



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

FROM The Registrar, Supreme Court of Appeal
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STATUS Immediate

Please note that the media summary is for the benefit of the media and does not form part of the judgment.

Salem Party Club v Salem Community (20626/14) [2016] ZASCA 203 (13 December 2016)

MEDIA STATEMENT

Today the Supreme Court of Appeal handed down a judgment dismissing an appeal by a number of farmers (landowners) against an order of the Land Claims Court (the LCC) in for restitution of rights in land was granted in relation to a portion of land which was once known as the Salem Commonage. The LCC had granted the order of restitution in favour of the claimant community known as the Salem Community.

The land to which the claim relates lies about 20km to the south of Grahamstown in the Albany District, Eastern Cape. It measures about 7 698 morgen. It is part of a bigger piece of land allocated to a group of about 50 British Settlers were known as the Salem Party, by the British Colonial Government, during the 1820s. Each family was allocated a farm and the commonage in the nearby area was used for the benefit of the whole group. In 1940 the Supreme Court in Grahamstown granted a court order in terms of which the commonage was to be subdivided and allocated to the landowners in proportion to the shares held by each one of them. The African families who lived on the commonage at the time had to seek refuge elsewhere.

On 24 December 1998 the Salem community lodged a land claim with the office of the Commission on Restitution of Land Rights in East London, in respect of the Salem Commonage. When lodging the claim the claimants alleged that their forebears occupied the land from the 1800s and that in about 1947 the land was subdivided and transferred to white farmers. As a result their forebears lost

'ownership rights', residential rights, grazing rights, rights to access firewood, to bury their dead and the rights to use the land as a commonage for the entire community.

After investigating the merits of the land claim, the Commission concluded that an African community lived on the commonage from the 1870s until the 1940s when its members had to relocate elsewhere. The Commission concluded that the claimants were entitled to restitution of rights in the Salem commonage land as their ancestors were dispossessed thereof as envisaged in section 2 of the Restitution of Rights in Land Act 22 of 1994 (Restitution Act). The landowners rejected the conclusion reached by the Commission and, when no settlement could be reached between the landowners and the claimants the Commission referred the dispute to the LCC, which found in favour of the claimants.

In dismissing the landowners' appeal against the decision of the Land Claims Commission, the Supreme Court highlighted the unorthodox approach ordained in the Restitution Act. The Court found that the Restitution Act requires that all the evidence on record: the independent documentary evidence, expert evidence, hearsay evidence and ordinary oral evidence, should be considered holistically. In this case, documents and records of the Cape Colony Administration obtained from the National Archives in Cape Town constituted strong independent evidence which showed that an African community lived on the commonage from the 1870s until the commonage land was subdivided in the 1940s and transferred to individual landowners. The court further found that although oral evidence was led in the LCC on behalf of the claimants and the landowners were open to criticism, the independent evidence showed conclusively that during this period African people lived on the commonage according to traditional customs which constituted their system of shared rules for accessing land for various aspects of their lives. It found that the process which culminated in the court order of the Grahamstown Supreme Court was racially discriminatory. Further, the court found that rejecting the claim because of a failure to file a resolution by the community authorizing Mr Madlavu to lodge the claim, would be unjust and inconsistent to the spirit of the Restitution Act particularly as the Commission had accepted the constitution of the claimant community as sufficient authority to act and had not required further information from the claimants.

In a minority judgment, Cachalia JA found that no proper documents had been furnished to the Commission to prove that Mr Madlavu had been authorized to lodge the claim on behalf of the community. For that reason the claim should fail. Further, that the evidence showed that the few Africans who lived on the commonage worked on the farms and derived the right to live there from the consent given by their employers did so by permission of their employers. They therefore never acquired any rights in relation to the commonage land. He also found that defects in the evidence of the witnesses who testified on behalf of the Commission and the community were fatal to the claim and that there was no evidence that the claimants' forebears were a community as defined in the Restitution Act and the court order of the Grahamstown court did not constitute discriminatory law or practice as envisaged in the Restitution Act.

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