IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

The Concerned Land Claimants' Organisation of Port Elizabeth v The Port Elizabeth Land and Community Restoration Association and Others

CCT 29/06

Hearing date: 10 May 2006

MEDIA SUMMARY

The following media summary is provided to assist in reporting this case and is not binding on the Constitutional Court or any member of the Court.

The applicant is an association of land claimants who were dispossessed of their land under a racially oppressive law (Community Development Act 3 of 1966). The Port Elizabeth Land and Community Restoration Association (PELCRA), another community organisation, is the first respondent. It was formed in 1993 to assist with claims for restitution of land. Representing land claimants, PELCRA negotiated and concluded a framework agreement with the Minister of Land Affairs (Minister) and other government respondents. At that stage the applicant did not exist. Its members belonged to and were represented by the PELCRA. In effect the applicant is a breakaway group from PELCRA.

Shortly after PELCRA concluded the framework agreement with the Minister in 2000, its terms were presented to the claimants at a meeting of PELCRA. All claimants welcomed the terms. The applicant says that it was not then obvious that the framework agreement was incompatible with the now aggrieved members' aspirations to recover their original plots of dispossessed land. Concerns arose in July 2001 when a proposed layout plan was displayed. On the plan a huge part of the undeveloped land had been allocated for commercial purposes and another for high-density housing. On the applicant's version less than half of the land is available for allocation to the claimants for residential purposes. It fears that a number of its members have been allocated residential stands much smaller that their original land and that some have accepted the stands by signing individual settlement agreements as required by the framework agreement without understanding the adverse impact on their land claims. In August 2001, claimants who preferred restoration of their original land met and formed themselves into an association, that is, the applicant.

In July 2003 the applicant approached the Land Claims Court and sought an order to review and set aside the decision of the Minister and the Chief Land Claims Commissioner to enter into the framework agreement. The applicant also sought a stop to any continued development of the land allocated for restitution. The Land Claims Court dismissed the relief sought and declined to grant the applicant leave to appeal. The applications were refused on the ground that the decision of the Minister or the Commissioner to conclude the framework agreement was governed not by administrative or constitutional law (which were the bases for the applicant's arguments) but by the law of contract. In addition, the Land Claims Court found that even if the Minister's actions were reviewable, the applicant had not shown that its members had standing because they were not directly prejudiced by the agreement. The SCA also refused the applicant's petition for leave to appeal and did not furnish reasons.

In this Court the case of the applicant rested on two grounds. The first is that the framework agreement is invalid because it offends section 25(7) of the Constitution, which gives persons or communities that were dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices the right, to the extent provided by an Act of Parliament, to either to restitution of the property or to equitable redress. The applicant argued that the framework agreement is invalid because it does not make provision for the restoration of the original dispossessed land in the earmarked area, although the land was available and had not been developed when the agreement took effect. The applicant's second argument is based on unfair discrimination. It says that the framework agreement improperly discriminates between claimants who were dispossessed of their land in the earmarked area and to whom restoration of land remained possible, and claimants in respect of other areas where restoration of land is no longer possible.

Neither of the applicant's arguments was raised by it before the Land Claims Court. As a result, the question before this Court was whether there were any exceptional circumstances that could justify bypassing the Land Claims Court and the Supreme Court of Appeal and hearing the matter by way of direct access. The Court holds that no such circumstances existed in this case. The dispute between the parties has dragged on for nearly five years and the applicant has not shown a need to resolve the dispute urgently. There was no reason advanced as to why the new arguments based on the Constitution were not raised before the Land Claims Court, whose view on the matter, as a specialist court, would clearly be important. In effect the Court was needlessly invited to act as a court of first and last instance. Though the just and equitable restitution of property is a pressing constitutional imperative, where a law that gives effect to the right to land redress establishes a specialist court to resolve related disputes, only very compelling public and other interests would justify bypassing that court. The Court held that none was shown in this case. It was thus not in the interests of justice to grant direct access to this Court.

Having found the direct access application bad, the Court nonetheless considered whether, if treated as an application for leave to appeal the decision of the Land Claims Court, it would be in the interests of justice to hear the appeal. In determining whether it was in the interests of justice to hear the appeal, the Court considered the applicant's prospects of success. It held that section 25(7) of the Constitution confers a right to restitution and equitable redress but leaves the form and manner of redress to legislation. The legislative scheme confers upon the Minister and claimants a wide discretion to determine the manner in which the awarded land rights are to be held or compensation to be made. Neither a claimant nor a community may insist as of right on original land dispossessed. Whether property restitution or equitable redress to historical dispossession is appropriate in any case is bound to vary and be subject to the specific context. The Court thus concluded that the applicant's argument that the framework agreement violates section 25(7) of the Constitution lacks any prospect of success.

Having concluded that the argument raised by the applicant bears no prospect of success, the Court considered whether there are other considerations relevant to the interests of justice for consideration. One such consideration which also militated against the grant of the application is the consequence of the delay of the applicants in pursuing this litigation. At every stage, the applicants have been dilatory. It is obvious that if the framework agreement were to be set aside enormous prejudice would result. A legitimate choice of the majority of land claimants would be brought to nought at the instance of a disgruntled minority. The Court held that it had not been shown that such a result would be it is in the interests of

justice. In addition, the Court holds that at least some members of the applicant have an alternative remedy. Claimants who have not agreed to the framework agreement are entitled to pursue their claims in the ordinary course under the Restitution of Land Rights Act.

The unanimous Court thus concluded that it is in the interests of justice neither to entertain the application for direct access nor to grant leave to appeal against the judgment of the Land Claims Court. The Court therefore dismissed the application and made no order as to costs.