REPUBLIC OF SOUTH AFRICA

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE
Case Number : 425 / 2001

In the matter between

GAMEVEST (PTY) LIMITED — **Appellant**

and

THE REGIONAL LAND CLAIMS COMMISSIONER FOR THE NORTHERN PROVINCE AND MPUMALANGA — **First Respondent**
THE CHIEF LAND CLAIMS COMMISSIONER — **Second Respondent**
THE COMMISSION ON RESTITUTION OF LAND RIGHTS — **Third Respondent**
THE BA-PHALABORWA BA GAMASEKE TRIBE — **Fourth Respondent**
THE BA GASHAI TRIBE — **Fifth Respondent**

Composition of the Court : **VIVIER, OLIVIER, NAVSA, NUGENT JJA AND HEHER AJA**

Date of hearing : **2 SEPTEMBER 2002**

Date of delivery : **25 SEPTEMBER 2002**

SUMMARY

Restitution of Land Rights Act 22 of 1994 - Review - administrative action or decision.

J U D G M E N T

OLIVIER JA

Introduction

[1] This is an appeal against the dismissal and the attendant costs orders in the Land Claims Court by Moloto J of an application brought by the Appellant ('Gamevest') against the Respondents. The application had its origin in claims submitted by the Fourth and Fifth Respondents by virtue of the provisions of the Restitution of Land Rights Act 22 of 1994 ('the Restitution Act') for restitution to them of, *inter alia*, certain farms at present registered in the name of the Appellant. The farms in dispute are Glip, Brand, Ram, Punt, remaining extent of Ziek, remaining extent of Brook and remaining extent of Breakfast, collectively known as Croc Ranch, and developed as a game reserve. The farms are situated in the Northern Province, near Phalaborwa and are, by all accounts, very valuable.

[2] It is common cause that the Ba-Phalaborwa tribal community comprises a family of four tribes, namely the Ba Ga Makhushane, the Ba Ga Selwane, the Ba Gamaseke (the Fourth Respondent) and the Ba Gashai, also known as the Ba Ga Mashishimale (the Fifth Respondent). The Ba-Phalaborwa people are able to trace their history to the 16th century with the Fifth Respondent joining the larger tribe during the 18th century. It is one of the oldest communities in the old Transvaal and currently has more than 62 000 members. Their land claim, covering 65 farms as well as a portion of the Kruger National Park and the Phalaborwa town and mines, is one of the largest and most complicated claims lodged under the Restitution Act. It is alleged that until at least 1913 the Ba-Phalaborwa people had undisturbed occupation of the whole of this area but that they were dispossessed without compensation by the then Government by virtue of the provisions of the Black Land Act 27 of 1913 and other

discriminatory laws. They allege that the Ba-Phalaborwa land was surveyed during 1922 and that the first white farmers settled on the Ba-Phalaborwa land from 1923.

[3] A right to restitution of rights in land was created by s 8(3)(b) of the Constitution of the Republic of South Africa Act, 200 of 1993 ('the Interim Constitution') which provided that every person or community dispossessed of rights in land before the commencement of the Constitution under any law that would have been inconsistent with s 8(2) had that sub-section been in operation at the time of the dispossession, would be entitled to claim restitution of such rights subject to and in accordance with ss 121, 122 and 123 of the Interim Constitution. Section 121 of the Interim Constitution provided that an Act of Parliament should provide for matters relating to the said restitution of land rights.

[4] The right to restitution of land rights was entrenched in the final Constitution, the Constitution of the Republic of South Africa Act 108 of 1996. The Restitution Act is the Act referred to in the Interim and Final Constitution. The restitution process is a finite one and subject to limitations. Only certain dispossessions of land rights are dealt with in the Restitution Act and a limitation is placed on the period within which claims may be lodged.

[5] The threshold requirements for the entitlement of a community to restitution are:

5.1 The claimant must be a community or part of a community. A community is defined as a group of persons whose rights in land are derived from shared rules determining access to land held in common by such group, and includes part of any such group. A tribe is a community, although all communities are

not necessarily tribes. A community claim may also be lodged by a part of the dispossessed community;

5.2 The community must have been dispossessed of a right in land after 19 June 1913;

5.3 The dispossession must have been the result of past racially discriminatory laws or practices;

5.4 The claim for such restitution must have been lodged by not later than 31 December 1998; and

5.5 No person or community shall be entitled to restitution of a right in land if just and equitable compensation as contemplated in s 25(3) of the Constitution or 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.

[6] Claims are to be lodged with the Commission on Restitution of Land Rights ('the Commission'), established by s 4 of the Restitution Act, or by way of an application lodged with the Registrar of the Court in terms of Chapter IIIA of the Restitution Act.

[7] It seems to me that the procedure for the lodgement, consideration and final determination of a claim for restitution of land rights may be divided into the following phases:

(A) *The lodgement of the claim* (in Afrikaans : 'indiening van die eis')

This is a formal act by the claimant and is required to have taken place not later than 31 December 1998 (s 2(1)(e)).

Section 10 of the Restitution Act sets out the requirements for the lodgement of a claim by a community:

1 It must be lodged by the representative of a community which is entitled to claim restitution of a right in land. The basis on

which it is contended that the person submitting the form represents such community shall be declared in full and any appropriate resolution or document supporting such contention shall accompany the form at the time of lodgement, or may with the necessary permission, be lodged at a later stage.

2 The claim must be lodged on the form prescribed for this purpose by the Chief Land Claims Commissioner. This document forms part of the Rules regarding procedure of the Land Claims Commission promulgated in Government Notice R703 of 12 May 1995 and as amended by Government Notice R1961 of 29 November 1996.

3 The claim must include a description of the land in question, the nature of the right in land of which the community was

dispossessed, and the nature of the right or equitable redress that is being claimed.

At this stage of the process, the duties of the Commission or its representative are, likewise, formal in nature. It must, 'subject to the provisions of section 2', *receive and acknowledge receipt of all claims lodged with or transferred to it in terms of this Act* (s 6(1)(a). It must also take reasonable steps to ensure that claimants are assisted in the preparation and submissions of claims (s 6(1)(b)) and to resolve disputes as to who legitimately represents a community for the purposes of any claim under the Restitution Act (ss 10(4), (5) and (6)).

It is clear that, except for the resolution of a dispute as regards representation mentioned in ss10(4), (5) and (6), and which is not relevant to this appeal, the Commission or its representative does not take any administrative decision, nor does it perform any administrative action which

may prejudicially affect any right of the present landowner or others holding other rights in or to the land. It has no discretion to refuse receipt of a claim at this stage; hence it takes no administrative decision in 'receiving' a claim.

(B) *The second phase* commences after the lodgement of a claim and ends with the publication of the fact that a claim has been 'accepted'; such publication to be in the Gazette and to persons in the district in which the land in question is situated (s 11(1)).

In this phase the Regional Land Claims Commissioner must consider certain matters, and may only proceed with the aforesaid publication if he or she is satisfied that (a) the claim has been lodged in the prescribed manner; (b) the claim is not precluded by the provisions of s 2; and (c) the claim is not frivolous or vexatious (s 11(1)(a), (b) and (c)). After giving consideration to these requirements, the Regional Land Claims

Commissioner then has to take an administrative decision and perform an administrative action, *viz* to refuse acceptance of the claim or to accept the claim. In the first case, he or she must inform the applicant of the refusal and furnish reasons therefor (s 11(4)). If the claim is accepted, he or she must give notice of the acceptance of the claim by publication in the Gazette and by taking steps to make the acceptance of the claim known in the district in which the land in question is situated (s 11(1)).

In the present case the decision to 'accept' the claim, and the publication of the required notice, took place on 5 April 2002, *ie* long after the application by the appellant was instituted in the court *a quo* and long after Moloto J had given judgment.

(C) *The third phase*, which may be called the investigation phase, is governed by the provisions of ss 11(6), (7), (8), 11A, 12, and 13. In a nutshell, it obliges the Regional Land Claims Commissioner to advise the

owner of the land in question of the application, to prevent dealings with the land, to deal with amendments to and withdrawal of claims, and to investigate the claims thoroughly. In case of dispute, the Chief Land Claims Commissioner may direct the parties concerned to attempt to settle their dispute through a process of mediation and negotiation (s 13).

(D) The fourth and final phase is the *referral stage***,** when the matter is referred by the Regional Land Claims Commissioner to the Land Claims Court (s 14). This occurs only if the parties to any dispute arising from the claim agree in writing that it is not possible to settle the claim by mediation and negotiation or the said Commissioner certifies that it is not feasible to resolve the dispute by mediation and negotiation, or when the said Commissioner is of the opinion that the claim is ready for hearing by the Land Claims Court.

The application

[8] The application was launched in the Land Claims Court on 3 August 2000. The relief claimed was, firstly, a review of certain decisions of the Regional Land Claims Commissioner, and further declaratory orders and a *mandamus*. Voluminous papers were filed of record, interim applications were launched and serious allegations of improper conduct were made by the Appellant's attorney. These allegations were, at the hearing of the matter before Moloto J, apparently persisted in by the Appellant's legal team.

[9] When the matter was argued before this court, the Appellant persisted only with an application for review, which was limited to two grounds. First, that the Regional Claims Commissioner permitted a substitution of the claimants *inter se* after the last day on which claims could be submitted, *ie* 31 December 1998; and secondly, that the claims were wrongly 'accepted' by, or on behalf of the Commission. The

Respondents opposed the relief sought on several grounds. They all raised the defence that the Appellant had failed to establish the very first and ineluctable requirement for judicial review; *viz* a decision by the Respondent/Defendant. This, therefore, needs to be considered *in limine*.

Was any reviewable 'decision' taken by the First, Second or Third Respondents?

[10] The main provisions of the Promotion of Administrative Justice Act 3 of 2000 ('the AJA') came into operation on 30 November 2000. As stated above, the application was launched on 3 August 2000. The AJA is consequently not applicable to the present proceedings. The Constitutional basis of our administrative law is to be found in s 33 and item 23 of Schedule 6 (Transitional Provisions) of the Constitution, which read as follows:

Section 33 of the Constitution :

'33 (1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

(3) National legislation must be enacted to give effect to these rights, and must -

(a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;

(b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and

(c) promote an efficient administration.'

Schedule 6, item 23

'23 (1) National legislation envisaged in sections 9(4), 32(2) and 33(3) of the new Constitution must be enacted within three years of the date on which the new Constitution took effect.

(2) Until the legislation envisaged in sections 32(2) and 33(3) of the new Constitution is enacted -

(a) section 32(1) must be regarded to read as follows:

"(1) *Every person has the right of access to all information held by the state or any of its organs in any sphere of government in so far as that information is required for the exercise or protection of any of their rights*", and

(b) section 33(1) and (2) must be regarded to read as follows:

"*Every person has the right to -*

(a) lawful administrative action where any of their rights or interests is affected or threatened;

(b) procedurally fair administrative action where any of their rights or legitimate expectations is affected or threatened;

> *(c) be furnished with reasons in writing for administrative action which affects any of their rights or interests unless the reasons for that action have been made public; and*
>
> *(d) administrative action which is justifiable in relation to the reasons given for it where any of their rights is affected or threatened."*
>
> (3) Sections 32(2) and 33(3) of the new Constitution lapse if the legislation envisaged in those sections, respectively, is not enacted within three years of the date the new Constitution took effect.'

[11] It is patently clear that the fundamental right created by s 33(1) and (2) of the Constitution is that of lawful and procedurally fair *administrative action*. I emphasise the words 'administrative action', because they emphasise the very first question to be asked and answered in any review proceeding : what is the *administrative act* which is sought to be reviewed and set aside? Absent such an *act*, the application for review is stillborn.

[12] What is an *administrative act* for the purpose of justiciability? There is no neat, ready-made definition in our case law, but in *Hira and Another v Booysen and Another* 1992 (4) SA 69 (A) Corbett CJ at 93 A - B required,

for common-law review, the non-performance or wrong performance of a statutory duty or power; where the duty/power is essentially a decision-making one and the person or body concerned has taken a decision, a review is available. This principle underlies s 36(1) of the Restitution Act, which reads as follows:

> 'Any party aggrieved by an act or decision of the Minister, Commission or any functionary acting or purportedly acting in terms of this Act may apply to have such act or decision reviewed by the Court'

The first ground for review : an unlawful substitution after the cut-off date

[13] *The first joint claim filed*

On 10 May 1995 the four traditional leaders of the Ba-Phalaborwa Tribes signed a land claim form in which the four tribes jointly claimed the whole of the Ba-Phalaborwa land including the Appellant's land. On 22 May 1996 a further land claim form was duly completed and signed by the four traditional leaders of the Ba-Phalaborwa Tribes claiming the entire land of

the Ba-Phalaborwa area as set out in Annexure "A" to the claim form. This claim was lodged with the Commission on 12 June 1996. It is common cause that this claim by the four tribes jointly, also includes the Appellant's land. The Ba-Phalaborwa people, including the Fourth and Fifth Respondents, had therefore already lodged a restitution claim for all of the Appellant's farms in 1996.

[14] *Lodgement of the 1998 claims*

During November 1998 the four tribes decided to obtain legal assistance as nothing had happened to the land claim already lodged. After collecting funds from tribal members, they approached an attorney, Mr Steytler. With his assistance further claim forms signed by, and on behalf of, all four tribes jointly were lodged in amplification of the claim already filed. This was done under a covering letter dated 27 November 1998 and received by the Commission on 30 November 1998 (well before the cut-off date of 31

December 1998). Mr Steytler did a preliminary investigation of the claim and advised the tribes to lodge separate claims, which they were reluctant to do. Mr Steytler had little time to do the enormous amount of research, but lodged the further claims with the information at his disposal at the time. He was assured by the Regional Land Claims Commissioner, Mrs Gilfillan, that he could amplify and clarify the claims after 31 December 1998, provided that the claim was lodged timeously. Mr Steytler then lodged claims on behalf of the Fourth Respondent, for the Appellant's farms Glip, Brand, Ram and Punt and, on behalf of the Fifth Respondent, for the Appellant's farms Ziek, Breakfast and Brook.

[15] *The later amendments*

During 1999, *ie* after the cut-off date and after further research, Mr Steytler realised that he had incorrectly allocated some of the Appellant's farms, which, it was claimed, had been dispossessed from the Fifth Respondent,

to the Fourth Respondent and included those farms in the Fourth Respondent's claim. Mr Steytler, in an affidavit in these papers, explains as follows

'5.7.1 An unified claim was initially lodged in 1995 or 1996, by the four Ba Phalaborwa tribes together, for all the land between the Olifants and Letaba rivers as indicated on the sketch map attached to the claim form signed by the four tribal chiefs on 10th of May 1995 [attached to the founding affidavit as Annexures "FI" and "FJ"]. They did this on their own, unassisted by any official or legal representative. The leading figure in this endeavour was Kgoshi Brown Malatji of the Makushane tribe. He died in 1997. Thereafter the claim was not followed up.

5.7.2 Late in November 1998 the four tribes instructed me to lodge a claim on their behalf. They did not have a copy of the claim that they had previously lodged. I explained to them that each tribe has to lodge a claim for its own land. They were reluctant to do this. They explained that they originally occupied the land as one unified tribe and that they still think of themselves as one tribal family. I explained to them that they are now four separate legal entities each with its own legal persona.

5.7.3 After a preliminary investigation I realised that the tribes have good claims but than an enormous amount of research still had to be done. At that time I was also instructed by many other tribes to lodge claims on their behalf. These last minute claims kept me very busy. There was not much time left before the deadline of 31 December 1998.

5.7.4 There was also the complication of establishing the exact boundaries between the tribes. Before 1922 the boundaries between the tribes were demarcated by natural geographical and topographical features on the ground. Their traditional boundaries did not always coincide with the farm boundaries drawn by the surveyors in 1922. As my clients' map reading abilities were uncertain, I realised that I would have to go to the Phalaborwa area personally so that their boundaries could be pointed out to me on the ground. There was not enough time left to do this before 31 December 1998. All that was certain at that stage was the outer perimeter of their claim area in the North, East and the South. At that stage I still had some uncertainty about their exact western boundary.

5.7.5 To prevent their claim from missing the cut off date of 31 December 1998, I therefore decided to lodge the claim with the information I had at my disposal at the time. .....

5.7.6 I discussed my problem with the previous Regional Land Claims Commissioner, mrs Durkje Gilfillan. She said I must lodge before the 31st of December 1998 but that I could amplify and clarify the claims later on as the process develops. She told me that I would not be allowed to add more land to the claim after 1998, but if the claimants agreed, land that had been claimed timeously, could be exchanged between claimants. Her advice is in line with the preamble to Act 22 of 1994 as well as Sec 6[1][b] [c] [cB] and [e]; Sec 6[2][e]; Sec 1[2] and Sec 33 of the Act.

.....

5.7.8 Later, in 1999, I had the opportunity to do some research and to consult with my clients at Phalaborwa. It then appeared that I had made some mistakes in the allocation of farms to the different tribes. All four tribes readily agreed to the rectification of their claims.

5.7.9 Further research and investigations in loco also made it clear that I had included some farms on the western periphery of their land that fell partially or wholly outside their western tribal borders. The tribes agreed that they would not insist on claiming only parts of farms and gave me permission to withdraw their claims in respect of the farms that fell partially or wholly outside their 1913 tribal borders.

5.7.10 In consultation with the First Respondent the format of the Ba Phalaborwa claims have also been changed to make them less complicated and more easy to understand. The claims were re-arranged and consolidated into 6 claims divided as follows:

[1] The claim of the Ba Phalaborwa ba Makushane tribe for a block of 22 original farms.

[2] The claim of the Ba Phalaborwa ba Selwane tribe for a block of 15 original farms.

[3] The claim of the Ba Phalaborwa ba Maseke tribe for a block of 7 original farms.

[4] The claim of the Ba Shai ba Mashishimale tribe for a block of 16 original farms, [including all the Appellant's farms].

[5] A joint claim by all four the above tribes for a portion of the Kruger National Park.

[6] A joint claim by all four the above tribes for the five original farms on which the town of Phalaborwa and its mines are situated today.'

[16] As these new facts only came to light as part of the opposing affidavits, the Applicant in its replying affidavit averred that it was now common cause that :

(1) The claim by the Fourth Respondent to the Applicant's farms Glip, Brand, Ram and Punt was made in error and was withdrawn. The Fourth Respondent, on Mr Steytler's version, has no claim for restitution of any land belonging to the Appellant.

(2) Fifth Respondent's claim to the Applicant's farms Glip, Brand, Ram and Punt was made by way of a so-called substitution after the statutory cut-off date.

[17] Accordingly, the Appellant avers, the only claim that may be valid is that of Fifth Respondent for the farms Ziek, Breakfast and Brook. *The decision of the first three Respondents to receive or accept the Fifth Respondent's claim for Glip, Brand, Ram and Punt was unlawful and liable to be set aside on review.*

[18] The gravamen of the first ground for review lies in the italicised sentence above. The first three Respondents and the Fifth Respondent

raised the defence, as a matter of administrative law, that no decision had been taken by any of the first three Respondents at the time when the review application was launched and, consequently, that there was nothing for a court to review. As a matter of substantive law, various defences to the Appellant's attack were foreshadowed. As the matter before us is one of administrative law, the substantive law defences need not at this stage be considered. The sole question for present purposes is whether any decision or action, in respect of the amendment of the claims by the Fourth and Fifth Respondents after the cut-off date, was taken by any of the first three Respondents. They denied any such decision or action, relying on the admitted fact that at the time the application was launched by the Appellant, no notice in terms of ss 11(1) and (3), *ie* to accept or refuse the claims by the Fourth and Fifth Respondents, in whatever form, had been

published. In a nutshell, it is averred that the review application was premature.

[19] Whether any of the first three Respondents have, subsequent to the cut-off date, and prior to the institution of these proceedings taken a decision or performed an act in respect of the claim by the Fourth Respondent to the farms Glip, Brand, Ram and Punt to the Fifth Respondent, is a factual question. The Appellant was not a party to the exchange and must rely on the facts furnished by Mr Steytler and the Respondents. I have quoted Mr Steytler's version fully in par [15] hereof, and it requires careful scrutiny.

[20] According to Mr Steytler's affidavit (par 5.7.6 quoted in par [15] hereof) he was advised *before lodging the claims and before the cut-off date* by Mrs Durkje Gilfillan *inter alia* that ' ... land that had been claimed timeously, could be exchanged between claimants.' Now, whether Mrs

Gilfillan was in law correct or wrong in making this statement is irrelevant for the purposes of this appeal. Her opinion or advice (for that is what it was) *before the lodgement of the claims* does not amount to an administrative decision or action. According to the scheme of the Restitution Act, as set out above (see par [7] hereof), the first administrative decision and action to be taken is that of the Regional Land Claims Commissioner in terms of s 8.11 to accept or reject a claim lodged with it. The advice given or opinion expressed by Mrs Gilfillan was not such a decision or action.

[21] But, according to Mr Steytler's affidavit (see par 5.7.10 quoted in par [15] hereof), the format of all the claims by the Ba Phalaborwa had also been changed to make them less complicated and easier to understand '... in consultation with the First Respondent.' Does this 'consultation' amount to an administrative decision or action?

[22] The First Respondent denies taking a decision or performing an action in this regard. Moreover, once again and for the reason set out above, any act performed by the First Respondent before the decision to publish the notice envisaged by s 11 of the Restitution Act is not, *before such publication*, reviewable.

[23] In the result, the application for review based on the allegation of unlawful substitution of claimants, must fail.

[24] The second ground for review takes us back in time to the lodgement of the claims of the Fourth and Fifth Respondents, in the form in which they then were, on 27 November 1998, *ie* before the cut-off date. The objection taken by the appellant is that the claims, as lodged, did not comply with the provisions of s 10 of the Restitution Act in that the claims failed to specify the acts of dispossession of a right in land relied upon, as opposed to mere allegations relating to the laws which could justify a dispossession.

[25] Whether the claims were defective as alleged, is a matter of substantive law and is not now justiciable, for the reasons given above. At the stage when the review application was launched, no administrative decision had been taken nor had any reviewable action been taken. All that was done by the Regional Land Claims Commissioner was to physically receive the claims and formally acknowledge such receipt. The Appellant, however, contends otherwise. On its behalf it was argued that even at the moment of the lodgement of claims with the Regional Land Claims Commissioner, and the receipt by him or her, the Commissioner must examine the claim and there and then accept the claim as complying with the Restitution Act, or to reject it. In the present case the Appellant avers that the Regional Land Claims Commissioner failed to apply his or her mind to this matter and should have rejected the claims for the reason stated above.

[26] The Appellant bases its argument on the provisions of s 6(1)(a) of the Restitution Act, which reads as follows:

> '6 **General functions of Commission.** (1) The Commission shall, at a meeting or through the Chief Land Claims Commissioner, a regional land claims commissioner or a person designated by any such commissioner -
>
> (a) subject to the provisions of section 2, receive and acknowledge receipt of all claims for the restitution of rights in land lodged with or transferred to it in terms of this Act; ...'

The Appellant relies on the words ' ... subject to the provisions of section 2, receive ...'

Section 2 is the provision in the Restitution Act which prescribes the conditions for entitlement to restitution, *inter alia* that the claimant is a community or part of a community dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practises.

[27] The Appellant's argument is that if one reads s 6(1)(a) together with s 2(1)(d) (because of the cross-referencing in s 6(1)(a)) it means that if the claim forms and accompanying documents do not give full particulars as to the dispossession of the right relied upon, the Chief Land Claims Commissioner, the Regional Claims Commissioner or the person designated by any such Commissioner may not receive the claim. *In casu*, because the dispossession has (according to the Appellant) not sufficiently been substantiated, the Regional Land Claims Commissioner should not have received the Fourth and Fifth Respondents' claims, and such claims ought to be set aside.

[28] As I have already explained, the scheme of the Restitution Act is such that the receipt of a claim and an acknowledgement of such receipt is a formal act, not amounting to an administrative decision or action. Only after the lodgement can and must the Regional and Claims Commissioner

examine the claim, and satisfy himself or herself whether the claim is *inter alia* not precluded by the provisions of s 2 (see s 11(1)(b)). This is not a task that can be done in a superficial, cursory manner. Section 11 deals with this stage of the process. To read s 6, which sets out the general functions of the Commission, as incorporating, on the mere receipt of a claim, the obligation to inspect the documents and decide whether the claim is a valid one, would lead to an absurd result. It would render s 11(1)(b) tautologous and devoid of meaning. The reference to s (11)(1)(b) in s 11(4) would also have to be ignored. That was manifestly not the intention of the legislature.

[29] The words 'subject to the provisions of section 2' in s 6(1)(a) are, as far as the processing of claims is concerned, of no import. What the legislature intended to say, but failed to do, was that as far as claims are concerned, the functions and duties of the Commission *etc* are to see that

the provisions of s 2 (entitlement to restitution) are applied and complied with. Section 6 was not intended to say when the validity of a claim is to be tested; that is set out in s 11, which deals specifically with the procedure in deciding that issue. Patently, the validity of a claim cannot be tested at the very moment of the receipt of the claim forms.

[30] In the result, the second ground of review must also fail.

The appeal against the costs orders in the court a quo

[31] Moloto J, after dismissing the application, ordered the applicant to pay costs on an attorney and client scale, such costs to include the costs occasioned by the postponement on 17 January 2001. The Appellant appeals against the special costs order in the event of the present appeal not succeeding. I deal firstly with the costs of the postponement of the hearing of the application on 17 January 2001.

[32] The matter was set down for hearing on 17 January 2001. The heads of argument on behalf of the first three Respondents were filed only on the previous day, *viz* 16 January 2001. Practice direction 4 of the Land Claims Court requires a respondent's legal representative to file heads of argument no later than five Court days before the hearing of any opposed application. The said Respondent's heads were clearly filed of record too late. On 17 January 2001 the Appellant's counsel moved for a postponement of the hearing on the basis that they did not have sufficient time to study, analyse and reply to these heads. The application was granted and the matter postponed to a later date. The question of costs was argued at the end of the hearing of the application.

[33] The learned judge *a quo* dealt in his judgment with the costs of the said postponement. It appears that he, in the end, awarded the costs of such postponement against the Appellant on the special punitive scale

simply as part of the overall costs order. No particular reasons were shown why (a) the Appellant had to pay the costs of the postponement, and (b) why it should have been awarded on the special punitive scale.

[34] With respect, I am of the view that on this aspect the learned judge erred. The postponement, so it appears from the record and the judgment, was caused by the fault of the first three Respondents in filing their heads of argument out of time. The matter was an important one for all parties concerned. I do not consider the request for postponement by counsel for the Appellant to have been unreasonable or unjustified. Accordingly, the usual order should have been made, *viz* that the first three Respondents should bear the Appellants' and the Fourth and Fifth Respondents' costs occasioned by the postponement.

[35] This brings me to the special punitive costs order made by Moloto J against the Appellant. The learned judge justified this order on, *inter alia*,

the following grounds:

(a) The unreasonable attitude which the Appellant's attorney, Mr Jurgens Bekker, persistently displayed in insisting that the first three Respondents should reject the Fourth and Fifth Respondents' claims, even though he knew that the matter was still under consideration, that the Commissioner had prioritised the investigations of other claims, and that the Commission was understaffed in relation to the huge number of claims received.

(b) Repeated scurrilous attacks in the Appellant's papers on Mr Bekker's colleagues and government officials imputing dishonesty, financial recklessness with taxpayers' money, collusion, fabrications and falsehoods on their part. In this regard the learned judge held that

> 'The attorney for the applicant conducted himself in a reprehensible manner in these proceedings, by prosecuting a case he had conceded; by the language he used against his colleagues, government officials and judicial officers; by suggesting dishonesty, and deceitfulness on the part of his colleagues and by burdening the record with repetitive prayers and

allegations.'

[36] As far as the factual basis for the special costs order against the Appellant is concerned, the learned Judge *a quo* cannot be faulted. In my view there was no improper exercise of his discretion and there is thus no basis for interfering with the punitive order as to costs (see *Sammel and Others v President Brand Gold Mining Co Ltd* 1969 (3) SA 629 (A) at 697 B - C).

[37] In the result, the appeal is unsuccessful, except for the aspect of the costs of the postponement of the hearing on 17 January 2001. Success on that issue is negligible and should not influence the costs of the appeal, which should be awarded to the Respondents. There is no justification for awarding the costs of the appeal also on the special punitive scale.

[38] *The following order is made*

1 The appeal is dismissed with costs, including the costs of two counsel.

2 The order of the court *a quo* is amended by deleting in paragraph 2 thereof the words 'such costs to include the costs occasioned by the postponement on 17 January 2001' and replacing it with the words : ' ... except for the wasted costs occasioned by the postponement on 17 January 2001, which costs shall be paid by the First, Second and Third Respondents, the one paying the others to be absolved, on the scale as between party and party.'

P J J OLIVIER JA

CONCURRING:

VIVIER JA
NAVSA JA
NUGENT JA
HEHER AJA