subject property in terms of the Restitution Act on behalf of the Opperman family on 28 July 1998. This claim was lodged, allegedly, after a *"formal family meeting"* held on 20 July 1998, where Opperman states he was elected the chairperson of a committee, known as the Claimant Family. This committee is comprised of four other members and was tasked with the prosecution of the claim, so the averment continued.

[12] The claim by Barnes was lodged on 17 November 1998 on behalf of persons who identify themselves as the Winkelhaak Task Group ("the Task Group"). They were also allegedly direct descendants of Adam Opperman. The Task Group was later re-constituted and became known as the Oppermansgronde Claimant Community. Barnes avers that the Task Group's main aim was to ensure that all the descendants of Adam Opperman would be given an individual share in the subject property whereas Opperman allegedly wanted same registered in his own name and not to manage it on behalf of the *"larger community of the descendants Frederick Salomo Opperman"*.

[13] Barnes further avers that the Task Group, unlike Opperman's Claimant Family, represents the entire community of Salomo's descendants, most of whom were from the five wards making up Oppermansgronde, namely, Winkelhaak, Droedam, Stofdam, Poortjiesdam and Doringfontein. According to a report compiled by historian, PA Erasmus, the members of the Task Group are mostly comprised of persons who are descendants of Adam Opperman's daughters.

[14] Mwale approached her grand -aunt, Ms. Rosina Smith, (her grandfather's sister) during 2002 to *"understand the details of a land claim [instituted] on behalf of the Oppermansgronde descendants and to establish whether such [sic] has already been lodged."* She states that, having explained to her that she was a direct descendant of the subject property's original owner, Ms. Rosina Smith

requested her to investigate the status of the claim and to lodge one on their behalf in the event that a claim had not already been lodged. Mwale further states that during the course of her investigations, she addressed correspondence to an official in the employ of the Regional Commissioner in which she requested him to lodge a claim on behalf of herself and her family.

[16] When she failed to hear back from the office of the Regional Commissioner, she sought the assistance of the Scorpions during July 2002. Mwale states that she only received a response from the Regional Commissioner during May 2003. The response informed her that the settlement agreement in respect of the claim had been concluded during the previous month. Mwale was also informed that the claimants were in the process of formulating a legal entity which she, correctly, assumed would be vehicle through which the subject property would be administered. Mwale further states that, having obtained a copy of the settlement agreement and having perused its contents, she formed the view that its terms were not in the best interests of the claimant community.

[17] The Regional Commissioner, in the interim, held various meetings with the two competing claimants in an endeavor to settle their differences. Having merged the two claims, the Regional Commissioner convened a meeting on 16 April 2003 where the claimants were asked to indicate whether they wanted their interests to be represented by the group led by Opperman or by the one led by Barnes. The group led by Barnes prevailed. This group was then tasked to enter into negotiations with the Regional Commissioner regarding the contents of the settlement agreement and to form the CPA which would administer the subject property on the claimants' behalf.

[18] The impugned settlement agreement was concluded on 26 April 2003. Thereafter, the CPA was formed and had its first annual general meeting on 21 May 2005, where a committee responsible for its management was elected.

[19] The CPA launched an application to uplift Adam Opperman's testamentary conditions during 2009 in the Free State High Court. Although it was opposed, the application was successful.

[20] Following an unsuccessful protest against the conclusion of the settlement agreement, Opperman launched these proceedings on 14 May 2014.

[21] Mwale, after a hiatus of approximately 5 years, during which she states that she did not have enough funds to pursue legal proceedings, ascertained that Opperman had in fact lodged a claim in respect of the subject property on behalf of the Opperman descendants. She further states that, when she eventually accumulated sufficient funds, she instructed at least three firms of attorneys during the period 2009 to 2017 to pursue this matter. However, for reasons that are not material to this judgment, she terminated their mandates. Her current attorney was appointed on 15 December 2017 with the assistance of the office of the Regional Commissioner. She then launched an application for joinder on 2 September 2016. The application was not opposed and was duly granted on 28 November 2016.

[22] Following unsuccessful attempts to resolve the parties' differences through mediation, a certificate of non-resolution was issued on 31 May 2017.

Opperman's claim

[23] Opperman has listed a number of issues which he states were of concern to him and his group. Foremost amongst these appears to be Opperman's disagreement with the sale of the approximately 25 hectares of the subject property to the local municipality. The Barnes group was of the view that financial compensation and the allocation of a similar sized alternative land would be less

disruptive to the restitution process. The group led by Opperman, on the other hand, demanded that the subject property in its entirety be restored to the claimants. Opperman also took exception to the fact that none of the amendments which he had proposed to the draft settlement agreement were included in the final document produced by the official from the Regional Commissioner tasked with drafting and settling the settlement agreement.

[24] Opperman also took issue with the fact that the testamentary conditions and restrictions recorded in Adam Opperman's Will were uplifted by the Free State High Court without his testimony. A subsequent attempt, by persons allied to his cause, to have the CPA placed under administration failed.

[25] Finally, Opperman claims that the settlement agreement was entered into fraudulently because it not signed by him but rather by persons who, allegedly, had not lodged the claim and who allegedly sought to prejudice and disentitle him and his family from benefitting from what was rightfully theirs.

The CPA's defense to Opperman's claim

[26] The CPA's defense that Opperman lacks the *locus standi* to bring this application is based on its contention that he has failed to prove that he is a direct descendant of Adam Opperman. In his answering affidavit, Barnes avers that Opperman was repeatedly requested to produce proof that he was a direct descendant of Adam Opperman during meetings convened by officials in the employ of the Regional Commissioner (including during a verification meeting) but failed to do so. His consistent response was simply that *"ek is my ID [I am my ID]"*. And, at some later stage, Opperman produced a letter, the contents of which, according to him, was sufficient proof that he was a direct descendant of Adam Opperman. The letter was, however, found to be insufficient proof and, accordingly, was not accepted as sufficient proof by the representatives of the CPA, so the contention continued.

[27] It was further contended that Opperman's assertion that, as the eldest male child of Jacobus Opperman, he was the rightful heir to the Oppermansgronde was misplaced as the Will simply states that such a child should merely hold the property as guardian on behalf of the other Opperman descendants. I find that, absent objective proof that he is, indeed, a direct descendant of Adam Opperman, the defense that Opperman lacks the *locus standi* to bring this application, has merit. See *Ash and Others v Department of Land Affairs* (LCC 116/98) [2000] ZALCC 54 (10 March 2000), where proof of descendancy was at issue, albeit in a different context. The application brought by Opperman therefore fails on the ground that he has failed to prove that he has the requisite *locus standi.*

[28] However, even if I am wrong in finding that Opperman lacks *locus standi,* the doctrine of acquiescence prevents him from obtaining the relief he seeks. See *Botha v White* 2004 (3) SA 184 TPD at 193 G-H where the Court held that:

> *"The doctrine of acquiescence is competent to halt cases where its application is necessary to obtain just and equitable results. The test for inferred acquiescence is the impression created by the plaintiff or applicant on the defendant or respondent. It can be proved by some act, conduct or circumstances on the part of the plaintiff or applicant, for example, by the applicant's delay in taking action, so that the respondent is lulled into a false sense of security. Then, in such circumstances, the enforcement of a right would cause real inequity and the applicant's conduct would amount to unconscionable conduct."*

See also *Burnkloof Caterers Ltd v Horseshoe Caterers Ltd* 1974 (2) SA 125 at 137 B-D, where it was held that:

> *"Whether an applicant can be said to have acquiesced in the conduct complained of, is a question of fact. On the facts in the present case respondent is, in my view, able to go no further than to show that du Preez was from March, 1972 aware of what the respondent was doing and that*

he raised no objection until August, 1973, despite the fact that he was from time to time in touch with Stahr and visited the premises frequently."

[29] It is not disputed that the settlement agreement was entered into during 2003 and that Opperman has been aware of its contents since then. He only instituted these legal proceedings during May 2004, approximately 10 years after the conclusion of the settlement agreement, without explaining the reason for his failure to do so earlier. Rather than approach the Courts to set the agreement aside, Opperman and followers embarked on protest action against the municipality on 27 February 2004.

[30] It was contended on behalf of the CPA that it has made substantial progress in its endeavor to sub-divide and register part of the subject property in order to enable verified claimants to obtain individual title. The majority of the verified claimants have allegedly made various improvements to the units they were farming, including the building of barns, erecting game fences, constructing dams, installing irrigation systems and establishing boreholes. To set aside the settlement agreement after the elapse of such a long time since its conclusion would cause unnecessary anxiety to, and might have serious financial consequences on, those members of the CPA who have invested substantial personal income and capital into their respective leased portions of the subject property, so the contention continued.

[31] It was also submitted that the CPA had been compensated for the 25 hectares that was transferred to the local municipality with land of a similar size. Also, a large housing development has already been (or was in the process of being) constructed on 11 of the aforesaid hectares. A further submission on this issue was that the CPA would not have the finances to pay the municipality for the improvements it had made to the subject property.

[32] It is also worth noting that Opperman failed to give a satisfactory explanation as to why he did not oppose the application brought in the Free State High Court during 2009 to uplift the testamentary conditions in Adam Opperman's Will. I agree with Mr. Steenkamp, for the CPA, that the only inference to be drawn from Opperman's conduct is that he abided by the settlement agreement.

[33] In the light of all of the above, I agree that to undo the transaction at this late stage will cause the inequity referred to above. However, given that there is no time limit to apply for membership of the CPA, it is still open to Opperman to apply for membership, subject to him proving his descendency from Adam Opperman.

[34] As a result, the relief sought by Opperman is also refused on the grounds of acquiescence.

[35] Finally, insofar as this aspect of the judgment is concerned, it behoves me to comment on the allegation of fraud purportedly committed by CPA and an official (or officials) in the office of the Regional Commissioner in the conclusion of the settlement agreement.

[36] As alluded to in paragraph [4] above, Opperman, without providing any proof to substantiate his accusation, states that the parties referred to in the preceding paragraph, fraudulently colluded in concluding the settlement agreement, which collusion prevented him from not only participating in its conclusion but also resulted in him and his family from benefiting from what was rightly theirs.

[37] Opperman's baseless accusation is unfortunate. Equally unfortunate is the fact that his legal representatives allowed that averment to find its way into the papers. Accusations of collusion and fraud are serious as they imply illegally and

should not be made lightly. Collusion is secret or illegal co-operation. See Collins Cobuild Advanced Learner's English Dictionary, Fifth Edition.

[38] It is evident from the contents of paragraph [17] above that the conclusion of the settlement agreement followed a meeting of the claimant community where the group led by Barnes was elected to represent it in its dealings with the Regional Commissioner's office. A duly elected committee manages the affairs of the CPA and no proof was adduced to buttress what is in essence a reckless claim of fraud and collusion.

Mwale's claim

[39] Mr. Thompson, for Mwale, submitted, *inter alia*, that, as a direct descendant of the Opperman family, Mwale:

> 39.1 was not privy to information pertaining to the current uses and distribution of the subject property; and,
>
> 39.2 and other members of her family had not received any benefit from the subject property.

[40] Mr. Thompson further submitted that the Regional Commissioner was aware of Mwale's interest in this matter prior to the conclusion of the settlement agreement and should have included her in its negotiations and finalization. The Regional Commissioner's failure to include her in the aforesaid process constituted so gross an irregularity that it warranted the setting aside of the settlement agreement to allow for a more representative process, so the submission continued.

Discussion

[41] The crux of Mwale's case, as I understand it, is that, she contends that she was entitled, as a direct descendent of Adam Opperman, to have been made part of the persons finalizing the settlement agreement's content or should have been represented at those negotiations. A further basis for the contention was that the official in the Regional Commissioner's office knew of her interest in this claim prior to the conclusion of the settlement agreement.

[42] I am, for the reasons that follow, not persuaded that Mwale is entitled to the relief she seeks.

[43] First, she states that she requested an official in the employee of the office of the Regional Commissioner to lodge a claim on her and her family's behalf if none had already been lodged. When she did not receive any communication from that official, she approached the Scorpions for assistance. She does not remember the date she made the request nor does she state whether she followed-up on her initial contact with him.

[44] It is also worth noting that, at the time that Mwale allegedly made contact with the office of the Regional Commissioner, there were already two claims in respect of the subject property which were submitted by 31 December 1998, the deadline for the lodgement of claims under the Restitution Act, which the officials were in the process of finalizing. The office of the Regional Commissioner would, in any event, have been unable to process the claim as it was submitted post the aforesaid deadline. See *Land Access Movement of South Africa and Others v Chairperson of the National Council of Provinces and Others* [2016] ZACC 22.

[45] Was the office of the Regional Commissioner under a legal obligation to invite Mwale to the settlement agreement's negotiations and finalization as contended by her?

[46] As can be seen from the above, Mwale appears, apart from making a call to the Regional Commissioner's office, not to have taken any further steps to make contact with that office. Instead, she sought assistance from a third party, the Scorpions, to get a response from the Regional Commissioner. Because there already was a duly elected committee representing the claimants' interests in place when Mwale made contact with the Regional Commissioner's office, it is probable that that office thought that her and her family's interests were being protected by that committee.

[47] At most, the Regional Commissioner's officials should have directed Mwale to the members of the Task Group for information regarding the claim. Also, given that it is not clear from her papers that Mwale had convinced the office of the Regional Commissioner that she was, in fact, a genuine (verified) claimant and, if so, whether she was elected to interact with the Regional Commissioner's office regarding the prosecution of the claim.

[48] It is also noteworthy that, when informed during May 2003 of the formulation of the legal entity to administer the subject property, Mwale did not approach the Regional Commissioner to voice her concerns or interest in being part of the team formulating that entity. Rather, she avers that she did not, at that stage, have sufficient funds for a legal pursuit of this matter. The noting of the aforementioned concerns or interest would not, in my view, have placed a significant financial burden on her, as that did not necessarily require legal intervention of lawyers. She could, as she did when she initially made contact with that office, simply have made written, telephonic or personal contact with the Regional Commissioner's officials.

[49] I am, therefore, of the view that the Regional Commissioner was not obliged to invite Mwale to be part of the negotiations team.

[50] Mwale's complaints could easily have been laid to rest or attended to had she made contact with the members of the Task Group. In any event, nothing currently prevents her from still approaching the CPA. In fact, she is, in the papers, invited by the CPA to apply for membership of that body and, if successful, then become privy to the information she seeks as well as to get to know the workings of that entity.

[51] Does the defense of the doctrine of acquiescence also apply to Mwale? She applied for and was granted the right to join the Free State High Court matter under case number 587/2010. The case settled on 15 November 2013 on the basis, *inter alia,* that all bloodline descendants of Salomo Opperman were granted an opportunity to apply for membership of the CPA. Instead of applying for the aforesaid membership, so as to be in a position to satisfy her concerns, Mwale waited approximately 5 years to apply to be joined as a party to this matter without giving reasons for that delay. She also does not state why she did not seek the setting aside of the settlement agreement during or immediately after the Free State High Court matter referred to above.

[52] Furthermore, her complaint that the settlement agreement was not *"favourable to the descendants of my forefather, nor was it in the best interests of the community"* is only supported by her criticism that the municipality's acquisition of the 25 hectares of the subject property for R19 650.00 was *"not commercially viable."* What she fails to take into account is the fact that an alternative piece of land was made available to the claimants.

[53] In the light of the above, I am of the view that the Regional Commissioner's alleged failures do not rise to a level which would justify the setting aside of the settlement agreement.

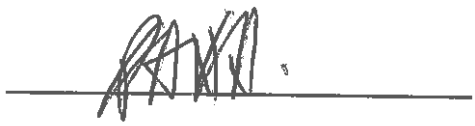
[54] Although it is clear that Mwale did not have knowledge of or participate in the meeting where the committee which negotiated the settlement agreement and eventually formed the CPA was elected, her claim fails on the doctrine of acquiescence. She waited too long to take any action to have the settlement agreement set aside. Her claim also fails on the basis that she has not indicated that she was prejudiced by her non-participation.

Costs

[55] It is the practice of this Court, in the absence of extraordinary circumstances, not to award costs in a matter such as this one, it being in the *genre* of social litigation. There are no reasons to depart from this practice in the circumstances of this case.

[56] In the result, I find as follows:

1. The application is dismissed.
2. There is no order as to costs.



MP Canca

Acting Judge, Land Claims Court

Appearances

For the first applicant: Advocate CM Thompson

Instructed by: Richen Attorneys Inc. Randburg.

For the second applicant: Advocate KM Mokotedi

Instructed by: Ranamane Mokalane Inc. Randburg.

For the third respondent: Advocate MDJ Steenkamp

Instructed by: Bezuidenhout Inc. Bloemfontein.