IN THE LAND CLAIMS COURT OF SOUTH AFRICA

In Chambers: **DODSON J** **CASE NUMBER:** 90/98

In the matter of

THE MAKULEKE COMMUNITY Claimant

Concerning:

PAFURI AREA OF THE KRUGER NATIONAL PARK AND ENVIRONS, SOUTPANSBERG DISTRICT, NORTHERN PROVINCE

JUDGMENT

Dodson J:

[1] The Makuleke Community occupied an area of land some 23 700 hectares in extent made up primarily of the northern section of the Kruger National Park for a period which appears from the papers in this matter to have been somewhere between 150 and 200 years. The area is unregistered State land. In 1969 the Makuleke Community was removed from the land as part of a transaction whereby the land was excised from the area administered by the South African Development Trust established in terms of chapter II of the Native Trust and Land Act.[1] The biggest part of the land was subsequently incorporated into the Kruger National Park with the remainder being incorporated into the Madimbo Corridor (used primarily for purposes of defence of the northern border of the Republic) and the homeland of Venda. In return, an area known as portion of the farm Ntlhaveni 2 MU was incorporated into the area of land administered by the South African Development Trust. It was to a part of this area that the Makuleke community was removed against their will. It is common cause that their removal was a result of racially discriminatory legislation and practices.

[2] On 20 December 1995, the Makuleke Community lodged a claim for the restoration of the land in terms of the Restitution of Land Rights Act.[2] I will refer to it as the Restitution Act. Section 2 of the Restitution Act provides as follows:

> "**2 Entitlement to restitution**
>
> (1) A person shall be entitled to restitution of a right in land if-

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1 Act 18 of 1936.

2 Act 22 of 1994.

> (a) he or she is a person or community dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices or a direct descendant of such a person; and
> (b) the claim for such restitution is lodged not later than 31 December 1998.

(1A) No person shall be entitled to restitution of a right in land if-

> (a) just and equitable compensation as contemplated in section 25(3) of the Constitution; or
> (b) any other consideration which is just and equitable,
> calculated at the time of any dispossession of such right, was received in respect of such dispossession.

(2) Subsection (1) shall be deemed to have come into operation on 2 December 1994."

It is common cause that the Makuleke Community complies with all the requirements of this section. That entitles them to "restitution of a right in land" which is defined as :

"(a) the restoration of a right in land; or

(b) equitable redress".

"Restoration of a right in land" is defined as "the return of a right in land dispossessed after 19 June 1913 as a result of past racially discriminatory laws or practices".

[3] The claim was lodged with the Commission on Restitution of Land Rights[3] and dealt with primarily under the auspices of the Regional Land Claims Commissioner for Mpumalanga and Northern Province. The claim was a complex one for a variety of reasons. The land is patently of importance for purposes of conservation and the promotion of biodiversity. It is strategically important, with the northern border forming the border between Zimbabwe and the Republic of South Africa and the eastern point of the land reaching as far as the border with Mozambique. A portion of the land is used by the South African National Defence Force for purposes of patrolling the border with a view to controlling illegal immigration. There appear to be mineral deposits on the land. Finally the broader public as beneficiaries of the establishment of national parks also have an interest in the matter, not necessarily in the legal sense, but in the sense that they have had access to the area for some time for purposes of recreation and enjoyment of a protected natural environment.

[4] The claim was further complicated by the fact that the Makuleke Community was claiming ownership of the land. This was not a right which the community enjoyed before the removal.[4] However section 35(4) of the Restitution Act provides:

"The Court's power to order the restitution of a right in land or to grant a right in alternative state-owned

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[3] The Commission on the Restitution of Land Rights is created and regulated by Chapter II of the Restitution Act.

[4] Apparently the Makuleke Community raised the argument during the course of negotiations that they may have aboriginal title, presumably along the lines of the concept as it has been developed by Australian courts and legislation. It has not been necessary to consider the validity of this argument.

land shall include the power to adjust the nature of the right previously held by the claimant, and to determine the form of title under which the right may be held in future."

[5] Another difficulty was that there were a large number of interested parties involved. They were the Makuleke Community, the South African National Parks,[5] the Minister of Environmental Affairs and Tourism, the Minister of Public Works, the Minister of Agriculture and Land Affairs, the Minister of Minerals and Energy, the Minister of Defence and the Member of the Executive Council for Agriculture, Land and Environment, in the Northern Province Government.[6]

[6] Presumably as a result of a direction in terms of section 13 of the Restitution Act,[7] settlement negotiations took place between the interested parties with the assistance of two mediators. Despite its complexity, the parties were, most commendably, able to arrive at a settlement of the matter. A written settlement agreement was entered into. The Regional Land Claims Commissioner and the Chief Land Claims Commissioner were satisfied that the agreement was appropriate. The agreement was referred to this Court in terms of section 14(1)(c) of the Restitution Act[8] with a request in terms of section 14(3)[9] that it be made an order of Court.

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5 The successor to the National Parks Board in terms of section 5 of the National Parks Act 57 of 1976.

6 Other parties who contributed to discussions leading to the ultimate settlement of the matter included the Wildlife and Environment Society of South Africa and the Group for Environmental Monitoring.

7 Sections 13(1) and (2) read:

> "(1) If at any stage during the course of the Commission's investigation it becomes evident that-
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> (a) there are two or more competing claims in respect of the same land;
> (b) in the case of a community claim, there are competing groups within the claimant community making resolution of the claim difficult;
> (c) where the land which is subject to the claim is not state-owned land, the owner or holder of rights in such land is opposed to the claim; or
> (d) there is any other issue which might usefully be resolved through mediation and negotiation,
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> the Chief Land Claims Commissioner may direct the parties concerned to attempt to settle their dispute through a process of mediation and negotiation.
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> (2) (a) A direction contemplated in subsection (1) shall be made in a written notice specifying the time when and the place where such process is to start.
> (b) The Chief Land Claims Commissioner shall appoint a mediator to chair the first meeting between the parties: Provided that the parties may at any time during the course of mediation or negotiation by agreement appoint another person to mediate the dispute."

8 Section 14(1)(c) reads:

> "(1) If upon completion of an investigation by the Commission-

[7] The signed agreement submitted to the Court, read with the amendments which have been made by the parties since the referral of the matter to the Court, makes provision for the following:

(i) the grant by the State of a 22 733,6360 ha portion of the land claimed (I will refer to it as "the land") in full ownership to a communal property association to be formed by the Makuleke Community;

(ii) the imposition and registration of certain restrictive conditions of title aimed at ensuring that the land is maintained as a conservation area on which no development or activity may take place except that which is compatible with the use of the area for conservation and ecotourism;

(iii) the fulfilment of certain suspensive conditions, namely, the Court making an order restoring the land in terms of section 35 of the Restitution Act generally in the manner contemplated by the agreement, the formation and registration of the Makuleke Communal Property Association, its ratification of the agreement and the exclusion of the land from the Kruger National Park, which requires the passing of a resolution of Parliament in terms of section 2(3) of the National Parks Act;[10]

(iv) the reservation by the State of the mineral rights in the land;

(v) the waiver by the Makuleke Community of a portion of their claim, being the claim in respect of an area of land known as Portion of Mutele Traditional Authority;

(vi) the retention by the Makuleke Community of their occupation of part of Ntlhaveni 2MU and the securing of their rights to it;

(vii) the declaration of the land as part of a national park in terms of section 2B(1)(b) of the

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> (a) . . . ;
> (b) . . .;
> (c) the parties to any dispute arising from such claim reach agreement as to how the claim should be finalised and the regional land claims commissioner is satisfied that such agreement is appropriate; or
> (d) . . . ,
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> the Chief Land Claims Commissioner shall certify accordingly and refer the matter to the Court."

9 Section 14(3) is quoted in n 14 below.

10 Act 57 of 1976. Section 2(3) provides:

> "Except under the authority of a resolution of Parliament, no land included in a park described in Schedule 1 shall be alienated or excluded or detached from the park."

National Parks Act,[11] to endure for a 50 year period, renewable by agreement for a further 50 year period, but subject to an escape clause effectively after 25 years;

(viii) a pre-emptive right in favour of the South African National Parks in respect of the land;

(ix) a pre-emptive right in favour of the Makuleke Communal Property Association in respect of the mineral rights;

(x) the continued use of parts of the land by the South African National Defence Force to enable it to carry out its border patrol functions;

(xi) the management of the land by a joint management board made up of three representatives of the South African National Parks and three from the Makuleke Communal Property Association according to a "Master Plan" to be prepared by the joint management board;[12]

(xii) compliance by the parties with the State's obligations under the Convention on Wetlands of International Importance;[13]

(xiii) the transfer of skills to, and the employment of staff from, the Makuleke Community;

(xiv) an exclusive right on the part of the Makuleke Communal Property Association or its partners or persons authorised by it to carry on permissible commercial activities on the land and to derive income from them;

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[11] Essentially, the section provides for land to be declared part of a national park, or for the creation of a national park, by agreement with the owner of the land, who makes it available for this purpose. It reads:

> "(1) The Minister may by notice in the Gazette declare-
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> (a) . . . .
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> (b) after consultation with the Minister of Mineral and Energy Affairs and subject to any agreement entered into between the board and, as the case may be, the Minister and any other Minister who may have an interest in such an agreement by virtue of the functions of his department, and the owner of any land, whereby that land is made available for the purposes of a national park, that land,
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> > under a name assigned thereto in the notice, to be a park, or declare such land to be part of a park or with the concurrence of the Minister of Mineral and Energy Affairs and, in respect of land referred to in paragraph (a), the Minister of Public Works and, as the case may be, any other Minister who has an interest by virtue of the functions of his department or, as the case may be, according to an agreement referred to in paragraph (b), exclude land from a park."

[12] Until that plan is in place, the park is managed according to an existing "draft Management Plan for the Kruger National Park", the relevant portions of which are attached to the agreement.

[13] The Convention on Wetlands of International Importance especially as Waterfowl Habitat (the Ramsar Convention) 1971.

(xv) various other ancillary matters.

[8] The above represents the background to this matter. What is the Court's function when a matter is referred to it in terms of section 14(3) of the Restitution Act? Section 14(3) does not expressly or by implication oblige the Court to make any agreement referred to it an order of court, notwithstanding that the parties may request it to do so.[14] Obviously the Court must treat such a request seriously and only refuse it for good reason. The Restitution Act is clearly geared to promote the resolution of restitution claims by negotiation, mediation and agreement.[15] Where the parties succeed in achieving this, the Court should as far as possible give effect to the intention of the parties. Generally, an agreement which settles a land claim will provide for restitution[16] in one form or another. If the Court makes the agreement an order of Court, it thus becomes an order by the Court to effect restitution. The power of the Court to order restitution in one form or another is derived primarily from section 35(1) of the Restitution Act. It reads:

> "(1) The court may order-
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> > (a) the restoration of land, a portion of land or any right in land in respect of which the claim or any other claim is made to the claimant or award any land, a portion of or a right in land to the claimant in full or in partial settlement of the claim and, where necessary, the prior acquisition or expropriation of the land, portion of land or right in land: Provided that the claimant shall not be awarded land, a portion of land or a right in land dispossessed from another claimant, unless such other claimant is or has been granted restitution of a right in land or has waived his or her right to restitution of the right in land concerned;
> > (b) the State to grant the claimant an appropriate right in alternative state-owned land and, where necessary, order the State to designate it;
> > (c) the State to pay the claimant compensation;
> > (d) the State to include the claimant as a beneficiary of a State support programme for housing or the allocation and development of rural land;
> > (e) the grant to the claimant of any alternative relief."

The use of the word "may" suggests that the Court has a discretion as to whether or not it should make such an order and what the content of that order should be. The discretion, although not unfettered, is a wide one. This is also apparent from the ensuing subsections in section 35 and from section 33 which lists the factors which the Court must consider in "considering its decision

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[14] Section 14(3) provides:

> "A referral made as a result of an agreement contemplated in subsection (1) (c) shall be accompanied by a document setting out the results of the Commission's investigation into the merits of the claim and a copy of the relevant deed of settlement together with a request signed by the parties concerned and endorsed by the Chief Land Claims Commissioner requesting that such agreement be made an order of Court."

[15] See for example sections 13(1) and (2), quoted in n 7 above, and section 35A of the Restitution Act which allows the Court to order the parties to attempt to resolve a matter through negotiation and mediation.

[16] See the definition of "restitution of a right in land" in paragraph 2 of this judgment.

in any particular matter".[17] These factors would also have to be considered by the Court in deciding whether or not to make an agreement referred in terms of section 14(3) an order of court.

[9] If, on referral of a matter in terms of section 14(3), the Court were to find, for example, that making the agreement an order of court would conflict with the public interest, or could not be justified on a proper application of the section 33 factors, or that the Court did not have jurisdiction for some reason, or that the agreement was invalid, or that an interested party had not been included, it would be entitled to refuse a request to make a settlement agreement an order of Court.[18] The Court would also be justified in refusing the request in the circumstances where the report prepared by the Regional Land Claims Commissioner and the agreement show that the parties are entitled to restitution, but actually adopting the precise terms of the agreement as the

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[17] They are:

"(a) The desirability of providing for restitution of rights in land to any person or community dispossessed as a result of past racially discriminatory laws or practices;
(b) the desirability of remedying past violations of human rights;
(c) the requirements of equity and justice;
(cA) if restoration of a right in land is claimed, the feasibility of such restoration
(d) the desirability of avoiding major social disruption;
(e) any provision which already exists, in respect of the land in question in any matter, for that land to be dealt with in a manner which is designed to protect and advance persons, or categories of persons, disadvantaged by unfair discrimination in order to promote the achievement of equality and redress the results of past racial discrimination;
(eA) the amount of compensation or any other consideration received in respect of the dispossession, and the circumstances prevailing at the time of the dispossession;
(eB) the history of the dispossession, the hardship caused, the current use of the land and the history of the acquisition and use of the land;
(eC) in the case of an order for equitable redress in the form of financial compensation, changes over time in the value of money;
(f) any other factor which the Court may consider relevant and consistent with the spirit and objects of the Constitution and in particular the provisions of section 9 of the Constitution."

[18] The approach of the Court was described by Gildenhuys J in *Elandskloof Vereniging i.s. Die Plase Elandskloof Nr 475 En 476* (unreported judgment in case number 20 of 1996) as follows:

> "Die Hof kan die saak in ooreenstemming met die skikkingsakte afhandel, indien die skikkingsakte in orde is, die toepaslike bepalings van die Wet nagekom is, en die verslag van die Kommissie vir die Herstel van Grondregte, soos vereis kragtens artikel 14(3) van die Wet, die bevindings bevat wat nodig is om die saak binne die regsbevoegdheid van die Hof te bring. Dit is nie die Hof se taak om sy oordeel oor die afhandeling van die saak in die plek van die ooreenkoms tussen die partye te stel nie. Gevolglik onderneem die Hof nie sy eie ondersoek oor die geldigheid van die hersteleis of die redelikheid van die koopsom van die grond nie. . . . [D]ie Hof [moet] toesien dat die skikking nie persone wat nie party daartoe is nie, se regte nadelig raak nie. Die regte van alle aanspraakmakers op die betrokke grond moet ondervang word. Die skikkingsakte moet duidelik en afdwingbaar wees, behoorlik verly en onderteken deur of namens alle belanghebbendes of hul gemagtigde verteenwoordigers. Die skikking mag nie teen die openbare beleid wees nie. Die voorskrifte van die Wet moet nagekom word : in hierdie verband moet daar in die besonder gelet word op die bepalings van artikels 14 en 35 van die Wet."

Court's order would not be desirable. This may be because the agreement deals with matters which fall completely outside the Court's jurisdiction or for a variety of other reasons, some of which will become apparent below. The Court would then have to fashion its own order in terms of section 35.

[10] What emerges from this analysis, at least for the present matter, is a two stage enquiry. Firstly, does the agreement, read with the report of the Regional Land Claims Commissioner, entitle the claimant to the restitution provided for in the agreement? Secondly, should the Court adopt the precise terms of the agreement as its order or make its own order based on the agreement and the report?

[11] Applying the first enquiry to this matter, the Court is satisfied that the formal and jurisdictional requirements are met and I do not intend enumerating these. The Court is also satisfied as to the efficacy of the agreement. In arriving at this point, the Court has proposed, and the parties have made a number of amendments to the agreement.[19] If regard is had to the agreement and the draft constitution of the Makuleke Communal Property Association, the Court is also satisfied that all members of the Makuleke Community will have access to the land on a basis which is fair and non-discriminatory as required by section 35(3) of the Restitution Act. This is so provided that paragraph 7 of the order the Court intends making in this matter is complied with and that the substance of the draft constitution is not changed.[20]

[12] A more difficult question is whether it is appropriate, having regard to the public interest and the factors in section 33 of the Restitution Act,[21] to allow restitution in the form of restoration of ownership rights in respect of State land which has been set aside in terms of national legislation for conservation, the promotion of biodiversity and recreation by and education of the public. The factors referred to in paragraphs (a) to (c) and (eA) of section 33 weigh in favour of the claimant. Justice and equity require that the severe infringement of human rights caused by the forced removal of a community which occupied the land for between 150 and 200 years without proper compensation, be remedied. As regards the question of feasibility raised in paragraph (cA), the fact that the community will not return to the land, but will continue to live on the land they now occupy, using the restored land for conservation purposes in a way which will contribute to their development, makes the form of restitution proposed feasible. This will also prevent any major social disruption (see paragraph (d)), as will the fact that the area will continue to be a part of a

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19 The amendments are in a separate written agreement signed by the parties which will form an annexure to the order in this matter along with the original agreement referred to the Court.

20 Although I express no final view on the matter, it seems to me in any event that (provided there is compliance with paragraph 7 of the order) the suspensive condition requiring formation and registration of a communal property association and the fact that the land will be held by such an association ensures compliance with section 35(3) of the Restitution Act. I say this because the constitution of such an association must, in terms of section 8(2)(c) of the Communal Property Associations Act 28 of 1996, comply with the principles in section 9 of that Act in order for the association to qualify for registration. These include principles of fairness, democracy, non-discrimination, transparency and accountability in the government of the association and, in terms of paragraph (d) of section 9(1), a principle of fair access to the property of the association.

21 The section is quoted in n 17 above.

national park, albeit in terms of another provision of the National Parks Act. This ought to prevent any threat to the jobs of those employed by the South African National Parks in this area and will ensure that the public continue to have access to it. The South African National Defence Force will also be able to continue to perform its border patrol functions. As regards paragraph (eB), the report of the Regional Land Claims Commissioner suggests that the dispossession in this case caused considerable hardship. This paragraph also requires that "the current use of the land and the history of its acquisition and use" be considered. Since the removal, the land has been used for conservation purposes. The desirability of this land use is recognised in the fact that the agreement provides for it to continue. The agreement thus achieves a "win-win" situation in which the demands for restitution, conservation and development have the potential to be met simultaneously. This is in keeping with the modern trend whereby it is recognised that a national park's human neighbours should share in the management of, and the benefits properly derived from, that park, rather than being excluded from it. In the circumstances and on the facts of this particular matter, the Court is satisfied that the Makuleke Community is entitled to the form of restitution which is provided for in the agreement. That includes an adjustment of the rights previously held by the Community in the land, to full ownership (subject to the order the Court intends making and the reservation of mineral rights to the State in terms of the agreement) in terms of section 35(4) of the Restitution Act.

[13] That brings me to the second enquiry identified above. The agreement in this matter is complex and wide ranging in its effect and contemplates the possibility of regulating the parties' interrelationship in perpetuity. If this Court is to make an agreement an order of Court, it must be satisfied that it is legally competent in every respect. In the Court's view, this would in certain respects have required full argument. This did not take place, both because the matter was dealt with under certain time constraints and because the Court formed the view that it was not necessary in any event for the agreement to be made an order of Court. There were other considerations. Any future breach of the agreement may, instead of being dealt with according to the normal civil process, potentially constitute contempt of Court. This would not be desirable. There would also be the potential for confusion regarding jurisdiction in respect of disputes arising from the agreement. Clause 51 of the agreement provides for non-exclusive jurisdiction on the part of the Witwatersrand Local Division of the High Court. But this Court has exclusive jurisdiction in terms of section 22(cC) to determine any matter involving the interpretation or application of the Restitution Act. It is arguable that that could include a dispute arising from an order of the Court made in terms of the Restitution Act. There is the added difficulty that the Land Claims Court may be a Court of limited duration.[22]

[14] For these reasons, the Court has come to the view that it should not make the agreement itself an order of court. The Court has prepared an order in terms of section 35 which restores the land to the Makuleke Community generally on the basis contemplated by the agreement. It has been circulated to the parties in draft form and amended in response to their comments. None of the parties objects to the order as it is now formulated. It appears at the end of this judgment. It is appropriate for purposes of the implementation of the order to make certain comments to explain its formulation.

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[22] See sections 22(5) and 2(1)(c) of the Restitution Act.

Re paragraph 1 of the order

[15] At the request of the Court, the property description was amended to reflect the description in the approved survey diagram of the land. The order refers to the amended property description. The order also reflects the deletion or amendment of some of the suspensive conditions from the original agreement. The term of the order requiring the prior resolution by Parliament to exclude the land from the Kruger National Park in terms of section 2(3) of the National Parks Act reflects a suspensive condition agreed to by the parties. In imposing the condition, the Court is giving effect to the parties' agreement and is not deciding the question whether or not such a resolution will always be required before land which forms part of a park referred to in schedule 1 to the National Parks Act can be restored in terms of section 35 of the Restitution Act, read with section 25(7) of the Constitution.[23]

Re paragraph 2 of the order

[16] The Registrar of Deeds has confirmed that the land is unregistered State land and it can accordingly be restored to the Makuleke Communal Property Association by way of a Deed of Grant.

Re paragraph 3, 4 and 5 of the order

[17] The restrictive conditions of title which the parties have agreed should be imposed were material in convincing the Court that it was appropriate to order restoration in this matter. They form a schedule to the agreement and, in their amended form, provide as follows (references to the "CPA" mean the Makuleke Communal Property Association, which is to be formed, to the "SANP" mean the South African National Parks and to the "JMB" mean the joint management board referred to in item (xi) of paragraph 7 above):

> "1 Subject to the reservation of mineral rights in favour of the Republic of South Africa on the following terms and conditions:
>
> 1.1 no mining and/or prospecting activities (as defined in the Minerals Act 50 of 1991) may take place in, on or under the land, save as provided in this schedule. Notwithstanding the aforementioned, but subject to the provisions of the Minerals Act, 1991, the excavation of sand, stone, rock, gravel, clay and soil by:
>
> 1.1.1 the CPA for the purposes of building and other commercial activities;
>
> 1.1.2 the JMB for the purposes of fulfilling its conservation management obligations in terms of the agreement; or
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> 1.1.3 the SANP for the purposes of fulfilling its obligations in terms of the agreement or the National Parks Act,
>
> shall not be prohibited : Provided that:
>
> a). prior to any such activities being undertaken, an environmental impact assessment as may be required by law must be conducted and the undertaking of such activities must be approved by the competent authority in terms of such law; and

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[23] Constitution of the Republic of South Africa, Act 108 of 1996.

b). such activities are not in contravention of the Master Plan at the time that such activities are to be undertaken.

1.2 In the event that the Republic of South Africa should wish to divest itself of the mineral rights in the land:

1.2.1 the Republic of South Africa must first offer the mineral rights in the land to the CPA at a fair and reasonable price;

1.2.2 the CPA shall be afforded a period of 90 (ninety) business days to consider the Republic of South Africa's offer and give its written acceptance of such offer;

1.2.3 should the CPA not accept the Republic of South Africa's offer within 90 (ninety) business days, the Republic of South Africa may offer the mineral rights in the land to a bona fide third party at a price that is not less, and on conditions which are not more favourable to such third party than those at which the CPA was entitled to purchase the mineral rights: Provided that, as a condition to such sale the third party undertakes to compensate the CPA in respect of any loss of surface rights as a result of any mining or prospecting activities.

1.3 In the event that the Republic of South Africa applies to a court of competent jurisdiction or other competent authority to amend, overturn, remove or expropriate the condition referred to in Condition 1.1, the Republic of South Africa agrees that:

1.3.1 it shall consult with the CPA prior to making any such application;

1.3.2 it shall procure that the CPA shall be given a bona fide and reasonable opportunity to participate with either the Republic of South Africa or any third party in the prospecting (as defined in the Minerals Act 50 of 1991) and/or mining (as defined in the Minerals Act 50 of 1991) of minerals in, on or under the land; and

1.3.3 notwithstanding the provisions of this clause 1.3, the CPA and/or the SANP may in its/their sole discretion oppose any such application by the Republic of South Africa or any other interested third party, on any grounds it/they deem/s fit.

1.4 Notwithstanding the provisions of clause 1.3, the Minister of Minerals and Energy undertakes that in the event that the condition referred to in clause 1.1 is overturned, amended, removed or expropriated in such a manner as to allow prospecting or mining to take place on the land, that he shall not grant any person permission to prospect or authorisation to mine the land if:

1.4.1 an environmental impact assessment as may be required by law has not been conducted or the approval by the competent authority in terms of such law has not been obtained; or

1.4.2 in the opinion of the Minister of Minerals and Energy, after consultation with the Minister of Environmental Affairs and Tourism such activity is not in the greater interest of the land than as an area of conservation; or

1.4.3 the person to whom the permission or authorisation is to be granted does not undertake to compensate the CPA in respect of any loss of surface rights to the land as a result of mining and/or prospecting activities.

2 Subject further to the following conditions:

2.1 no part of the land may be used for residential purposes insofar as such purposes would conflict with the land being maintained and utilised as an area of conservation and associated commercial activities;

2.2 no part of the land may be used for agricultural purposes;

2.3 the land is to be utilised and maintained solely for the purpose of conservation and associated commercial activities;

2.4 no development of whatsoever nature may be made on the land prior to an environmental impact assessment as may be required by law being undertaken and the approval of the competent authority in terms of such law being obtained in respect of such development.

2.5 the CPA may not sell or otherwise dispose of, alienate or transfer any of the land to any person, other than a person or body controlled by or beneficially owned by the CPA, without first offering the land to the SANP. Should the SANP not accept the CPA's offer within 45 (forty five) business days the CPA may, during a period of 180 (one hundred and eighty) business days after expiry of the 45 business day period, sell and transfer the land to a bona fide third party at no less than the price at and on conditions which are not more favourable to the purchaser than those at which the SANP was entitled to purchase the land."

Then follow certain definitions which need not be quoted. These include a definition of "associated commercial activities" which restricts such activities to those compatible with the use of the land for conservation and ecotourism purposes.

[18] The Registrar of Deeds has indicated in a letter that he is willing to register all of the conditions as formulated by the parties in the agreement, provided the agreement is lodged as a supporting document at the time of registration. Although the view of the Registrar of Deeds is accorded great respect, this is not on its own sufficient to confirm the validity and registerability of the conditions or that this Court has jurisdiction to order their imposition. Some of the conditions contained in clause 1 of the schedule of conditions, in particular, are novel and complex in many respects. The Court has formed the view that it would only have been able to incorporate the conditions in clause 1 into its order after the matter had been properly argued before it. This has not happened. Nor is it necessary, because clause 1 is not material in convincing the Court that it should make an order in this matter. For this reason and no other the Court has omitted the condition from the order. Its omission should not be taken by the Registrar of Deeds as a reason not to register it. The Court simply declines to express a view on the matter.

[19] The conditions in clause 2 of the agreement are of greater concern to the Court in arriving at its decision. The Court has satisfied itself as to their registerability and its jurisdiction to impose them, provided that they are registered in accordance with the Court's order. The order requires that the conditions be made in favour of the South African National Parks and the Minister of Environmental Affairs and Tourism in the national government. In the absence of a requirement that the conditions be registered in favour of certain persons, the Court was concerned that an argument might be made out that the conditions were "nuda praecepta".[24]

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[24] ie "nude prohibitions" as they are also referred to. In this regard I respectfully disagree with the view expressed in HS Nel *Jones Conveyancing in South Africa* 4th ed (Juta, Cape Town, 1991) at page 223 that Greenberg JA in *Friedlander v De Aar Municipality* (1944 AD 79 at 92 to 93) held conclusively that such a provision could only be invalid in the context of a testamentary disposition.

Paragraph 7 of the order

[20] At the time of the forced removal of the Makuleke Community in 1969, there were certain families belonging to a different tribe or community who resided on the land and were also forcefully removed. To date those families have not co-operated in the claim, apparently despite sustained attempts by the Regional Land Claims Commissioner and the mediators to get them to do so. However, the Makuleke Community wishes to leave the door open to individual members of those families to benefit from the settlement if they act within a reasonable time. These clauses are designed to achieve this. They also provide for the inclusion of any member of the Makuleke Community who may have been omitted from the process of identification of its membership for any reason.

[21]The Court makes the following order:

1 Subject to paragraph 3 below, the State must restore the portion of land described by the figure 'a B C D E F G H J K L m middle of Limpopo River n middle of Luvuvhu River p middle of Mutale River a' and referred to as 'the farm Makuleke No. 6 - MU' in approved survey diagram number SG 10710/1998 ("the land") to the Makuleke Communal Property Association in full ownership within a reasonable time after all of the following events have taken place:

1.1 the registration of the Makuleke Communal Property Association in terms of section 8 of the Communal Property Associations Act, 1996;

1.2 the ratification by the Makuleke Communal Property Association of the agreement attached to this order as annexure A and the agreement amending it, the signed originals of which are attached to this order as annexures B1 to B8;

1.3 the adoption by Parliament of a resolution to exclude the land from the Kruger National Park in terms of section 2(3) of the National Parks Act 57 of 1976.

2 The restoration in paragraph 1 must be effected by way of a Deed of Grant.

3 The State must make the Deed of Grant subject, at least, to -

3.1 those title conditions listed in clauses 2.1, 2.2, 2.3 and 2.4, read with clause 3, of schedule 3 to annexure A (as amended by annexures B1 to B8), which must be imposed in favour of the national Minister of Environmental Affairs and Tourism and the South African National Parks referred to in section 5(1) of the National Parks Act 57 of 1976;

3.2 the title condition in clause 2.5, read with clause 3, of schedule 3 to annexure A (as amended by annexures B1 to B8), which must be imposed in favour of the South African National Parks.

4 The parties may make formal changes to the conditions referred to in paragraph 3 of this order, if the changes-

4.1 do not affect the substance of the conditions; and

4.2 are necessary to effect the registration of the conditions.

5 To the extent that compliance with paragraph 3 of the order requires the execution of a notarial deed in terms of section 65 of the Deeds Registries Act (Act 47 of 1937), the parties must sign all documentation needed to give effect to that paragraph within the time period referred to in paragraph 1 of this order.

6 This order lapses if the conditions referred to in clause 4.1 of annexure A (as amended by annexures B1 to B8), are not fulfilled by the latest date determined in terms of clause 4.1. of that annexure.

7 The constitution of the Makuleke Communal Property Association must provide for membership as of right of the Association for individuals other than its founding members who apply for membership before 15 December 2003 and are able to show that-

7.1 they were dispossessed of rights in the land due to their forced removal from the land as a result of racially discriminatory laws or practices during or about 1969; or

7.2 they are the direct descendants of a person referred to in paragraph 7.1.

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Judge A Dodson

Handed down on : 15 December 1998

For the Claimant: *M Hathorn* of *Legal Resources Centre, Johannesburg*

For the Minister of Defence, the Member of the Executive Council for Agriculture, Land and Environment, Northern Province and the Minister of Land Affairs:

SJA Swanepoel of the *State Attorney (Pretoria)*

The Ministers of Mineral and Energy, Agriculture, Environmental Affairs and Tourism and Public Works and the South African National Parks were not legally represented.