OFFICE OF THE CHIEF JUSTICE
REPUBLIC OF SOUTH AFRICA

IN THE LAND CLAIMS COURT OF SOUTH AFRICA

HELD AT RANDBURG

CASE NO: LCC54/2018

Before: The Honourable Ngcukaitobi AJ

Delivered on: 02 August 2019

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED: YES / NO
24/7/19
DATE
SIGNATURE

In the matter between:

DISTRICT SIX COMMITTEE	**1st Applicant**
MYMOENA CLASSEN	**2nd Applicant**
ANNIE BAM	**3rd Applicant**
MARIAM SIMONS	**4th Applicant**
CEDRIC ADAMSON	**5th Applicant**
MARIAM MOSEVAL	**6th Applicant**
AMIENA KRIEL	**7th Applicant**
CYRIL SAMUEL WAGENER	**8th Applicant**

And

MINISTER OF RURAL DEVELOPMENT & LAND REFORM	**1st Respondent**
COMMISSION ON RESTITUTION OF LAND RIGHTS	**2nd Respondent**
CITY OF CAPE TOWN	**3rd Respondent**
THE PREMIER OF THE PROVINCE OF WESTERN CAPE	**4th Respondent**
GOVERNMENT OF THE PUBLIC OF SOUTH AFRICA	**5th Respondent**
THE TRUSTEES FOR THE TIME BEING OF THE DISTRICT SIX BENEFICIARY AND REDEVELOPMENT TRUST	**6th Respondent**

JUDGMENT

INTRODUCTION

1. In this case there are three questions to be answered. The first is whether to issue a declaratory order that the first respondent, the Minister of Rural Development and Land Reform, at the time Minister Maite Nkoana-Mashabane failed to comply with the court order of 26 November 2018 granted by this court as per Kollapen J. The second is whether Minister Mashabane is guilty of contempt of court. The third is whether Minister Mashabane should pay the costs of the hearing on 17 April 2019 in her personal capacity.

2. The application is opposed.

3. Given the seriousness of the orders I am required to make: To declare that a member of Cabinet is guilty of contempt of court, has breached a

court order, and must pay costs personally for her failure to comply with her official duties, it is important to set out the background facts in full.

4. The power of this court to issue declaratory orders flows from section 22(1)(cA) of the Restitution of Land Rights Act 22 of 1994. The section empowers this court to issue a declaratory order on my question of law which relates to section 25(7) of the Constitution or the Restitution Act. In terms of section 22(1)(cD) this court has the power to decide any constitutional matter falling within its jurisdiction.

5. These powers are reinforced by section 38 of the Constitution, which grants this court the power to issue an *"appropriate"* relief, including a declaratory order where a right in the Bill of Rights is infringed. Section 172(1)(a) of the Constitution states that this court *"must"* declare any law or conduct as invalid if it finds that such law or conduct is inconsistent with the Constitution.

6. This court has the same powers as the High Court in respect of matters falling within its jurisdiction. The approach of this court to contempt of court is accordingly similar to that followed by the High Court. The same applies in relation to personal cost orders.

7. I propose to commence by setting out the material facts, including the litigation history. I shall then outline the applicable legal provisions and conclude by explaining the respects in which I believe the conduct of the Minister departs from expected constitutional and legal norms.

LITIGATION BACKGROUND

8. In the Notice of Notion dated 22 March 2019 the applicants sought an order to declare that the Minister had not complied with the order of Kollapen J of 26 November 2018. The relevant paragraphs in the order of Kollapen J state:

8.1. The Minister is required to formulate, without delay and in consultation with the body of claimants, a reasonable plan and programme which she will implement to satisfy the claims of the claimants.

8.2. The plan must include:

8.2.1. An indicative conceptual layout for the redevelopment of District Six with sufficient detail to determine the number and layout of the residential units to be allocated to claimants.

8.2.2. Specific details of how the plan is to be funded including the budget to be allocated by the respondents for execution of the plan.

8.2.3. Estimate timeframes for the implementation of the plan, broken into appropriate intermediate milestones.

8.2.4. The methodology that will be applied in allocating residential units among the claimants.

8.3. The plan should be delivered within three months of the order and thereafter at three monthly intervals, until such time as the redevelopment of District Six is complete.

9. These orders were taken with the consent of the Minister. The applicants allege that the Minister has failed to comply with these orders. The application was set down for hearing on 17 April 2019. On that date the Minister's counsel appeared, asking for the postponement of the matter. The postponement application was dismissed, with costs on the scale of attorney and own client. The Minister was ordered to appear in court personally on 17 May 2019 to show cause why she should not be held in contempt of court, and should not be ordered to pay the costs of the hearing 17 April 2019 personally.

10. On 17 May 2019 the Minister appeared in person. She was led in evidence and cross-examined. The applicants persist with the relief they seek. It is against this background that the matter comes before me. A brief historical overview about the dispossession of the former residents of District Six is necessary to set the dispute in its proper historical context.

THE DISPOSSESSION

11. The Group Areas Act 77 of 1957 was a key statue to enforce the Apartheid policy which designated vast areas of land for occupation by White people. Blacks were forcibly removed from any area declared for White occupation. In terms of section 20 of the Group Areas Act, the

State President had the power to reserve certain areas for White occupation. Blacks in those areas had to be forcibly removed to make way for Whites.

12. On 11 February 1966, then President of the Apartheid Government of South Africa C R Swart, declared by Proclamation several areas in Cape Town, including the area known as District Six *"an area for occupation and ownership by members of the White Group".*[1]

13. The effect of this Proclamation was that any person not classified as White in terms of the obnoxious Population Registration Act 30 of 1950 (which divided people into four racial groups, namely Whites, Natives (Blacks), Indians and Coloureds) lost their right to live in District Six and had to leave.

14. According to University of Cape Town Professor, Shamiel Jappie, who submitted an affidavit in support of the applicants, at the time of the proclamation some 4373 out of 6122 of the properties in District Six were occupied by Whites, 1094 by Coloureds and 655 by Indians. There were 35000 individuals who were removed from District Six as a result of the 1966 proclamation.

15. There was minimal compensation, if any given to those who were forcibly removed. Most people expelled from District Six were given notice to leave, some a couple of months, others a couple of weeks and some

[1] Government Gazette No: 1370, 11 February 1966.

even a matter of days. Those affected were compelled to sell their properties, although they could not do so at fair market terms.

16. Where there were alternative housing arrangements, Professor Jappie, notes that these were dismal, "architecturally bleak, concrete walk up apartments" with no schools, no recreational facilities and no religious facilities.

17. For the most part those dispossessed were thrown out and dumped into the streets and expected to start their lives from scratch. The negative impact of the forced removals was immediate. Places like Hanover Park, today notorious for drugs, gang activity and crime grew directly out of the displacement of the people from District Six. The majority of Hanover Park residents in fact came from District Six, with Hanover Park itself having been named after one of the main streets of District Six. In the period after the evictions there were complaints of inadequate roads, poor lighting, lack of telephone services, poor community services, absence of churches and mosques.

18. In the Cape Flats, where most of the District Six residents relocated to, there were reports of poorly constructed, cramped dwellings, imposing undue costs upon the new residents and exorbitant and exploitative rentals. The social fabric naturally disintegrated. In this climate of a collapsing community network and harsh physical and economic

environment, gangsterism emerged as a means of survival as lower income groups from District Six turned to crime.

19. In the Peninsula, the District Six forced removals were identified as the main source of violence and unrest. Personal memories support this. Affidavits submitted to this court by some of the applicants recall policemen barging into their houses, with eviction notices barking orders to leave. The personal toll that it took was immense.

20. Ms Rachmat Abrahams who is now 78, recalls their removal in 1972, when the bulldozers came to their street. She had a 5 year old child and was pregnant at the time. She also had no alternative accommodation. An alternative house was offered by the Government in Mannenberg but was not acceptable because of the distance to work. Abrahams believes that there is a correlation between the gang culture prevalent in the Cape Flats and the forced removals of the 1970s.

21. Another former District Six resident Mr Mogamat Hanslow remembers 1972 when he was aged 30. Like others he was removed when a bulldozer arrived. There was no alternative accommodation. There was no compensation for the loss of rights in property.

22. For Ms Mureida Hajie, who was moved in 1978, with her four children, life in the new area of Belhar, resulted in a divorce with her husband who began associating with criminal elements in the new neighbourhood.

23. These personal stories, taken together with the destruction of the social fabric of the community led to the breakdown in community structures and threw people into economic destitution.

24. Throughout the 1980's the story of District Six remained central to the popular imagination of South Africa as the definitive event in the construction of the apartheid geography through the enforcement of the Group Areas Act.

25. Hence it was to be expected, legitimately, by former residents of District Six that their case would be amongst those to be given priority by the new government.

26. As I note above, some of those who lost homes in District Six are still alive. They remember the events as if they occurred yesterday. Freedom did arrive in their lifetime. What is elusive however is the tangible realisation of the dream of freedom by returning them to District Six. The return of the land under the Constitution is the realisation of the constitutional promise for all.

27. I now consider the land claim process.

THE LAND CLAIM

28. The land claims of District Six were submitted under the Restitution of Land Rights Act. The Act gives effect to section 25(7) of the Constitution, which states that "a person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is

entitled, to the extent provided by an act of Parliament, either to restitution of that property or to equitable redress."

29. For its part, the Act provides, in section 2, for a process and qualification criteria for persons dispossessed of land and rights in land to claim the restoration of the dispossessed rights or equitable redress.

30. It is necessary at this stage to distinguish between the different groups which have represented the interests of claimants in District Six.

30.1. The first is the District Six Working Committee, which is the first applicant here. It has 2360 members. Each of these members are claimants who submitted their claims before the closing date of 31 December 1998. These were either claimants or descendants of claimants forcibly removed from District Six between 1966 and 1980.

30.2. The second group is the District Six Beneficiary and Redevelopment Trust. The trust was established in 2001. In terms of its trust deed, the purpose of the trust was to acquire and hold land or any right in land within District Six or any other land to build dwelling houses or other residential accommodation for the beneficiary community. The beneficiary community is described as *"persons who were forcibly dispossessed of their land rights in District Six and who have instituted land claims."*. The full extent of the activities

undertaken by the Trust in fulfilment of its mandate under the deed of trust are not clear from these papers. But it was a party to a tripartite agreement with the City of Cape Town and the National Department of Land Affairs. In terms of that agreement, the City of Cape Town agreed to make land available for development. The development would comprise the establishment of a township until the residential units to be built are disposed to beneficiaries.

30.3. The third group is the District Six Reference Group. This was apparently appointed in 2012 at the instance of the then Minister of Land Affairs and Rural Development, Mr Gugile Nkwinti. It comprised of 20 claimant members. Its role was to *"fast track their home owning within the mandate of the State President, the Honourable Mr Jacob Zuma, to ensure claimants return to District Six no later than the end of 2014."*.

31. The role of both the trust and the Reference Group is dealt with later in this judgment.

32. It seems, however, that much of the work of pressing the claim through this litigation has been pursued by the first applicant. Prior to launching the proceedings before Kollapen J, the applicants had engaged the Department of Land Affairs and Rural Development in correspondence.

33. On 3 May 2017 the attorneys acting on behalf of the applicants addressed a letter to the then Minister, which set out a comprehensive background to

the claim. The letter pointed out that about half of the District Six claimants took financial compensation and the remainder asked for restitution.

34. The restitution was undertaken in three phases. Phase one began in 2004 and overlapped with phase two which were both completed in 2013. Some claimants had taken transfer of their properties as part of phases one and two. Phase three, however had not begun at all. The Government undertook that the transfer of the residential units to the residents would be done in stages with the first batch scheduled for completion in July 2017. It appears that this has not happened for reasons which were not explained.

35. There are still considerable uncertainty about the plan of the Government. Hence the applicants attorney's letter concluded by asking specific questions which included: how many claimants had received restitution of land; how many would not receive land as part of phase three; who will be the beneficiaries for phase three; how will they be identified; how many houses or units will be built in phase three; where will the houses or units be; and when will these houses or units be made available?

36. The letter demanded certain information. In respect of claimants who opted for financial compensation it was asked when this would be paid. In regard to those who sought restitution the attorneys asked when they would *"receive occupation and ownership of land."*. Given that a settlement agreement for the restoration of the rights in land had been

concluded some 18 years earlier, the claimants demanded an answer within 30 days, failing which court proceedings would be instituted.

37. A meeting was held between the Department and the attorneys on behalf of the claimants, on 28 July 2017. Apart from preliminary concerns about the duplication of membership and the different bodies representing the claimants, it does not appear that the meeting produced any tangible outcomes for the claimants. On 28 August 2017, the Department responded to the letter of the claimants. It gave the following information:

37.1. There were 2670 claims lodged by the applicants prior to the 31 December 1998 deadline.

37.2. Of these, 1380 claimants received financial compensation, all of whom had been paid.

37.3. 1216 claimants opted for land restoration. 247 of these had received houses pursuant to phases one and two. The remaining claimants numbering 969 had not received their houses and it was not known when they would receive them.

37.4. Another 749 claimants had lodged claims when the land claims process was reopened in 2014 before a subsequent interdict was confirmed by the Constitutional Court.

38. The Department confirmed that it had not identified the beneficiaries to be allocated land in phase three. The Department also advised that some 20

houses were envisaged to be completed by 2017, and 88 by end of May 2018. By the time the case was argued before me, no information was given about these plans and how they link with phase three.

39. It was on this basis that the claimants attorneys addressed a further letter to the Department in which it was noted that even after the completion of phase three, on the admitted facts by the Department some 969 claimants would still be without residential units. In this regard the attorneys asked for a *"detailed programme of the actions and the timelines for the finalisation of the redevelopment scheme for the remaining 969 claimants of the 1998 claimants.*".

40. The reference to "1998 claimants" requires some explanation, which I do next.

The Land Claim Process Since 1998

41. Our Constitution has often been described as *"transformative*". This transformative element of the Constitution is intended at dismantling the legacies of colonialism and apartheid and building a new society which is underpinned by the values of dignity, equality and the achievement of freedom.[2]

[2] In terms of section 8(3)(b) of the Interim Constitution of 1993, the restitution of land was part and parcel of the right to equality, signifying the importance of land restitution for the attainment of equality. The change, however, to provide for land restitution in a separate section does not change the importance of land restitution for the attainment of equality.

42. It was noted in the case of *South African Transport & Allied Workers Union & Another v Garvas & Others* 2013 (1) SA 83 (CC) that the *"lesson of our history"* is that *"ours is a never again Constitution."*.[3] Yet this truism is not self-executing. The executive is at the forefront of the implementation of the guarantees of the Constitution. To implement the Constitution it must first be domesticated by executive policy and administrative actions.

43. In this case, for instance, despite the clearly identifiable and narrow category of beneficiaries, the State has no policy for the selection of beneficiaries for phase three. The number is known. It is 969. Yet the State appears to have no coherent policy response to their claim. The approach of the State is difficult to understand if one has regard to the background of the claim, an aspect which I turn to.

44. The matter goes back to 1998, as one of the early land claims. On 13 September 1998 the District Six Record of Understanding was concluded between District Six Beneficiary Trust, the Department of Land Affairs and the City of Cape Town. The vision was to provide restitution for those forcibly removed from District Six through an integrated development programme. Certain principles were agreed upon which included anchoring the redevelopment of District Six in the aspirations of those who wanted to return to District Six.

[3] At para 63.

45. Thus, as early as 1998, it was always within the contemplation of the National Government that the District Six Restitution Programme would include its redevelopment in order to accommodate the desire of the claimants who wanted to return to District Six. It was never contemplated that the claimants would be given empty promises of empty pieces of ground. And the redevelopment would never have been possible without funds, which should have been budgeted for.

46. The principles of the Record of Understanding were later incorporated into the Framework Agreement concluded in terms of section 42D of the Restitution Act, signed by then Minister of Land Affairs, Ms Thoko Didiza on 26 November 2000. In its preamble the Framework Agreement referred to the implementation of *"a process of restitution of land rights and redevelopment"*.

47. The Framework Agreement divided the claimants into two categories, those wanting to accept financial compensation and those interested in participation in the development of District Six. A formula for the allocation of funds to both these groups were sent out on an equitable basis. The City of Cape Town agreed to transfer the land to those claimants *"who have elected to return to District Six at such time that they will be entitled to take transfer in terms of the development agreement."* It was envisaged that the Development Agreement would be concluded soon after the conclusion of the Framework Agreement.

48. The Framework Agreement contained some of the principles which had to be incorporated in the Development Agreement such as:

48.1. A land use and transport plan.

48.2. The claimants residential site allocation scheme, which shall provide for fair and equitable criteria and methods for the allocation of residential suites.

48.3. Bulk services and infrastructural requirements including municipal services.

49. No specific timeframes were built into Framework Agreement. But the parties undertook *"to do all things possible and to use their best endeavours, n a spirit of co-operation and good faith, to ensure that the implementation agreement are concluded and implemented."*. It was in this context that the trust was established to *"acquire and hold land or any rights to land within District Six"* for the beneficiary community.

50. The Development Agreement was signed in April 2006. The nature of this development was outlined as follows:

50.1. The establishment of the township in accordance with the layout plan, including the necessary land surveying and the opening of the township register for the township.

50.2. The construction of infrastructure including the verification of defects during the maintenance period referred to in the services agreement.

50.3. The erection of the improvements on the residential erven forming part of the land.

50.4. The disposal of the residential erven as per the procedure contained in clause 5 of the agreement. In turn, clause 5 referred to the terms of the disposal of erven. Written deeds of disposal were to be concluded with recipients of the property. A price would be agreed upon subject to various considerations.

51. At the time, the total cost for the redevelopment of District Six was estimated at between R6 billion and R7 billion. The estimated contribution per household was set at R250 000.00, which was not affordable to many households. As a result it was reported in the newspapers on 9 September 2011 that many of the houses were standing empty because of the unaffordability of the contributions.

52. In the period subsequent to 2006 the redevelopment was staggered in phases. Phases one and two were completed and some claimants were able to take occupation, apparently with some financial contribution. But the overwhelming majority still could not.

53. In 2012 President Jacob Zuma, who became president from 2009, initiated further discussions on the District Six claims. He assigned

Minister Gugile Nkwinti to facilitate the discussions with claimants. They noted that 138 residential units had come to fruition in phases one and two.

54. In September 2012 Minister Nkwinti facilitated the election of the Reference Group consisting of 20 claimant members to fast track the redevelopment. Mr Nkwinti announced a *"mandate"* by President Jacob Zuma to ensure the return of all claimants to District Six by the end of 2014. The Reference Group appears to have been given a mandate to deal with technical matters relating to the restitution process and the issues of social integration. It met with all three spheres of Government, National, Provincial and Local, and was able to confirm that all three spheres of Government were of *"one mind"* as to the redevelopment of District Six and that it should be finalised *"as a matter of extreme urgency with no political inferences in the process"*. Its conclusion was that all the District Six claimant communities should be *"returned home by end 2014"*.

55. One of the aspects agreed upon by the Reference Group was the establishment of a special purpose vehicle which would receive payments made for the benefit of the claimants. In this regard it was mentioned that the National Government had committed R700 million *"for the construction of the restitution homes"*. Houses were to be built in 2013 to ensure that claimants returned to District Six by end of 2014.

56. By March 2012 a firm of architects and planners had produced a blue print for the redevelopment of District Six, which was entitled *"the District*

Six development framework". It is a bulky document comprising more than 120 pages, annexures excluded. This document contains the full spectrum of the design and developmental steps which had to be undertaken in order to finalise the redevelopment of District Six, including the costing. It also included the number and options of residential units which would be needed for the redevelopment. They worked on the assumption that 1500 claimants had to be returned to District Six.

57. The document proposed different models of ownership, including freehold, sectional titles, share blocks, partial ownership and leasehold. It concluded by outlining a series of recommendations to be undertaken by the Government towards the expedited redevelopment of District Six.

58. Attached to the report was a public participation report dated 30 March 2012 compiled by another consulting and engineering firm. According to this report the public participation process showed that some of the claimants were *"angry and disillusioned"* about the process. The cause for the anger and disillusionment was the delays in the allocation of houses and the lack of information emanating from the Government as to the delays and the specific time frames when the houses would be given. Despite this, the Department could announce that *"by 11 February 2014 verified District Six restitution claimants will all be home."*

59. Nothing came of this promise. 2014 came and went. During the oral testimony of Minister Mashabane, she could not shed light as to the R700 million or indeed as to the undertaking made by the Government that

each and every claimant of District Six would be home by the end of 2014. A media statement was released by the Department on 10 February 2017. It stated that the *"overall project completion"* was at 30% and the expectation was to complete 20 houses in July 2017 while noting that a further 108 houses were being built comprising of apartment blocks and new houses. No further details were given as to when these would be finalised. Nothing has be mentioned in the affidavits submitted before court or indeed in the oral testimony about this press statement. Evidently, by July 2017 there was no meaningful progress, hence the claimants instructed their attorneys to engage the Department in correspondence.

60. When the correspondence could not produce the desired outcome, litigation commenced. This is what eventually led to the order by Kollapen J, which forms the basis of the current application.

61. It is against this background that the matter came to court. The point to emphasise at this stage is that since 1998, it has always been known that the restitution of District Six should be accompanied by its redevelopment to enable those who wish to return to do so. Funds were always within the knowledge of the Government. It was not for the first time, in these proceedings, that money was needed for redevelopment. It was always part and parcel of the plan.

COMPLIANCE WITH COURT ORDER

62. I should now examine the issue of non-compliance with the court order. A convenient starting point are the reports filed by and on behalf of the Minister in apparent compliance with the order.

The Report of 26 February 2019

63. The first report was filed on 26 February 2019 Mr Pule Gilbert Sekwana. He described himself as the Acting Deputy Director General: Rural Infrastructure at the Department of Rural Development and Land Reform. He stated that he was duly authorised to depose to the affidavit on behalf of the Minister and the Commission for the Restitution of Land Rights.

64. In paragraph 5 of the affidavit he stated that *"the plan envisaged by the order has not yet been completed as consultations are on-going."* He explained that from mid-December 2018 to around mid-January 2019 consultations were *"very difficult as most people were out of office and on holiday"*. Nevertheless, the Minister and officials were continuing with their efforts to finalise a plan to place before the court. He stated that *"the limited period of 3 months including the further difficulty of the holidays has been insufficient to finalise the plan."*

65. He referred to a consultation workshop held on 20 November 2018, a meeting held between the consultants of the Department and the Reference Group. He made reference to a letter addressed by the Minister of Rural Development and Land Affairs to the Minister of Human Settlements *"as part of the Inter-Ministerial engagement process relating to the District Six redevelopment"* dated 6 February 2019. Nothing much

turns on that letter, as most of the background information contained therein is common ground. But it is notable that it was expected that phase three would be completed in the first half of 2020. The department would have utilised all the funds allocated to it for the District Six redevelopment. Finally, the letter requested a meeting between the Ministers of Land Affairs and Human Settlements. At the time of the filing of the affidavit, on 26 February 2019 the suggested meeting had apparently not yet materialised.

66. There was a reference to meetings held on 8 February 2019 with the representatives of the applicants and another meeting on 20 February 2019 with the Department of Higher Education. The report attached what is referred to as a *"draft holistic plan"*, which was subject to further consultations with representatives of the claimants, the consultants appointed by the Department, engagements on an Inter-Ministerial level, further discussions with the Cape Peninsula University of Technology and public participation. The Report noted *"concerns and challenges"* faced by the Department relating to affordability. It concluded by stating that ongoing consultation and engagement processes require the claimants representatives to take into account concerns relating to affordability.

67. Plainly, as the affidavit of Mr Sekwana itself acknowledges, the plan envisaged by the court order was not delivered. Instead a document prepared for different purposes in around November 2018 was produced.

It was deficient in its failure to comply with all aspects of the Kollapen J order.

The Report of 17 May 2019

68. On 27 May 2019, Minister Mashabane filed her second report. She noted that she was no longer the responsible Minister and was unaware who the new Minister would be. She repeated that the plan as envisaged by Kollapen J has not been finalised because it *"is dependent upon the holistic plan"*. Since the holistic plan was a draft working document, the Department would not be able to finalise the plan.

69. The Minister stated that the Department had been able to secure a once off amount of R351 million as part of a potential public private partnership for the development of the restitution units. But, as is common cause, this amount is insufficient because on the estimates of the Department the construction of the units to be allocated to the claimants would cost about R2.4 billion. Like the February 2019 report, it was repeated that the draft holistic plan would be subject to further consultations with the Reference Group, the consultants, the Inter-Ministerial task team, the Cape Peninsula University of Technology, a public participation process and heritage authorities. In this regard, no explanation was given what steps had been taken to fulfil these aspects ever since the February 2019 report.

70. In paragraph 19 of the affidavit of 27 May 2019 a timetable of meetings scheduled to take place in June ad July were set out. In reference to the

allocation methodology, the report noted that there were certain principles agreed upon for the allocation: The date of the lodgement of the claim was the primary criterion, persons with special needs would be given preference; there were disagreement as to the role that age should play, although the view of the Commission was that elderly people should be given preference. People with chronic illnesses and indigent persons would also be factored in. It was also noted that there was an in principle agreement that the Department and the Commission would appoint an external and impartial service provider to oversee the allocation process.

71. More statistics were submitted. What these showed were that there were 2760 claims lodged. Out of these 1449 received financial compensation. Those awaiting redevelopment numbered 1201. To date 139 had been allocated. Those still awaiting allocation were 1062. 110 claims were dismissed for non-compliance. Nothing turns on these figures as these numbers were known prior to the commencement of the litigation.

72. It is apparent that there is no material difference between the report filed in February 2019 and that filed in May 2019. As such, the terms of the order of Kollapen J remain unfulfilled. There is still no commitment as to when the order will be fully complied with. I should now deal with the evidence of the Minister on 17 May 2019.

Minister Mashabane's Oral Testimony

73. It will be recalled that Minister Mashabane had been called on three primary questions. First, to determine whether or not a declaratory order

should be made. Second whether an order of contempt of court should be granted and third whether a personal costs order should be made.

74. Minister Mashabane noted that she is not new in high government office. She was first appointed by President Nelson Mandela and President Thabo Mbeki in ambassadorial roles. In May 2009 she was appointed by President Jacob Zuma as Minister of International Relations and Co-operation. She remained in that role until February 2018 when she was appointed by President Cyril Ramaphosa as Minister of Rural Development and Land Reform. When these proceedings were instituted, she was the Minister responsible for Land Affairs. The issues of District Six fell under her direct responsibility. She stated in evidence that she was fully briefed about District Six by then Minister, Nkwinti.

75. I have already noted above that the order was granted under the authority and consent of the Minister. Its import was to require the Minister to formulate, without delay a reasonable plan and programme which she would implement to satisfy the restitution claims of the claimants. It also outlines the contents of the plan. There was a requirement for the submission of the reports on three monthly intervals about the steps being taken in this regard until the development of District Six is complete.

76. It is now common cause that this order was not complied with. The Minister's oral evidence confirmed as much. The report of February 2019 by Mr Sekwana accepted this and so did the report of 27 May 2019 signed by the Minister.

77. The primary explanation advanced by the Minister for not complying with the order related to the financial constraints facing the Government. She testified that the Department, would contribute some R351 million towards redevelopment, but this would not be sufficient as the total estimated cost for the redevelopment is some R2.4 billion. Pertaining to this potential shortfall, she said that the matter had been raised with the National Treasury, the President and the Inter-Ministerial Committee of Cabinet, chaired by the Deputy President. She did not give any explanation what the responses of the President, the Deputy President and the National Treasury had been to the lack of funds. She also mentioned that the Department had engaged experts to help towards the finalisation of the plan. The experts had not finalised the plan for various reasons. She was also not able to explain how long it would take for the plan to be finalised. She estimated that she would need another period of three months, taking us to August 2019. But as of 27 May 2019 when the second report was filed no commitments were made regarding the date when the report envisaged by Kollapen J would be ready.

78. It seems unavoidable to issue a declaratory order that the Minister has not complied with the order, in breach of her constitutional obligations imposed by section 165(5) of the Constitution. It must be recalled that the Minister has a duty to comply with the Constitution; to comply with court orders; and to account for her failure to comply with court orders. In *Zulu and Others v eThekwini Municipality* 2014 (4) SA 590 (CC) at paras 70 – 71 it was held that "*[f]ailing to fulfil [constitutional] obligations falls short of*

the constitutional mandate. Further, government officials have a duty not only to discharge their functions, but also to account for when they have not".

79. On these facts, the Minister did not comply with the court order and failed to provide an adequate explanation for the failure. Is the Minister guilty of contempt of court? I deal with this next.

Contempt of Court

80. The leading authority on the standard of proof in respect of contempt of court is *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA), where it was held that once an applicant proves *"(i) the existence of the order, (ii) its service on the accused, and (iii) non-compliance, if the accused fails to furnish evidence raising a reasonable doubt whether non-compliance was wilful and mala fide, the offence will be established beyond reasonable doubt".*[4]

81. But there is a distinction between a finding of contempt for purposes of committal and a finding of contempt for the imposition of civil remedies intended to ensure compliance, such as declaratory orders, mandatory orders and prohibitory orders.[5] Thus in *Pheko II*, the Constitutional Court held:

> "[W]here a court finds a recalcitrant litigant to be possessed of malice on balance, civil contempt remedies other than committal may still be

[4] At para 22.

[5] *Pheko and Others v Ekurhuleni Metropolitan Municipality* (No 2) 2015 (5) SA 600 (CC).

employed. These include any remedy that would ensure compliance such as declaratory relief, a *mandamus* demanding the contemnor to behave in a particular manner, a fine and any further order that would have the effect of coercing compliance."[6]

82. Motive is not relevant. "Once the three requisites . . . have been proved, in the absence of evidence raising a reasonable doubt as to whether the accused acted wilfully and *mala fide*, all the requisites of the offence will have been established. What is changed is that the accused no longer bears a legal burden to disprove wilfulness and *mala fides* on a balance of probabilities, but to avoid conviction need only lead evidence that establishes a reasonable doubt."[7]

83. The Minister denies contempt. She testified as to her commitment to land restitution and ensuring that the claimants receive back their land. She testified that the non-compliance was not a result of her deliberate contempt but because of certain constraints facing her department. She mentioned the financial constraints and its potential impact on other Government priorities. She referred to the need for further consultation with the claimants. She accepted that she is personally responsible to ensure compliance with the order.

84. It is worth noting that the papers were issued in April 2018, although the order was itself given in November 2018. Thus, the Department had more than enough time to reflect on its position. It was only in November 2018 that a decision was taken to consent to the order. In the light of the

[6] *Pheko II* at para 37.
[7] *Fakie* at para 23.

extensive history of the matter, there can be no doubt that the Minister and officials within the Department were fully aware of the matter. There can be no suggestion that they only became aware of the inability to comply when they were called upon to do so by the applicants.

85. It seems to me that is not probable that the constraints facing the Department became apparent only in February 2019. They were issues that must reasonably have been within the knowledge of the Department and the Minister in November 2018 when the order was agreed upon. In this regard, in cross-examination, the Minister was asked whether she thought it was feasible to comply at the time the order was made bearing in mind the steps that had to be taken to ensure compliance. After evasive responses, she ultimately stated that she was hoping that the Department would comply. But it is not clear to me how the Minister could have hoped that the Department would comply if she knew exactly what needed to be done in order to ensure compliance.

86. The Minister was also asked about the exact period when she realised that she would not be able to comply with the order to which she replied that this was *"as we move on"*. In the affidavit of Sekwana however, it was stated that this was discovered *"early on"* thus implying that it was discovered soon after the court order was made.

87. In my view, a member of Cabinet, acting reasonably, in good faith and in discharge of their constitutional obligations could not agree to a court order when they must have been aware that it would not be possible to

comply with it. The information disclosed from the papers and indeed during the oral testimony of the Minister does not indicate any information that was not available to the Minister at the time the court order was made with consent. So, if it is to be accepted as I believe it must be, that the order was made with the knowledge that it could not realistically be complied with, then the conduct of the Minister can properly be characterised as reckless and careless. It is reckless to agree to a court order when no proper, due and meaningful attention is paid to whether the terms of the order can be met.

88. When the Constitution promises, in section 25(7), that those people whose property rights were unfairly taken away under Apartheid would be entitled to the restoration of those rights, it also envisages that they would be treated fairly, with dignity and due recognition of their past loss. The restoration of land under the law is not a favour to be dispensed by the government. It is a right guaranteed by section 25 of the Constitution. It is not fair to play with the emotions of land claimants by making promises for the return of the land when, one is in fact reckless as to their ability to ensure compliance with the promise.

89. I now turn to the steps taken by the Minister to comply. Three points must be made on the law. First, court orders are binding until set aside through proper judicial proceedings (*Bezuidenhout v Patensie Sitrus Beherend Bpk* 2001 (2) SA 224 (E) at 229). Second, state organs have a duty to assist courts to ensure their independence, impartiality and effectiveness (section 165(5) of the Constitution). Third, public bodies must make good

faith endeavours to comply with court orders. As noted by the Supreme Court of Appeal:

> "[8] Having said that, the Municipality consented to the court making an order in those general terms. That obliged it to make serious good faith endeavours to comply with it. That is what we are entitled to expect from our public bodies. If they experienced difficulty in doing so then they should have returned to court seeking a relaxation of its terms. If there was a dispute between them and the appellants regarding the scope of the order and what needed to be done to comply with it, it was not appropriate for the Municipality to wait until the appellants came to court complaining of non-compliance in contempt proceedings. It should have taken the initiative and sought clarification from the court. Its failure over a protracted period to take these steps is to be deprecated.[8]

90. Against this standard, I must examine the conduct of the Minister. The steps taken by the Minister in apparent compliance with the order were summarised by Mr Budlender when cross-examining the Minister. They are: informing the President; briefing the Inter-Ministerial committee; having discussions with the Ministers of Human Settlement and Education; discussion with the Minister of Public Works; and raising the matter with the National Treasury. Beyond this, the Minister could not give any evidence of any other steps that were taken to comply with the order.

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[8] *Meadow Glen Home Owners Association and Others v City of Tshwane Metropolitan Municipality and Another* 2015 (2) SA 413 (SCA) at para 8.

91. The affidavit of 27 May 2019 does not take the matter further. It includes discussions held with the District Six Reference Group concerning the allocation criteria. It is not clear to me why these discussions are not being held with the applicants. There is also no further information about any steps taken to raise funds, if the delay is solely attributable to lack of funds, as suggested by the Minister. I should accept that there has been no meaningful progress made by the Minister to ensure compliance. There is also no possibility of complying with the court order within the time period that was agreed.

92. These steps are wholly inadequate. They do not display a serious, meaningful and *bona fide* attempt to comply with the order. But it remains to consider whether or not it can be said that the Minister acted with malice. I do not think that the suggestion that the Minister deliberately settled the matter in November 2018 with no intention of complying with it can be fairly made. The probabilities are that she did not do enough to satisfy herself that she could comply before she agreed. She then failed to take reasonable steps to ensure compliance. I do not believe that this amounts to direct intention to breach the order. Nor can *dolus eventualis* be shown.

93. It is not clear on the evidence if the Minister fully appreciated what would had to be done to comply with the court order before making the commitment on 26 November 2018. It seems that the order was made without any prior investigation of what would be required for compliance. This is reckless conduct.

94. But I do not use "recklessness" in the same way as that used in a finding of *dolus eventualis*.[9] For *dolus eventualis*, I must find that the Minister knew that compliance was not possible – in other words she must have subjectively foreseen the possibility of breach of the court order – but was reckless as to this result.[10] Even after the order was made, I would have to find that the Minister intentionally failed to comply with the order. I am not confident that the evidence establishes either hypothesis beyond a reasonable doubt.

95. What I do find, however, is that it was reckless of the Minister to consent to an order without satisfying herself that compliance could realistically be achieved. Not only was the Minister not sure of whether there would be compliance, she did not bother to ensure that what had to be done before committing to the court order was in place.

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[9] In *Heg Consulting Enterprises (Pty) Ltd* v *Siegwart' s* 2000 (I) SA 507 (C) at 518H-I, the court held that intention in the form of *dolus eventualis* is sufficient for criminal contempt of court.

[10] *S v Humphreys* 2015 (1) SA 491 (SCA) at para 12. Brand JA enunciated the correct legal enquiry thus:

> "In accordance with trite principles, the test for dolus eventualis is twofold:
>
> > (a) Did the appellant subjectively foresee the possibility of the death of his passengers ensuing from his conduct; and
> > (b) did he reconcile himself with that possibility (see eg S v De Oliveira 1993 (2) SACR 59 (A) at 65I-J)?
>
> Sometimes the element in (b) is described as "recklessness" as to whether or not the subjectively foreseen possibility ensues (see eg S v Sigwahla 1967 (4) SA 566 (A) at 570B-E".

96. Now, it should not be understood that my view is that the Minister should have been absolutely certain that compliance would be achieved. I accept that in many instances, the administrative machinery of the State would not make it possible for a Minister, who is the head of the department, to have each and every piece of information to ensure absolute compliance with a court order. But where a court order is agreed upon, it is fair to expect that reasonable attempts will be made to ensure compliance afterwards, which did not happen here.

Gross Negligence

97. I do not think that the steps that have been taken by the Minister's officials, including by the Minister herself are reasonable steps to ensure compliance. The Minister repeatedly protested in evidence that she did not act out malice. I have sympathy with this. But I think also that the conduct of the Minister must be measured against what would be reasonably required. I think that the conduct of the Minister has been lackadaisical, lacking the sufficient appreciation of the scale, urgency and importance of the matter at hand. The Minister's own evidence displayed an acute lack of insight into the intricate details of the functioning of the Department. Her evidence displayed the inability to grasp some essential facts pertaining to this matter.

98. My finding is that the Minister was reckless and grossly negligent in failing to ensure that compliance would be possible before consenting to the order. Moreover, after the order was granted the Minister did not take adequate and reasonable steps to ensure that the matter was attended to.

When the Minister gave evidence, I was not satisfied that she was sufficiently close to the detail concerning the nature of the challenges faced by the Department. Nor did she seem to appreciate the consequences of the failures of government for the claimants.

99. As matters stand, the situation is not getting any better. The Minister gave an estimate of August 2019 by which the new plan would have been designed. But she was not able to explain the factual basis upon which this new plan would be expected to be delivered by August 2019. It all seemed speculative. In fact, when the report of 27 May 2019 was filed, it became quite clear that there would be no compliance and the period when compliance will be achieved is not known.

100. It is on these grounds that an appropriate declaratory order must be granted.

Personal Costs

101. I turn my attention to personal liability for costs.

102. Personal costs orders against state functionaries are part and parcel of the tools available to courts to prevent abuse of court processes. So for example, where there is *"a flagrant disregard of constitutional norms"* personal costs should be considered.[11] And as noted in *Black Sash Trust v Minister of Social Development* 2017 (9) BCLR 1089 (CC) *"bad faith*

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[11] *Gauteng Gambling Board and Another v MEC for Economic Development, Gauteng Provincial Government* 2013 (5) SA 24 (SCA) at para 54.

and gross negligence" are factors which may legitimately be taken into account in awarding personal costs against state officials. Most recently, personal costs were awarded where the conduct of a holder of public office was in *"bad faith"* and *"grossly unreasonable".*[12]

103. Overall, I have found that the conduct of the Minister was reckless, grossly unreasonable and breached section 165 of the Constitution. The conduct comes close to contempt of court. But I do not need to make a finding of contempt of court to decide whether or not the Minister should pay the costs of the 17 April 2019 personally. It will be recalled that the Minister instructed an application for postponement virtually at the last minute for the 17 April 2019. That application purported to explain why the Minister was not ready. The explanation was found wanting by this court. The reason advanced for the postponement was to enable the Minister to file an answering affidavit. Yet the answering affidavit could have been filed in the time that it took to draft the application for postponement.

104. There is more. The present litigation became necessary to ensure compliance by the Department of its legal duties. Not only did the government bear the duty to ensure the full realisation of the restitution claims of District Six, it also had a duty to ensure that it does so promptly. After all, section 237 of the Constitution states that all constitutional obligations must be performed diligently and without delay. Delays by the

[12] *Public Protector v South African Reserve Bank* [2019] ZACC 29 at para 205.

government can also render the rights in the Constitution illusory, thus undermining the spirit, purport and object to the Constitution.

105. It is a grave matter to find a member of Cabinet grossly negligent in the discharge of their official and legal duties. But it is proper in this case. The very purpose of this litigation was to compel the Minister to perform her obligations in terms of a court order. She was aware of the order. She had committed her department to the order. Yet, when the time came for compliance, she found excuses to avoid compliance. She said she had received a full briefing from Minister Nkwinti concerning District Six. If this is so, she would have known about the plight of the claimants. She would have known about the hardships of the claimants in pursuing the claim, attributable to the negligence of the government of which she is the chief representative on land matters. Her conduct in the litigation shows that she does not appreciate the necessity to attend to the matter with diligence and promptness.

106. The reason given by the Minister why the order was not complied with was ultimately one of lack of funds. But I did not get any sense that any meaningful attempts were made to secure the funds. And it is as if the shortage of funds was not foreseeable. As early as 2012, the national government had set aside the amount of R700m for the District Six community. The Minister's answer, when this was put to her, was that she will ask National Treasury. Yet when she filed her report on 27 May 2019, she did not provide any information as to whether National Treasury had been asked or not. But more importantly, this case is not about the actual

construction of the houses. It is about a plan. There is really no genuine explanation why the plan has to date not yet been finalised.

CONCLUSION

107. These circumstances are sufficient to conclude that the Minister's conduct should be declared a violation of the court order, in breach of section 165 of the Constitution, and the Minister should bear personal costs in respect of the proceedings of 17th April 2019.

108. There is a postscript. Minister Mashabane's evidence contains many references to the President, the Deputy President as Chairperson of the Inter-Ministerial Committee and the National Treasury. What is clear is that the Minister believes that the problem of District Six cannot be solved by the Department alone. It needs the attention of the government as a whole.

109. It is not for me to say whether or not the President, or Deputy President or National Treasury are also to blame for the delays experienced in District Six. Not only are they not parties before me, there is also no evidence of their role in the matter. I do believe, however, that it would be appropriate for this court to refer the judgment to the Deputy President, so that the District Six matter can receive the attention of the Inter-Ministerial Committee. I shall be making an order to that effect.

ORDER

110. The following order is issued:

1. It is declared that Minister Mashabane failed to comply with the Court Order of 26 November 2018, made by Kollapen J.

2. It is declared that in failing to act as mentioned in paragraph 1 above, Minister Mashabane was grossly unreasonable in the discharge of her constitutional duties, and breached the provisions of section 165(5) of the Constitution.

3. Minister Mashabane is directed to pay the costs of the proceedings on 17 April 2019, including preparation and appearance, in her own personal capacity, on an attorney and own client scale, such costs to include the costs of senior and junior counsel.

4. The Registrar of this Court is directed to bring this judgment to the attention of the Deputy President of the Republic of South Africa in his capacity as the Chairperson of the Inter-Ministerial Committee.

5. The First and Second Respondents in their official capacity are directed to pay the costs of the application on the attorney and own client, the one paying the other to be absolved, such costs to include the costs of senior and junior counsel.



Tembeka Ngcukaitobi
Acting Judge of the Land Claims Court
02 August 2019

Appearances

For Applicants: Adv. G. Budlender SC, Adv. A. Nacerodien & Adv. J Blomcamp – *Instructed by Norton Rose Fulbright*

For Respondents: Adv. H Maenetje SC, Adv. N Muvangua & Adv. R Tshetlo – *Instructed by The State Attorney, Cape Town*