IN THE LAND CLAIMS COURT OF SOUTH AFRICA

HELD AT RANDBURG

Case number: **LCC 2018/206**

(1) REPORTABLE: **YES**
(2) OF INTEREST TO OTHER JUDGES: **YES**
(3) REVISED.

4 October 2023 .....

In the matter between:

IZAACS, IAN JACOBIE	Plaintiff
and	
THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA	First Defendant
DEPARTMENT OF ARGRICULTURE AND RURAL DEVELOPMENT	Second Defendant
CHIEF LAND CLAIMS COMMISSIONER	Third Defendant
THE REGIONAL LAND CLAIMS COMMISSIONER; FREE STATE AND NORTHERN CAPE	Fourth Defendant

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JUDGMENT

SPILG, J

INTRODUCTION

1. In 1914 Prime Minister Louis Botha and his Cabinet resolved to support Great Britain against Germany in what came to be known as the First World War. In implementation of this decision, troops were sent under General Jan Smuts into the territory then called German South West Africa (now Namibia).

2. At that time the Izaacs family (the family name was then spelt Izaks) were living on the farm Aries (where they had a half interest). It is located in the Gordonia area of the Northern Cape along the then Orange River, now named the Gariep. In this locality the Gariep River forms a natural border between South Africa and Namibia. The Izaacs also owned two pieces of land known as water-erf which they rented out.

3. The family was disastrously affected by the decision to invade German South West Africa.

   Firstly, in September 1914 a party of German soldiers stationed at Nakob crossed the border and surrounded the Police Station which was situated on the Isaacs farm, fighting ensued, the family were captured and taken into German territory as prisoners while some of their livestock was slaughtered. The family was subsequently released and returned to the farm

   Far worse however was to follow.

   The Botha Government's decision to support the British war effort and its justification did not sit well with some who, not ten years earlier, had fought the British and came back from the war to find that many thousands of their women and children had died from epidemics and the effects of malnutrition due to the appalling conditions of the concentration camps in which they had been interned. This was one of the first mass round ups of civilians during a war.

Moreover the Boers' farms had been raised to the ground, crops destroyed and livestock slaughtered pursuant to Lord Kitchener's scorched earth policy.[1]

4. Disaffected Boers led by Generals De Wet, Beyers and Kemp, mounted a rebellion in 1914. This is referred to as the Afrikaner Rebellion during which time portions of the Northern Cape and western Free State were taken over by their forces.

5. A few months after the Izaacs returned to Aries from German captivity, rebels under General Kemp came to the Izaacs' farm and commandeered a large amount of their stock[2].

6. The rebellion was later quelled by Union troops[3]. Due to the devastation wrought on the farmers through the loss of livestock, crops and the like the Union Government established the Rebellion Losses Commission to compensate all those who had suffered economic loss at the hands of the rebels.

7. In an in depth analysis, the plaintiff's expert Prof Legassick (who has since passed away), described the discrimination meted out by white residents, businessmen and farmers to a group who formed part of a larger racial group classified as of coloured descent and who were pejoratively referred to as "*Basters*". The disgraceful acts of racism against this group, with whom the Izaacs were identified, is well documented. They were stereotyped as inherently of a particular disposition which rendered them an inferior people. This also set them up for exploitation.

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[1] The Second Anglo Boer war (1899 to 1902) saw the British force some 30 000 Boer women and children as well as over 100 000 Africans into concentration camps. Despite humanitarian pleas (that of Emily Hobhouse being one of the best remembered) and snap debates at Westminster over 25 000 Boer civilians and possibly some 14 000 Africans died in the camps from measles and typhoid epidemics and the effects of malnutrition. The *Kaiser's Holocaust* by David Olusoga and Casper W Erichsen (2010) at p160; In *The Boer War* by Thomas Pakenham (1979) at p 518 the numbers were given as at "*at least 20 000 whites and 12 000 coloured people had died in the concentration camps*. (See also at pp 572-3)
Olusoga and Erichsen explain that the Spanish rulers of Cuba had four years earlier forced civilians into similar camps in order to quell a revolt in 1896 (The *Kaiser's Holocaust* at p 160)

[2] Professor Grundlingh, who also testified on behalf of the plaintiff, considered that the rebellion caused considerable upheaval in the country districts and that black peasant farmers were particularly hard hit by the rebels' forceful commandeering of livestock and other resources

[3] South Africa was then named the Union of South Africa pursuant to the treaty which ended the Second Anglo Boer War

8. Prof Legassick, in addressing the land occupation by Basters with specific reference to Gordonia states:

"1. A Baster settlement was established in Gordonia in 1880 of which Abraham and Elizabeth September were members. The settlement was outside the Cape Colony but established by the Cape government. It was administered largely by Basters. In the settlement only Basters and those married to them were permitted to be landowners. In 1889 Gordonia became part of British Bechuanaland and from 1895 part of the Cape Province.

2. When Basters originally occupied the land it was relatively valueless. In the 1880s (spearheaded by Abraham September) a canal was built leading water from the Orange River, from Ouap down to Upington and beyond, permitting irrigation of the land and vastly increasing its value. By the first decade of the twentieth century the "water-erven" in Upington along the river were valued at some £100 a morgen. [Standard Bank Inspection Report, 17/8/1908]. By 1956 this land adjoining the Orange River could be described as "a heavenly greenbelt… a verdant paradise" (J. Brauer, Cape Times, 18/2/1956). Expert bundle page 9, B para 1 39 Cf Jacobs v Dept Land Affairs 2016 (5) SA 282 (LCC) which tells the full story of the dispossession of the September family through fraud.

3. Between the 1880s and 1920 Gordonia was turned from a "Bastard" racial zone into a white racial zone so that whites could engage in commercial agriculture within it. The purpose was for whites to acquire the land and deprive the Basters of land, thus applying the policy of segregation, i.e., spatial apartheid. The loss of land by "Bastards" can be substantiated from the attached maps [see appendices]. In 1921 259 Bastard men from Gordonia signed a petition to the South African parliament complaining of the loss of their land and blaming the South African government for it. (Pretoria Archives (PA), LDE, 3953, 11106,

"An den Achtbare Leden van het Parliament", September 1919/May 1921). In the same year Bastards told an official of the Department of Lands that they were "finding it practically impossible to find places where they can pursue their calling, which is agricultural farming, and even where they do succeed in securing places where they can live, their form of tenure is very insecure… [causing] them a great deal of inconvenience and financial loss." (PA, LDE, 3953, 11106, D. Liebenberg, Controller, Report of 27/5/1921). Their tenancies were threatened, wrote the Rand Daily Mail, in 1923 because "Europeans…. more and more require the land for their own use." (14/3/1923

….

5. *The "Bastards" were expropriated and reduced to labourers in Gordonia by being dispossessed of land. This was the purpose of the policy of segregation: turn blacks (or browns) into labourers by dispossessing them of land that they owned. This, it is submitted, was a deliberate policy by public officials. Let us quote from a published report to government by a newly-appointed magistrate, J. Ashburnham, in Gordonia in 1895: "The native inhabitants of the district are the so-called Bastards. Under the former regime a number of these men acquired farms and other landed property, and are now practically independent. This fact has an unwholesome influence on the rest of the community who, as relatives, friends, or hangers on of landed proprietors, are disinclined to work, and are apt to take a somewhat false view of their position. Good servants are therefore extremely difficult to obtain in this district." It was not just the magistrate but other whites, who claimed they were unable to obtain good servants. This is a statement reflecting not simply the views of the magistrate, but of white public and official opinion more generally. It was published in an official publication of the Cape Government.*

9. In short, due to racist practices *"basters"* were considered as racially inferior justifying their exploitation, subjugation and diminution to the status of servants.[4]

   This is what befell the Izaacs at the hands of the public officials who failed to recompense them through the reparation scheme which otherwise would have enabled them to service their bonds. They were effectively forced off the family land.[5]

10. As Prof Legassick succinctly put it in his uncontested report:

> *"The dispossession of the Isaac (Izaks) family from their farm at Aries and erfs 408 and 409, Keimoes was as a result of racial discrimination by public officials….*
> *The properties were sequestrated for payment of debt, which the family was unable to pay because of losses of property at the hands of German and rebel South African troops during the First World War. Because of racial discrimination by functionaries exercising public powers, they were unable to secure compensation for these losses from the Rebellion Losses Commission, and hence could not repay their debt and lost their property."*

11. The State accepted that it was due to such racially discriminatory practices against the so called Basters, that the Izaacs family were not given an opportunity to recover from the devastation of the stock losses suffered during the rebellion and the inability to tend to their lands or receive the compensation that ought to have been paid out to them. Instead the failure by officials to ensure the payment of reparations had a devastating effect on the Izaacs family.

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[4] The tainting of people who were financially well off as inferior resulting in economic exploitation to acquire their property or exclude them from economic activity (and competition) for racist ends finds adequate parallels in the legislatively sanctioned Land Act of 1913 and subsequent statutorily endorsed job-reservation legislation and equates with the early actions of the Nazi regime against persons it considered racially inferior

[5] Prof Grundlingh noted that it was not surprising that the matter was not effectively remedied by officials to enable the Izaacs to service their bond, thereby actively facilitating their land being declared executable under the bonds

Without reparations they were unable to service the bonds they had taken out in 1913 with the result that the bonds over all their properties were called up.

12. Accordingly the claimant satisfied the requirements of the Restitution of Land Rights Act 22 of 1994 ("*the Act*") in respect of being dispossessed of the farm Aries and the water-erfs 408 and 409, Keimoes as a consequence of past racially discriminatory laws or practices.

13. The original claimant was Johan Donald Izaacs. He instituted restitution proceedings in December 2018. Sadly he passed away before the trial commenced. By agreement between the parties, his son Ian Jacobie Izaacs was substituted as the plaintiff under Rule 15 of this Court's Rules. However the claim had effectively been made on behalf of the descendants of Caroline Regina Izaacs, Joseph Johannes Izaacs Jnr and Johan Donald Izaacs as joint owners of the erven. The terms of the award in this matter make provision for its distribution among them.

THE ISSUES

14. The case before the court is only concerned with the dispossession of Erfs 408 and 409 Keimoes; not the farm Aries.

15. The plaintiff accepted that the erven were not restorable and claimed;

    a. R1.5 million in respect of the dispossession

    b. R 8.562 million for the loss of use of the two erven

16. Although the State conceded that the Izaacs family were dispossessed of the erven it raised the following issues with regard to the amount of compensation which could be awarded;

a. In regard to the dispossession it contended that the family had received partial compensation and that the total amount of compensation should only be R1 149 830;

b. The family was not entitled to compensation for past loss of the use of the property.

17. An issue which the court raised was the effect if any the death of the claimant and his substitution by his son as plaintiff has on the claim. I will return to this.

RESTITUTION IN THE FORM OF COMPENSATION

The Law

18. There are certain aspects of restitution in the nature of compensation which were settled by the Constitutional Court in the leading case of *Florence v Government of the RSA* 2014(6) SA 456 (CC). They are;

a. the starting point is to determine the market value and from there to have regard to the other factors identified in s 33(1) of the Act;

b. market value is determined at the time of dispossession and then brought to current values based on the Consumer Price Index ("*CPI*")

c. the other factors under s 33 may then result in an adjustment of the figure determined in the first leg of the calculation. This adjustment may result in an overall increase or decrease in compensation from the calculation derived by calculating the CPI adjusted market value under (b).

19. Section s 33 of the Act provides:

Factors to be taken into account by Court. —

In considering its decision in any particular matter the Court shall have regard to the following factors:

(a) The desirability of providing for restitution of rights in land to any person or community dispossessed as a result of past racially discriminatory laws or practices;

(b) the desirability of remedying past violations of human rights;

(c) the requirements of equity and justice;

(cA) if restoration of a right in land is claimed, the feasibility of such restoration;

(d) the desirability of avoiding major social disruption;

(e) any provision which already exists, in respect of the land in question in any matter, for that land to be dealt with in a manner which is designed to protect and advance persons, or categories of persons, disadvantaged by unfair discrimination in order to promote the achievement of equality and redress the results of past racial discrimination;

(eA) the amount of compensation or any other consideration received in respect of the dispossession, and the circumstances prevailing at the time of the dispossession;

(eB) the history of the dispossession, the hardship caused, the current use of the land and the history of the acquisition and use of the land;

(eC) in the case of an order for equitable redress in the form of financial compensation, changes over time in the value of money;

(f) any other factor which the Court may consider relevant and consistent with the spirit and objects of the Constitution and in particular the provisions of section 9 of the Constitution.

20. It is apparent from s 33 that a court is also required to take into account s 9 of the Constitution (the equality provision)[6] and ultimately must have regard to all relevant factors.

Market value, as important as it is, is not the only factor in determining just and equitable compensation.

21. These other factors ultimately require the court to balance, on a case by case basis, the interests of the claimant and the public interest.

In some cases this may result in an amount of compensation significantly higher than the then market value extrapolated to current CPI values or even in a substantially lower award. See the judgment of Moseneke (ACJ) in *Florence*. By way of illustrations see *Jacobs v Department of Land Affairs and others* 2016 (5) SA 382 (LCC) at paras 102 and 103 to 118 and *Jacobs (in re Erf 38) v The Department of Land Affair*s LCC 120/1999 at paras 32 and 33 (unrep. Judgment on 6 January 2017- Justice.gov.za website).[7]

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[6] Section 9 provides:

Equality

1. Everyone is equal before the law and has the right to equal protection and benefit of the law.

2. Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

3. The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

4. No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

5. Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

[7] This was mentioned in the earlier judgment of *Pillay N.O. v The Government of the Republic of South Africa and Others* ([2022] ZALCC 21 (8 August 2022) at para 8 ftn 3

The Market Value

22. It is common cause that the historic market value of the erven at the time of dispossession was £1200. Adjusted by CPI to current values the amount is R475 000.

23. However, if any consideration can be given to contemporary sales then it is accepted that the current value of the erven (being cultivated as a vineyard) on the open market would be R1.5 million.

24. Mr Terblanche who is an expert valuator (valuer) described how the two erven owned by the Izaacs family were originally leased out as water erven and. because much of it was highly fertile, subsequently came to be used for farming grapes for the raison market. This may account for the market difference between a CPI adjusted market value at date of dispossession and the present market value.

25. The Izaacs family had in fact leased the erven out in 1909 for a 15 year period at a rental payable in produce which the plaintiff's other expert valuer estimated to be the equivalent of £30 per annum at the time.

Whether the Izaacs received any consideration as contemplated in s 33(eA)

26. *Adv Matebese* raised two issues on behalf of the State.

Firstly, it was pointed out that the Izaacs had bonded their three properties in 1913 in order to raise a loan of £2000 from a Mr Dewar. He argued that this constituted a benefit which the family had utilised.

27. The immediate observation is that the loan was not utilised to purchase the erven or the half interest in the Aries Farm. The undisputed evidence reveals that the

erven had already been acquired by the family in 1898 and 1904 respectively while the half interest in the Aries farm had been purchased by 1905.

28. It is also evident from the record of the court case in which Dewar claimed the properties executable, that the loan had been needed to acquire livestock. This is because the reparations the family claimed from the Union Government as a consequence of the rebellion totalled £2000. all for loss of livestock. The record of the court proceedings also reveals that due to the failure on the part the Government to pay reparations to the Izaacs, their properties were subsequently sold and fetched £1400 thereby reducing the Izaacs' liability to £600.

29. Furthermore, the uncontested historic evidence produced by Profs Legassick and Grundlingh is to the effect that the Izaacs family lost their livestock to the rebels, were unable to recover financially or service the debt without receiving reparations from the Union Government which, as stated earlier was claimed to be the value of the livestock so stolen.

30. The other point taken by the State is that the Izaacs failed to prove that reparations were not received. There are three responses to the submission.

    The State accepted that the dispossession was due to the racist conduct of the officials who failed to ensure that the Izaacs received reparations timeously.

    The second is that the uncontested oral evidence of the dire circumstances and conditions under which the family was forced to leave Gordonia overwhelmingly reveals that they left with very little despite having acquired land and had reared livestock on it for a period of almost 20 years.

    The inherent probabilities are that had the Izaacs received reparations there would not have been an exodus in the manner described. The historians who were called as experts could not locate any payment of reparations to the Izaacs. It is unnecessary, because of the overwhelming evidence on the point, to decide whether it was for the plaintiff in these circumstances to prove a negative of non-payment. *Prima facie* it would appear that on what the plaintiff had put up in

evidence, it was for the State to challenge non-payment of reparations and to prove the positive of payment.

The third response is that on the evidence, the properties did not fetch more than £1400 and to take this amount into account as consideration received, not only ignores each of the earlier points but amounts to giving with the one hand and taking with the other.

Purely arithmetically, the undisputed evidence and overwhelming probabilities are that the £2000 loan of 1913 was used to buy livestock which was then commandeered within the year of purchase by the rebels. This meant that by the time of dispossession there was no benefit since there was no livestock -and livestock cannot be equated with a consumable. A benefit therefore could only have been derived had the officials paid out the reparations. The evidence before the court is that they had not paid out, at least by the time the Izaacs were dispossessed and forced to leave their lands (which it is common cause, was as a consequence of racially discriminatory practices on the part of Union Government officials).

Application of s 33 considerations

31. In a case confined to compensation, s 33 enjoins the court to have regard to the desirability of remedying past violations of human rights, to the requirements of equity and justice, to the circumstances prevailing at the time of the dispossession, the history of the dispossession, the hardship caused, the current use of the land, the history of the acquisition and use of the land , changes over time in the value of money and any other factor which the court may consider relevant and consistent with the spirit and objects of the Constitution with specific focus on the right to dignity.

32. In many cases involving individual family claimants, as opposed to communities, it is difficult to predict whether they would have remained on the land for any length of time before selling, or a developer would have acquired it, or that the individual would have been able to develop the land on his or her own, or (by

reason of the vagaries of economic factors) would have sold at some stage prior to the property being fully exploited.

33. In *Pillay* at para 19 I said the following:

> *In a case of this nature, the first part of the exercise undertaken by the court is to place the claimant in the same position he, she or the community concerned, would have been in if discriminatory laws and practices had not been exercised in effecting the dispossession of the land in question, always bearing in mind that damages under the Act are neither punitive nor retributive.*[8]
>
> *This part of the enquiry, which is to determine the true market value of the property at the time of dispossession, must apply the method of assessment determined in Florence which requires, as an aspect*[9] *of the enquiry an assessment of the market value of the property concerned at the time of dispossession less any amount that may have been received reckoned at present day values by reference to the CPI..*
>
> *The method of assessment therefore seeks to determine financial loss at the time of dispossession taken to current day values*[10]*. It does not, as found in the minority judgment of Florence, measure compensation by reference to the position the claimant should have been in "but for" the dispossession*[11]*.*

34. In the present case ss 33 (b), (c), (eB) and (f) are particularly significant. Over and above the value of the property at the time of dispossession they also require the court to take into account the current use of the land, the history of its acquisition, the history of the dispossession, the desirability of remedying past violations of human rights and dignity and the requirements of equity and justice.

I would add that inferentially, if the primary objective is restitution of the land that was taken away through racially discriminatory laws and practices, then if restoration is not feasible, considerations of equity and justice as well as the court's residual duty to consider any other relevant factor consistent with the spirit and objects of the Constitution requires that some consideration at least be given to the discrepancy, if any, between the value of the land based on its current

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[8] *Florence* at para 125.
[9] *Id* at para 122
[10] *Id* at paras 101 and 131-133.
[11] *Id* para 53

natural attributes if it was capable of restoration and the CPI adjusted methodology in calculating the market value at the time of dispossession.

35. In the present case, in order to determine whether any regard should be had to the current market value (which is more than double the CPI adjusted value at the time of dispossession) consideration should be given to the likelihood of the Izaacs continuing to own the erven or whether such a consideration would be entirely speculative. If for instance, they had acquired the land for a short term clearly no regard could be had to current market prices.

36. The evidence before the court indicates that the erven had been acquired over almost a twenty year period by an entrepreneurially astute family. who had grown the portfolio of land acquired along the Gariep River and had rented it out for the equivalent of £ 30 pa. This equated to a 2.5% pa return on the land value at the time. Those who bought there and who were not subjected to racially discriminatory laws or practices tended to remain as there were few recorded sales.

37. By 1913 the Izaacs were an established farming family engaged in livestock, leasing water-erven and considerably expanding their livestock. It is therefore unlikely that they would have disposed of the erven. The probabilities are that they would have retained their land in Gordonia and exploited it to good advantage.

38. But for the failure to recompense the Izaacs family for their livestock losses as a consequence of the rebellion, and on which they were dependant, the evidence demonstrates with a sufficient degree of certainty for the purposes of s 33, that the family would have remained on the land indefinitely and as entrepreneurial farmers who had access to finance and would have always used the erven to best advantage. If they sold the erven at any stage it would have been as cultivated to best purpose.

39. *Florence* tells us that equitable redress has regard to what was "*taken away at the time of dispossession*" but then regard must still be had to all the relevant

considerations as required by s 33. In undertaking that investigation "a *history of hardship caused by the dispossession may entitle a claimant to a higher compensation award in order to assuage past disrespect and indignity*". [12]

40. Section s 33 (eB) in particular entitles a court when considering the restoration of dignity and the overarching considerations of equity and justice to have regard to the current use of the property. In the present case the evidence conclusively demonstrated that the Izaacs family who were farmers had a strong attachment to the land in question for purposes of exploiting it for agricultural purposes.

41. In addition to seeking compensation based on the current market value of the erven, the plaintiff also claimed compensation for the loss of use of the erven since dispossession. This was based on the rental returns which the family had derived by leasing the erven out at the equivalent of an initial rental of £30 per annum. It was argued that this yielded an annual rate of return calculated at 2.5% of the property value. The revised calculation by Mr Lowther on behalf of the plaintiff valued the loss at R 5.496 million.

42. Mr Lowther sought to give evidence on what he termed putting "*a number on hardship*". He also contended that the amount of rental received might not have been consumed each year but invested in the education and development of the family and that it was reasonable to accumulate each annual value to 2018.

43. The court ruled that the aspects dealing with placing a monetary value on hardship were outside Mr Lowther's field of expertise and disallowed his evidence in that regard. Furthermore, the assumption of what amount of revenue derived from the leases would not have been consumed in the ordinary course by each successive generation of the Isaacs family is entirely speculative.

44. *Adv Krige* on behalf of the plaintiff however relied on compensation being based on the *aquilian* action for actual patrimonial loss and sought to correlate that

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[12] Both extracts from *Florence* at para 124

directly to what he submitted were "*the gross injustice and violation of the Isaacs' family's human rights*", being considerations identified in s 33 of the Act.

45. In my view care must be taken that issues of dignity, equality and justice as well as remedying past violations of human rights remain linked to the consequences of the dispossession from the land. This is because restitution is only available by reason of dispossession consequent upon racially discriminatory laws and practices. Compensation and the considerations on which it is to be based in terms of s 33 remains umbilically linked to the loss of land and its consequential effect on those entitled to claim. In many cases it may be difficult to draw the line because of the all-pervasive nature of racist laws and practices prior to the advent of our democracy.

46. There is clear and uncontradicted evidence that the Izaacs family of Gordonia suffered the indignity and humiliation of being treated as second class citizens in the land of their birth. They were demeaned by others by reason of the incidence of birth, endured the humiliation of being degraded and openly treated and spoken down to as inferior people.

    Prof Legassick described how General Smuts, endorsed the views of Olive Schreiner on the "*half-caste*"; a person she described as "an *outcast – with settled habits and social level of neither white nor black*". The Professor also noted that: "*In a keynote speech on segregation given in London during the First World (22/5/1917), General Jan Smuts stated "There are certain axioms which have been laid down in regard to the black and white races. One is that there must be no inter-mixture of blood."* Reference may also be had to para 5 of Prof Legassick's report which was reproduced earlier.

47. The dispossession itself resulted in a complete reversal of fortunes for a solid farming family who had been financially well off. They were effectively reduced to the clothes on their back, unable to provide even a decent education for their children.

The failure to compensate was directly related to discriminatory practices and directly resulted in the Izaacs family having to leave the land and endure the life of labourers and of thwarted opportunities.

48. Our laws recognise that transformation and restoration of dignity is not achieved within a generation or even two. The experiences of others who were regarded as second class citizens both here and in other countries are well document and the scars do not heal even after several generations; particularly when it concerns dignity and equality, whether of the individual, family or community.
49. The hardship endured by the present plaintiff and those he represents clearly was not as severe as it was for the claimant himself. Nonetheless it pervades the family psyche and affects the next generation if regard is had to the anguish and degradation of not being accepted within the broader society at a critical phase in the family's fortunes by reason of an abnormal society which had quite literally bastardised them.

50. The question is how does a court correlate in monetary terms the hardship endured by previous generations to an appropriate award of compensation for the present generation in order to give effect to the s 33 considerations that must be taken into account.

51. In my view to consider the present plaintiff's claim on the footing of a delictual claim under the aquilian action or to apply principles of *litis contestatio* on the death of a claimant is to ignore the fundamental nature of restitution under the Act as expressed by the leading cases as well as the provisions of the Act with regard to claims which survive a claimant's death.

In *Jacobs* the Supreme Court of Appeal expressly held at para 16 that:

> "*Importantly, the court made it clear that in determining what was just and equitable, the computation of compensation was fundamentally different and was not to be likened to a delictual claim aimed at awarding damages that were capable of precise computation of loss on a 'but for' basis. It also differed from compensation paid for expropriation, where the person whose property is expropriated would be entitled to compensation for the current*

market value of property, for any actual financial loss caused by the expropriation, and where the possibility of future loss must be taken into account in determining compensation.

52. In *Florence* the Constitutional Court said at paras 131 to 133 that:

"[131] … The starting point and main plank of the Restitution Act is an acknowledgment of widespread dispossession that occurred since 19 June 1913 and the need for equitable redress in the form of restoration of land or financial compensation. The legislation does not warrant an approach that fixes compensation as if the loss never occurred. Nor does it warrant awarding a full replacement value of the taken subject property.

[132] Section 2(2) of the Restitution Act provides powerful indicators in support. First, it expressly prohibits relief to any person who received just and equitable compensation or a similar consideration at the time of dispossession. This means that the scheme of the Restitution Act makes the time of dispossession the critical starting point of an assessment of financial compensation. The Government is right that the purpose of the financial compensation is to provide relief to claimants in order to restore them to a position as if they had been adequately compensated immediately after the dispossession. It must be correct that just and equitable financial compensation does not aim to restore claimants in current monetary terms to the position they would have been in had they not been dispossessed, but rather the financial loss they incurred at the time of dispossession.

[133] Further support for this approach is to be found in the very enactment of section 33(eC) of the Restitution Act. The scheme of the Restitution Act undoubtedly aims to compensate financial loss as at the time of dispossession. That explains why just and equitable compensation would have to reflect the change, from the time of dispossession to the time of compensation, in the value of money. If compensation were based on the fiction of continued ownership of the property, its possible financial trajectory or capital-gain would be difficult to compute. The purpose of compensation

advanced by Ms Florence is inconsistent with the purpose of the Restitution Act and in any event unwieldy and would lead to over-compensation.

(emphasis added)

53. The Constitutional Court's concern, that basing compensation on the fiction of continued ownership post-dispossession would be difficult to compute, be unwieldly and lead to over-compensation, was also taken up in *Jacobs* where Mbha JA at paras 18 to 20 said.

[18] Clearly, the appellant's attempt to justify an increased award is flawed. The Constitutional Court has held that using the current value of the property and the value of past loss of use of land are not the measure of what is just and equitable. If the LCC had used these measures, this Court would unhesitatingly have held that the discretion vested in that court had not been judicially exercised or had been influenced by wrong principles.

[19] In deciding what would be just and equitable compensation for the dispossession of the Farm Uap, the LCC had due regard to the factors listed in s 33 of the Act and accepted, in particular, that the September family had suffered hardship as a result of being dispossessed and subsequently evicted from their land. This factor justified an upward movement in the award, ultimately arriving at the figure of R10 million as just and equitable compensation.

[20] In rejecting the appellant's claim, the LCC correctly found that the appellant's approach seemed to be at odds with the views of the Constitutional Court in Florence, and that such an approach was based on the 'fiction' of undisturbed perpetual ownership and commercial exploitation of the land. Importantly, the LCC held that if that approach were to be adopted, the court would open a vortex of speculative claims premised on unknown variables of the trajectory of the land and its use, absent the dispossession. I am unable to fault the reasoning of the LCC. I find, accordingly, that the appeal in respect of the Farm Uap must fail."

(emphasis added)

54. In all the circumstances, in a meaningful way a court compensates a claimant for not being able to return to the land (which itself can contribute to restoring dignity and self-esteem).by taking into account the CPI adjusted value of the land at the time of dispossession *and* the other s 33 considerations.

Florence informs us that these considerations are also to be counter-weighed by the strain on the fiscus in providing restitution whether by acquiring the land back or *via* other forms of restitution.

55. The State contends that in addition to the CPI adjusted value of the erven at the date of dispossession in the amount of R 475 000 there should be added an amount of R 675 830 for "*hardship allegedly experienced*" making a total amount of R 1 149 830. Little indication is provided as to how this amount is determined. It appears to be more arbitrary.

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56. The Plaintiff on the other hand seeks the impermissible; attempting to place the Izaacs family survivors in the same position as if there had been no dispossession. This is contrary to the cases of *Florence* and *Jacobs* which are both binding on this court. Furthermore the plaintiff performs his calculations without regard to the vagaries of life, ignoring contingencies and making unrealistic assumptions.

57. This is a case where the ravages that racial discrimination wrought on the Izaacs family financially, physically and emotionally requires to be compensated in monetary terms based on the factors set out in s 33.

In doing so it is necessary to give effect to the *ratio* of *Florence* at para 124[13] and its application in *Jacobs* at para 19 (cited earlier).

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[13] The full text of *Florence* at para 124 reads:

Equitable redress must be sufficient to make up for what was taken away at the time of dispossession.149 The amount of compensation has to be just and equitable reflecting a fair balance between public interest and the interest of those affected after considering relevant circumstances listed in section 33 of the Restitution Act. For instance, a history of hardship caused by the

58. In the circumstances of this case equitable redress requires that the s 33 considerations which apply, being in particular subparas (b), (c) (eB) and (f) (in relation to the right to dignity) should result in a substantial increase to the amount of R475 000 determined as the CPI adjusted value of the erven at the time of dispossession. One of the factors is that historically the Izaacs family had used their lands to their best potential and were financially able to do so but for the dispossession The court is satisfied that if at the time of dispossession the establishment of vineyards was the best use to put the natural attributes of the erven, then the family would have done so.

    The Izaacs family are entitled to have this taken into account in order to satisfy the requirements of the section, including the spirit and objects of the Constitution and in order to mitigate their hardship and suffering which is directly attributed to the racially motivated disrespect, indignity and economic exploitation they endured as so-called "*basters*" at the hands of the then government, its leaders and officials.

59. In total the monetary value of the s 33 considerations, apart from the CPI adjusted value of the erven at the time of dispossession, should not exceed the current value of the erven, which is in the amount of R1.5 million; but it also should not be less than that amount in order to give proper effect to the requirements of s 33 read as a whole. The other s 33 considerations therefore amount to just over R1 million[14] which sum is to be added to the CPI adjusted value of the erven at the date of dispossession.

60. The court sat with Reverend Mbuyiselo Stemela as the assessor, and is grateful to him. He is in full agreement with the factual outcome and the reasons for it.

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dispossession may entitle a claimant to a higher compensation award in order to assuage past disrespect and indignity

[14] R1.025 million to be precise

COSTS

61. No costs were actually borne by the plaintiff personally since the State bore these costs throughout the proceedings.

ORDER

62. It is for these reasons that the court granted the following orders:

1. *The First and Second Defendants shall pay to the descendants of Caroline Regina Izaacs, Joseph Johannes Izaacs Jnr and Johan Donald Izaacs the sum of R1.5 million Rand (One Million Five Hundred Thousand Rand) in accordance with the provisions of the Restitution of Land Rights Act.*

   For sake of clarity, Izaacs has also been spelt Izaks by the Plaintiff

2. *The plaintiff, Ian Jacobie Izaacs, was substituted as the designated plaintiff for John Donald Izaacs on the latter's death. John Donald Izaacs having been cited as such in terms of para 6 of the particulars as acting;*

   a. *on behalf of a group or class of persons, being the descendants of Caroline Regina Izaacs, Joseph Johannes Isaacs Jnr and John Donald Izaacs as joint owners of the properties that were in issue under the above claim;*

   b. *on his own behalf as a direct descendant of his (i.e. John Donald Izaacs) grandfather*

   and accordingly the plaintiff shall prepare a schedule of descendants entitled to participate in the proceeds of the award claim as set out in para 4 hereof;

3. *The schedule referred to in the previous para of this order shall;*

   a. *Contain a family tree so that the surviving descendants may be identified together with their pro-rata portion of the proceeds*

   b. *Explain how the pro-rata portion of each surviving descendant is determined as well as identify which section of the Restitution of Land*

Rights Act is relied on for identifying each beneficiary entitled to participate and how distribution is to be effected where a deceased estate is involved;

c. *Be served on each known beneficiary and executor of any relevant deceased estate, affording each15 days to give written notice of any intention to object to the planned distribution, which notice shall be delivered to all the cited parties and the court ad shall give an address of the legal representative and all relevant contact details including email addresses and cell-phone numbers*

d. *Should any descendant reside outside the Republic of South Africa steps must be taken to obtain an order for service to be so effected*

4. *By no later than 21April 2023, the plaintiff shall depose to an affidavit which shall;*

   a. *Set out the steps taken to identify the surviving beneficiaries*

   b. *Provide the family tree and the basis of the pro-rata apportionment of the proceeds to each*

   c. *Provide the explanation set out in para 3(b) hereof*

   d. *Identify the executors of all relevant estates of the descendants of Caroline Regina Izaacs, Joseph Johannes Isaacs Jnr and John Donald Izaacs (being the great-grandfather of the plaintiff) through whom the first and second respondents should make payment, or explain how the distribution is otherwise to be effected*

   e. *Provide proof of service of this order and that specific attention to para 3(c) above has been given to the descendants and to the executors of relevant deceased estates as the case might be*

   f. *Identify who, if anyone, opposes the proposed distribution or method of distribution*

5. *Payment of the R1.5 million is to be made into an interest bearing trust account held by the plaintiff's attorney of record within 15 days from date of this order*

   Such payment shall be deemed to be payment effected by the first and second defendants in terms of para 1 above to the descendants so entitled

6. *Failing payment within the said 15 day period, the first and second defendants shall pay interest at the legal rate from two weeks after date of judgment to date of payment.*

7. *The plaintiff's attorney of record shall hold such amounts as aforesaid in an interest bearing trust account as stakeholder and shall only be entitled to pay the amounts out as determined by the court in the manner set out in para 8 hereof*

8. *The amount of R1.5 million together with such interest as may accrue shall be paid to such descendants as are entitled to it, or the executors of the relevant estates for distribution, as the case might be and as determined by the court after it has received the affidavit set out in para 4 above and given further directions as to the finalisation of the payments and the determination of those entitled to payment out of the monies that the first and second defendants paid into the attorneys' trust account as aforesaid*

9. *No order as to costs, the Plaintiff's legal costs already being covered by the State.*

SPILG, J

DATE OF FINAL JUDGMENT:	4 October 2023
FOR PLAINTIFF:	Adv J Krige
	Chennells Albertyn
FOR DEFENDANTS	Adv ZZ Matebese SC
	Adv T Tyuthuza
	The State Attorney, Kimberley