The Land Claims Court

Trust Bank Centre • Cnr. Hill St & Kent Ave • Randburg 2194
Private Bag X10060 • Ranburg 2125
Tel: +27 (011) 781 - 2291 • Fax: +27 (011) 781 2218
Web: http://www.law.wits.ac.za/lcc

17 June 2011

Enquiries: LCC30/2007

Ref: Mr J Blignaut
C K Friedlander Shandling Volks Inc
Tel: 021 441 8700
Fax: 021 441 8701/2

Ref: AP/dh/CIT14/0044
Fairbridges Attorneys
Ms Deidre Olivier
Tel: 021 405 7300
Fax: 021 689 1502/8580

State Attorney
Ms Shakirah Chothia
Tel: 021 441 9203
Fax: 021 421 9364

Ref nr: EJP/39673
E Moosa Wagley & Petersen Inc
Mr Moosa
Tel: 021 689 9038
Fax: 021 419 5135

Dear Sir/Madam

Re: WILLIAM BOOTH AND 2 OTHERS VERSUS THE MINISTER OF LAND AFFAIRS AND AGRICULTURE AND OTHERS CASE NUMBER LCC30/2007

Please find attached judgment herein from Presiding Judge SC Mia.

Any queries may be directed to the Registrar of the Land Claims Court Ms Josephine Malandula.

Yours Faithfully

REGISTRAR
LAND CLAIMS COURT

IN THE LAND CLAIMS COURT OF SOUTH AFRICA
HELD IN RANDBURG

CASE NO: **LCC30/2007**

Decided on: 15 June 2011

In the matter between:

WILLIAM BOOTH	**First Applicant**
THE TRUSTEES FOR THE TIME BEING OF THE TATENDA TRUST	**Second Applicant**
ELECTROPROPS 4 (PTY) LIMITED	**Third Applicant**

and

MINISTER OF LAND AFFAIRS AND AGRICULTURE	**First Respondent**
REGIONAL LAND CLAIMS COMMISSIONER	**Second Respondent**
CITY OF CAPE TOWN	**Third Respondent**
NATIONAL BOTANICAL INSTITUTE	**Fourth Respondent**
PROTEA VILLAGE ACTION COMMITTEE	**Fifth Respondent**
DEPARTMENT OF PUBLIC WORKS	**Sixth Respondent**

JUDGMENT

MIA AJ:

[1] In this matter the applicants seek to review the decisions of the Minister of Land Affairs (hereafter "the Minister") and the Regional land Claims

Commissioner (hereafter "the Commissioner"). They requested various declaratory orders and orders to set aside the decisions of the Minister and the Commissioner relating to erf 212 and erf 242 Bishopscourt. The erven are the subject of a land claim by claimants who lived in Protea Village before 1959 when the first removals were commenced. The claimants, the fifth respondents herein, sought restoration of the land in terms of the Constitution Act, Act 108 of 1996 (hereafter "the Constitution") read with section 2 of the Restitution of Land Rights Act, Act 22 of 1994 (hereafter "the Act. The applicants wish to be a party to any agreement relating to this property. In pursuance of this goal they raise a number of problems with the investigation, the decisions taken by the Minister and the Commissioner and the process followed by the Minister, the Commissioner and the claimant community's claim. They seek orders as appears below:

"a. declaring that the residents of Bishopscourt, or their duly authorized representative or representative body, are interested parties as envisaged in section 42D (1) of the Restitution of Land rights Act, 22 of 1994 ("the Restitution Act"), and thus persons who are entitled to be parties to any settlement agreement relating to erven 212 and 242, Bishopscourt (which shall, where appropriate, be referred to collectively hereunder as "the properties");

b. declaring that the memorandum of agreement signed by the Respondents on 24 September 2006 ("the Agreement") is contrary to the provisions of the Restitution Act;

c. reviewing and setting aside the decision by the first Respondent (the Minister) to approve the agreement subsequent to 22 June 2006, on a date unknown to the Applicants;

d. reviewing and setting aside the decision by the Third Respondent (the City) to conclude the Agreement;

e. declaring that the agreement cannot take effect, either as currently

worded and formulated, or at all;

f. reviewing and setting aside the decision by the Second Respondent (the Commissioner not to refer the Agreement to the Land Claims Court ("the Court"); and

g. directing the Commissioner to refer any final settlement agreement to the Court in terms of section 14(3A) of the Restitution Act;

h. directing any of the Respondents who oppose this application to pay the applicants' cost thereof, including the costs consequent upon the employment of two counsel;

i. granting the Applicants further and/or alternative relief."[1]

[2] The application was heard on the 16 and 17 November 2009. During this hearing the applicants and respondents requested that a number of issues be referred to oral evidence. After it became apparent that both parties wished to ventilate certain issues which were in dispute a ruling was made that evidence be led on the following aspects:

1. Whether the Protea Village inhabitants had rights in land which are derived from shared rules determining access to land held in common by such group.
2. How if at all the community exercised beneficial occupation of the land described as erf 212 Bishopscourt.
3. Whether Protea Village Action Committee (hereafter PROVAC) was mandated to lodge and negotiate the land claim.
4. Whether there is an overlap between claimants who have obtained financial compensation and the claimants for the "community claim".

---

[1] Notice of Motion

The applicants submitted that this evidence would show that the Minister had made decisions that were not reasonable and did not adhere to the prescripts of the Restitution Act. The respondents submitted that the evidence would show that the Minister and Commissioner had not acted unlawfully or reached a decision unreasonably.

The Parties

[3] The applicants are property owners whose houses border erf 212. The first and second respondents are the state bodies responsible for the land restitution programme. The third respondent is the owner of erf 212. The fourth respondent has a 99 year lease over the land adjacent to erf 242. The fifth respondent represented claimants who sought restoration of erf 212 and 242 and farm 875. The sixth respondent is a state body responsible for maintaining state property and public open space.

The properties in dispute

[4] Erf 212 was transferred to the Municipality of Cape Town in 1974 and was designated as a public open space for Bishopscourt Township. The Deed of transfer included servitudes and title deed restrictions for the benefit of the Anglican Church and the residents of Bishopscourt. The servitude grants the Anglican Church access to certain portions of land to service and maintain a pipe enabling them to draw water from the spring. It is not clear whether the Anglican Church still draws water from the spring. The transfer was also subject to the condition that the land remains subject to the provisions of the laws relating to townships and that the rights of owners of erven and other persons to public places in the township are not affected by the transfer.

[5] Erf 212 has been used for recreational purposes by the surrounding residents. They refer to it as "the arboretum". It is bound by Kirstenbosch Drive to the north, Winchester Avenue to the west, houses in Bishopscourt to the south and the Bishopscourt Archiepiscopal estate to the east. Erf 242 is situated to the north of Kirstenbosch Drive and to the south and west of Fernwood in particular Appian Way, Rose Street and Winters Wynd. The Botanical Gardens and Rhodes Drive are to the west of erf 242. Between erf 242 and Rhodes Drive is the Farm 875 which is used for fetes, markets and other public events.

[6] There is no dispute or objection by the applicants to restore erf 242 and the farm 875 to the claimants. It appears from the founding affidavit that the applicants object only to the inclusion of erf 212 in the restitution claim as they own houses which border erf 212. They raise a number of concerns regarding the manner in which the claim was submitted and the Minister and Commissioner's decisions pertaining to the property. The applicant's believe that restoration of erf 212 will result in an invasion of their privacy, an increase in noise levels and that their properties will be devalued. They also highlight that there is a servitude registered over erf 212 and that it is reserved as public open space for use for the residents of Bishopscourt and Fernwood and anyone who lives there. The applicants have on numerous occasions attempted to participate by seeking to be a part of the Steering Committee determining how the development of erf 212 and erf 242 will occur. They attended meetings of PROVAC, sought an audience with the Commissioner, attended a meeting between the office of Commissioner, the City Council and PROVAC with a view to participating in discussions. After publication in the Government Gazette the Commissioner considered the inputs of the township residents when meetings were held where the Bishopscourt

Residents Association and the Fernwood Residents Association were present. It is common cause between the parties that both associations expressed their support for the restoration of the properties to the people who lived there and were forcibly removed. They do not oppose the claim for restitution of erf 242, erf 212 or farm 875. The first applicant is a member of the Bishopscourt Residents Association.

Joinder

[7] A communal property association (hereafter "CPA") may be created and registered where its constitution deals with matters referred to in the Schedule to the Communal Property Association Act, Act 28 of 1996. It appears from the submissions made that the claimant community formed and registered such an association recently but after this application was lodged. It is envisaged that the CPA will take over the representations and negotiate on behalf of the claimant community with the Commissioner and the Minister. An application for joinder was brought by the Communal Property Association of the Protea Village claimant community. The applicants in the main application had no real difficulty with this court granting this application and contend that this is initially what ought to have occurred. They are happy to abide the court's decision in this regard. Rule 12(5) of the Land Claims Court Rules provides that:

> "the Court may at any time upon application by any party or of its own accord, order that a person be joined as a party in the case upon such terms and conditions as the Court considers appropriate, including conditions as to –
>
> a) payment of costs;
> b) the delivery of a notice of appearance; and
> c) the further procedure in the case

[8] The CPA represents the interests of the Protea Village Community

appropriate.
(my emphasis)

[12] Counsel for the applicants submitted that the words "the parties who are interested" should be given a wide interpretation so as to include the applicants. Counsel for the respondent submits that the applicants do not have a direct and substantial interest and should not be permitted to be a party to the agreement. The Protea Village claim has not been rejected and has met the requirements of the Restitution Act. The land which they claim does not belong to any of the applicants. Whilst I accept that the applicants are interested in what happens to the land adjacent to their property, the applicants have not demonstrated why they are "parties interested in the claim" as referred to in section 42D of the Restitution Act.

[13] The Minister's authority in terms of section 42 D relates to claimants who are claiming the land and persons who own the land at the time that the claim is submitted. The Municipality of Cape Town is the owner of erf 212. The evidence indicates that the municipality was consulted and discussions were held regarding the property. It appears that members of BRA and FRA were permitted to be sit in on meetings between the Commissioner, the claimants and the Municipality who owned the land. The applicants have no competing claim to the land as owners of private property. The Minister appears to have acted with the requisite authority in terms of section 42D of the Restitution Act in negotiating the agreement with the current land owners of erf 212, erf 242 and Farm 875, the claimant community as represented by PROVAC and now the CPA. There is no indication that this decision to was unreasonable. In light of the above I am of the view that the Minister's decision not to include the

claimants and are in essence the same parties before this court known as PROVAC. The CPA is the vehicle which the Restitution Act and Communal Property Association Act refer to and provide for in facilitating the finalisation of a claim to a community. The members of the CPA have an interest in the claim and in this matter; consequently I had no difficulty with the application and during argument granted the order joining the CPA as the seventh respondent.

[9] Section 33 of the Constitution provides:

> "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."

I have analysed and considered the evidence of the witnesses in relation to the particular issues in dispute and the relief sought herein which are dealt with below.

Issues in dispute

[10] Counsel both agreed that if this court was of the view that the residents of

Bishopscourt and Fernwood were parties interested in the claim and entitled to be party to the settlement agreement between the Minister and the Communal Property Association that this would be determinative of the whole matter. The applicants require the court to review the Minister's decision not to admit them or the BRA or FRA as interested parties to the agreement and seek that the court review the various decisions and the claim pertaining to erf 212 and erf 242

Applicants as an interested party

[11] Section 42D of the Restitution Act provides:

> "(1) If the Minister is satisfied that a claimant is entitled to restitution of a right in land in terms of section 2, and that the claim for such restitution was lodged not later than 31 December 1998, **he or she may enter into an agreement with the parties who are interested in the claim** providing for one or more of the following:
>
> *(a)* The award to the claimant of land, a portion of land or any other 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 or the latter's ascendant, unless-
>
> (i) such other claimant is or has been granted restitution of a right in land or has waived his or her right to restoration of the right in land in question; or
>
> (ii) the Minister is satisfied that satisfactory arrangements have been or will be made to grant such other claimant restitution of a right in land;
>
> *(b)* the payment of compensation to such claimant;
>
> ***(c)* both an award and payment of compensation to such claimant;**
>
> *(d)* .....
>
> [Para. *(d)* deleted by s. 4 of Act 48 of 2003.]
>
> *(e)* the manner in which the rights awarded are to be held or the compensation is to be paid or held; or
>
> *(f)* such other terms and conditions as the Minister considers

applicants as a party to the section 42 D agreement was not unreasonable.

Title Deed Condition

[14] Whilst the applicants are not parties interested in the claim as provided in section 42D of the Restitution Act as neighbours of erf 212, they purport to be parties interested in erf 212 as a public space. Counsel for the applicant submitted that the public space ought to be retained as such in view of the servitude being registered over it and the condition in the title deed that the township laws apply and should not affect the rights of residents and parties interested in the public open space. They refer to the condition attached to the Deed of Transfer which reads:

> "the land hereby transferred has been laid out as a Township known as BISHOPSCOURT TOWNSHIP EXTENSION No. 2 in accordance with General Plan T.P. 1013LD and that it remains subject to the provisions of the law relating to Townships and that the rights of owners of erven and of other persons to public spaces in the Township are not affected by this Transfer"

[15] Counsel for the respondents submit that to retain the servitude and reserve the arboretum sanctions and lends support to racially discriminatory legislation and practices and the results thereof and in effect entrenches the result of racially discriminatory laws and practices of the past. They submit further that once the land is restored that the usual laws relating to townships will apply. It is at this stage that the applicants will be afforded an opportunity to lodge any objections to the change in the use of the right from public open space to residential when the Land Use Planning Ordinance can be

applied to provide for public space . This is countered by the applicants that section 42B of the Restitution Act excludes this. Section 42 B (2) provides:

> "The laws governing the establishment of townships shall not apply to land restored or awarded to any claimant in terms of this Act, as long as that land is predominantly occupied by that claimant."

[16] I am in agreement with the applicant that the above provision does exclude the operation of the laws governing the establishment of townships which may include the Land Use Planning Ordinance. In deciding whether to opt for restoration in the present matter the interests of the Bishopscourt and Fernwood residents, and their right of access to the arboretum, must be weighed up against the claimant community's right to be restored to land they were deprived of. The national commitment to redress the wrongs of past, in this instance the racially discriminatory laws and practices which resulted in the forced removal of the Protea Village community as provided in section 33 of the Restitution Act must be considered to ensure restitution occurs in an appropriate form. There is no indication that the Minister did not weigh up these factors in determining that the applicants, the BRA and FRA should not be parties to the section 42 D agreement or that the land should be restored. The Municipality of Cape Town appears to have been consulted and negotiations occurred between the Municipality and the Commissioner which is the entity responsible for applying the laws governing townships. There is no evidence before me that the decisions taken by the Minister, the Commissioner or the Municipality pertaining to erf 212 was without authority or that the decision was unreasonable.

[17] The public interest herein is limited to the use of the arboretum by the residents of Bishopscourt and Fernwood and members of the public. Both these communities have indicated that they agree that the claimants be restored to the land they were dispossessed of. The above information appears to be common cause. The Minister in considering this information decided not to include the applicants or the BRA or the FRA in the agreement in terms of section 42D. There is no indication that either the Minister or any party acted without authority in coming to the decision not to include the applicants in the section 42 D agreement.

[18] In the matter of **Khosis Community, Lohaltla, and Others v Minister of defence and Others 2004 (5) SA 494 (SCA)**, the Court per Harms JA recognised the value in restoration and stated the following at paragraph 29 onward:

> "The first issue then is to decide whether it is in the public interest that the reserves should not be restored (s 34(6) *(a)*). It has been stated that the finding of the LCC that it is in the public interest that the reserves should not be restored to the Gatlhose and Maremane communities was not attacked on appeal for the reasons given. What remains for consideration is the Khosis area.
>
> In considering its decision in this regard a court has to take into account the factors listed in s 33. All of them are not necessarily applicable in any given case. However, in a case such as the present **the general approach ought to be that the dispossessed community is entitled to restoration of the land unless restoration is trumped by public interest considerations."**

Having regard to the above there is no evidence that the decision and the

process the Minister and or the Commissioner adopted in coming to the decision to restore erf 212, 242, or farm 875 was unreasonable or that there was any bias.

[19] The applicants question the Minister and the Commissioner's decisions to publish the claims in the Government Gazette on two bases the first being that there was a publication initially providing for alternative land for redevelopment purposes or financial compensation and then two further publications providing for restoration in the one claim and financial compensation in the other.

[20] Section 11(1) of the Restitution Act prescribes the procedure after lodgment of a claim and provides that there shall be a publication in the government gazette to publicise the existence of the claim. It enables the Commissioner to condone a claim not lodged in the prescribed manner and to dismiss a frivolous and vexatious claim. Subsection 6 provides that:

> "Immediately after publishing the notice referred to in subsection (1), the regional land claims commissioner shall by notice in writing-
>
> (a) advise the owner of the land in question and any other party which, in his or her opinion, might have a interest in the claim of the publication of the notice; and
>
> (b) refer the owner and such other party to the provisions of subsection (7)"

Subsection (7) provides for the preservation of the land and permits changes only with the permission of the Commissioner. There is no indication that the Commissioner did not follow this process. Section 11 A provides for the withdrawal or amendment of notice of a claim where the Commissioner received representations from persons affected by the

publication of notice of a claim. Section 11 A (4) permits the Commissioner to correct an obvious error and cause such notice to be published in the Government Gazette.

[21] During the course of investigations it appears that the Commissioner discovered that the notice did not reflect the claims lodged and published the latter notices in the Gazette. The above sections authorize the Minister to do so and the publications appears to have followed this process. In terms of section 42 D(1)(c) of the Restitution Act the Minister may enter into an agreement providing for:

> "(1) If the Minister is satisfied that a claimant is entitled to restitution of a right in land in terms of section 2, and that the claim for such restitution was lodged not later than 31 December, 1998, he or she may enter into an agreement with the parties who are interested in the claim providing for one or more of the following:
>
> (a) The award to the claimant of land, a portion of land or any other 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 or the latter's ascendant, unless—
>
> (i) such other claimant is or has been granted restitution of a right in land or has waived his or her right to restoration of the right in land in question; or
>
> (ii) the Minister is satisfied that satisfactory arrangements have been or will be made to grant such other claimant restitution of a right in land;
>
> (b) the payment of compensation to such claimant;
>
> **(c) both an award and payment of compensation to such claimant;**
>
> (d) . . . . .

[Para. (*d*) deleted by s. 4 of Act No. 48 of 2003.]

(my emphasis)

[22] Section 42D(1)(c) makes provision for an award of land, compensation or both an award of land and compensation to a claimant if the Minister is satisfied. In light hereof the decision to publish the claim as an award for compensation as well as an award of land appears to have been within the Minister's discretion in terms of section 42D91)(c) and section 11A of the Restitution Act.

Existence of a community

[23] The applicants request this court to review the Minister's decision to accept the claim of the claimant community. They dispute that a community existed in Protea Village. They refer to the Gross Report prepared at the instance of the Commission by Sally Gross and the evidence of the claimants, who lived in Protea Village, that they were tenants who paid rent to agents of various landlords and their employers. They submit that this evidence does not prove that the claimants are a community as defined in section 1 of the Restitution Act and that the Minister and the Commissioner could not have acted reasonably in coming to the conclusion that the claimants were a community. The term community is defined in section 1 of the Act as follows:

> '"Community " means any 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;'

Counsel for the applicants referred to the decision of the court in the matter, **In Re Kranspoort Community 2000 (2) SA 124 LCC,** where

Dodson J (as he then was) considered the definition of "community" as defined in the Restitution Act and considered the circumstances of the community residing at Kranspoort.

[24] Counsel for the applicant submitted that it was not apparent on the papers that claimants had shared rules which determined their access to land. It was also submitted that the informal and customary relationships which informed the manner of occupation fell short of what was required to prove that the claimants were or formed part of a community. Counsel submitted further, that the claimants appeared to be a church congregation rather than a "community" as defined in the Restitution Act. In addition to the claimants proving that they were a community at the time of dispossession, they had to demonstrate that they were a community at the time that the claim was lodged. It was submitted on behalf of the applicants that this was not done and further indicated that the Minister and the Commissioner had acted unreasonably in coming to a decision with regard to accepting the claim.

[25] In contrast, Counsel for the respondents submitted that there was evidence indicating that the community had shared rules. This was evident in that they determined how houses were passed to other members of the community over the years. Although rental was paid to landlords the elders in the community informed what the norm was in the community and addressed any deviation or problem that arose. Even though there was no committee who sat and determined the rules beforehand the elders had by consensus within the community determined the norms of the community residing in Protea Village. The elders took decisions and

and addressed problems immediately on an *ad hoc* basis. The passing of houses was such an *ad hoc* decision taken when the need arose but was informed by the shared values of the community. It is this information which the Minister and the Commissioner had regard to as contained in the Gross report and it could not be said that the Minister or the Commissioner acted unreasonably in accepting the above to conclude that a community existed in Protea Village.

[26] The definition of community is available to assist in determining whether the community existed or not having regard to the purpose of the legislation. The rules which govern a community may have different sources and they need not be formal and sophisticated to prove that the community exists. In the Kranspoort matter Dodson J highlighted that the definitions are all qualified by the words "unless the context indicates otherwise". Apart from the shared rules which governed the lives of Protea Village residents the context indicates clearly that a community existed.

[27] The Gross Report indicated that there was:

> "A powerful communal sense of living in harmony with nature and the land.... As early as 1848, members of the village community used the land grow flowers and vegetables, which were often sold in Claremont, and tended to describe the area as their "garden village" even in the nineteenth century" (Protea Village Community Claim Bishopscourt report by Sally Gross April 2001 page 20 of record).

[28] Ms. Gross also highlighted the "Intra communal considerations rather than the contractual arrangements with landlords" which determined who took over a dwelling. These arrangements took place in a closely knit community and the links of relationship are described as "widely

extended family". The perception of the persons occupying the area was that it was viewed "more as its traditional corporeal property than an area rented out to households piecemeal on an individual contractual basis." (See Record at p56.) Ms Gross maintained her conclusion that the claimants were part of a community during cross examination. She based her conclusion on the broad sense of community she found and the "shared common values" and the "kind of culture" and closeness and common life which she discovered during her interviews. The Gross Report indicated that she obtained information through interviews with the claimant community on how the community determined use of the land. The land close to homes was used for vegetable and flower gardens and the spring and rugby fields were used by the community and no-one could build their homes on the fields.

[29] The evidence of the community which is embodied in the Gross Report is the information which the Commissioner and or the Minister based their decision to accept that the claimants who resided in Protea village were a community and accepted the claim as a community claim in terms of section 11 of the Restitution Act. They clearly have the authority to do so in terms of section 11 of the Restitution Act. I can find no basis having regard to the information above to find that the decision taken was not reasonable. Whilst the applicant disputed that community existed there is no indication that they presented evidence before the Commissioner or the Minister to rebut the existence of a community. The evidence that has been placed before this Court also fails to rebut the existence of a community in Protea Village. Thus the decision to accept the claim as a community claim appears to have been reasonable having regard

to the information at the Commissioner and the Minister's disposal.

PROVAC's mandate

[30] The challenge to PROVAC's mandate to lodge and negotiate the community claim does have regard to section 42 D which authorises the Minister to enter into an agreement with '**parties who are interested in the claim'.** This does not require the persons negotiating the claim to be legal persons when the claim is lodged. Such an interpretation would place undue obstacles in the way of people who sought to lodge claims be they individual or members of a community. It also does not require all of the persons who were part of the community to authorise a person or group of persons or an association to lodge a claim. The evidence indicated that members of the community held meetings where the claim was discussed and gave a mandate to PROVAC to lodge and negotiate the claim. It also appears that meetings were arranged to give feedback and take further instructions on how to proceed. In the aftermath of the disruption and separation that the forced removals had on the lives of the inhabitants of Protea Village, PROVAC co-ordinated activities such as the reunions and picnics and meetings. From the evidence it was clear that there was sufficient cohesiveness demonstrated by the community's organisation of activities and functions which indicates that there was a community which existed at the time the claim was lodged.

Duplication of claims

[31] The applicants raised concerns regarding duplication of claimants

seeking financial compensation and those seeking restoration. It appears from the history of this matter and the evidence that some claimants lodged individual claims and at a stage it became apparent that these were people from the same area, it was then decided to process the claim as a community claim. Counsel for the applicant submitted that there was no proper mandate to enable PROVAC to proceed with the claim and the Commissioner had accepted the claim as valid without considering that there was an overlap of claimants seeking financial redress and claimants seeking restoration. Further that there was a disjuncture between the current list of claimants and those on the original list and that the Minister could not have properly considered this matter and the merits of the claim.

[32] I have addressed the question of the mandate above. The joinder of the CPA addresses any concerns there may have been with regard to the mandate from individual claimants. It appears that names which appear on the list for restoration also appeared on the list for financial compensation. The formation and registration of the CPA will addresses concerns raised with regard to duplication and the disjuncture or overlap of lists of claimants. The Communal Property Association Act 28 of 1996 provides for a constitution of the CPA. It is herein that the CPA can address matters such as who qualifies for membership and procedures to resolve disputes. It is unlikely that claimants who have benefitted financially will be permitted to share in the fruits of restoration. Once land has been identified to be restored it will be restored to the community rather than to individual persons. Counsel for the respondents which included the Protea Village claimants represented by the CPA, indicated that events had

overtaken this matter. What appeared to be a plan to restore portions of land to individual claimants has now changed to a type of share block with an economic hub. The Commission will have to consider this new plan. The concerns raised regarding claimants benefiting twice will be addressed if indeed this is the position. It is unlikely however that the CPA would permit persons to benefit twice. During cross examination the commissioner indicated that her office has taken action to stop the claimants from selling claims once it came to her attention. Her commitment to continue doing so was repeated. I have considered the applicant's version that the first applicant, Mr Booth was offered a portion of land/ claim in the Protea Village claim for sale. However in the absence of the transaction being finalised it cannot be said that the Commissioner has not addressed this problem or that the CPA approved the transaction.

Costs

[33] When this matter was heard Counsel for the applicants submitted that the usual practice of this court be adopted that each party pay their own costs. In final submissions however it was submitted that in view of the litigation being in the nature of constitutional litigation that there is ample authority for the applicants to be granted costs in their favour even in the event that the application was not successful. Counsel referred to the matter of **Biowatch Trust v Registrar, Genetic Resources, and Others 2009 (6) SA 232 (CC)**, in support of their submissions for costs in their favour. I have had regard to the authority herein. The authority provided has been useful. The court per Sachs J points out at page 244-245,

> "Nevertheless, even allowing for the invaluable role played by public-interest groups in our constitutional democracy, courts should not use costs awards to indicate their approval or disapproval of the specific work

done by or on behalf of particular parties claiming their constitutional rights. It bears repeating that what matters is not the nature of the parties or the causes they advance but the character of the litigation and their conduct in pursuit of it. This means paying due regard to whether it has been undertaken to assert constitutional rights and whether there has been impropriety in the manner in which the litigation has been undertaken. Thus, a party seeking to protect its rights should not be treated unfavourably as a litigant simply because it is armed with a large litigation war-chest, or asserting commercial, property or privacy rights against poor people or the State. At the same time public-interest groups should not be tempted to lower their ethical or professional standards in pursuit of a cause. As the judicial oath of office affirms, judges must administer justice to all alike, without fear, favour or prejudice."

[34] Even though the applicants have not succeeded herein I have had regard to the above dictum and the usual practice in the Land Claims Court. Notwithstanding the view above Sachs J refers to the decision of Ngocbo J in **Affordable Medicines Trust and Others v Minister of Health and Others 2006 (3) SA 247 (CC)** at paragraph 139, where the view is expressed that;

> "There may be circumstances that justify departure from this rule such as where the litigation is frivolous or vexatious. There may be conduct on the part of the litigant that deserves censure by the Court which may influence the Court to order an unsuccessful litigant to pay costs."

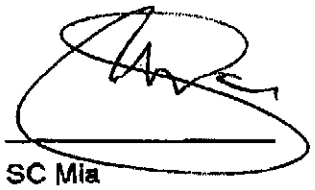
[35] Costs remain in the discretion of the court and having regard to the submissions that the applicants seek to pursue a constitutional right and

that the claim is not vexatious I am of the view that each party should pay its own costs.

Order

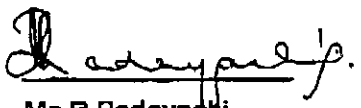
[36] In view of the above I make the following order:

1. The application is dismissed
2. Each party shall pay its own costs.



SC Mia
Acting Judge
LAND CLAIMS COURT

I agree.



Ms B Padayachi
Assessor

Appearances

For the Applicants

Advocate P. Farlam assisted by Advocate M. O' Sullivan

Instructed by CK Friedlander Shadling Volks Inc.

For the Respondents

Advocate M Donen SC assisted by Advocate B Joseph

Instructed by Office of the State Attorney Cape Town