IN THE LAND CLAIMS COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

Case number: **LCC 2019/42**

(1) REPORTABLE: **YES**
(2) OF INTEREST TO OTHER JUDGES: **YES**
(3) REVISED. **8 August 2022**

SPILG, J

In the matter between:

GREGORY JAMES PILLAY N.O.	Plaintiff
and	
THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA	First Defendant
THE CHIEF LAND CLAIMS COMMISSIONER	Second Defendant
COMMISSION ON RESTITUTION OF LAND RIGHTS	Third Defendant
THE DEPARTMENT OF RURAL DEVELOPMENT AND LAND REFORM	**Fourth** Defendant
REGIONAL LAND CLAIMS COMMISIONER FOR THE EASTERN CAPE	**Fi**fth Defendant

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JUDGMENT

SPILG, J

24 June 2022

INTRODUCTION

1. This is an action for compensation in terms of s35(1) (c) of the Restitution of Land Rights Act 22 of 1994 (*"the Act"*). It arises from a land claim lodged by Mrs Annie Francis Hambridge in early 1996.

2. She had lodged the claim for restitution of the land itself on the basis that she was the widow of James Hambridge who had lost the right to the land which she had "*shared*" with him, that she was unaware of any other family member who had an interest in the land and that "*we had lost our life-time investment in property*",

3. The land in question was erf 112 Fairview, Gqeberha, measuring 2 838 m^2 situated at 2 Wattle Road, on the corner of 17th Avenue, in the suburb of Fairview. It will be referred to as "*112 Fairview*".

4. The claim was only gazetted in October 2008, by which stage Mrs Hambridge had passed away. She had died in September 2006.

5. Mrs Hambridge left a will and her executor was duly substituted *nomine officio* as the claimant by order of this court in October 2014. The executor is Gregory James Pillay ("*Pillay*") who is the cited plaintiff.

6. In the statement of claim, which was delivered in April 2019, Pillay alleged that Mr James Hambridge had owned 112 Fairview and when the area was declared a White Group Area on 11 June 1965 pursuant to the provisions of the Group Areas Act 77 of 1957, the property became an affected property. Because Mr Hambridge was classified as a member of the so-called "*Coloured Group*" he was forced to sell the property to the Community Development Board ("*the CDB*") which was a statutory body.

   The land was therefore expropriated by the State in furtherance of racially discriminatory legislation.

7. The statement of claim further alleges that 112 Fairview was registered in the name of the CDB in August 1971 and that Mr Hambridge was paid out R4 000 as compensation for the expropriation. It is alleged that the amount was well below the market value, should have been R17 000 at the time, and therefore was neither just nor equitable as contemplated in s 2 (2)(a) of the Act.

As a further consequence of the forced sale, it was alleged that the Hambridge family incurred transfer duty in order to purchase an alternative property. The amount was 1% of the R4130.44 purchase price (paid on 9 March 1978). It was also alleged that at the time another family also occupied 112 Fairview with the Hambridges and they were also required to purchase a new property. They too were obliged to pay transfer duty (on 20 July 1972) which was 3% of R4500 and in addition paid stamp duty in the sum of R13.75. All these costs are identified as the associated losses incurred as a consequence of the dispossession.

The amount of under-compensation and associated losses adjusted by the consumer price index ("*the CPI*") to values at 20 July 2018 amounted to R 881 200. The claim seeks to have the capital claimed adjusted having regard to the CPI at date of judgment

8. The statement of case alleges that the forced sale and the under payment of compensation by the CDB as well as the associated losses incurred were all as a result of past racially discriminatory laws and practices under the Group Areas Act.

Although the basis of the claim as pleaded is for an amount of compensation which represents the difference between the amount paid and what ought to have been paid if based on a fair market value, the statement of case adds that in awarding compensation the court should have regard to:

(a) The desirability of providing for restitution of rights in land to the claimants who were dispossessed as a result of past racially discriminatory laws or practices;

(b) the desirability of remedying past violations of the Hambridge family's human rights including dignity, their rights to hold and maintain their property, to keep their family intact and the right not to be discriminated against unfairly;

(c) the requirements of equity and justice which dictate that compensation as claimed should be paid;

(d) the desirability of avoiding major social disruption by awarding compensation since it is impracticable or unfeasible to restore the property itself;

(e) the dispossession having deprived the family of a secure spacious home that house two families who had to seek an abode elsewhere.

The underlined words indicate that, save for the last factor, the considerations are those affecting the Hambridges.

To a fair extent the considerations relied on encapsulate many of the factors identified in s 33 of the Act which are relevant to this case and which a court is obliged to take into account.[1]

The full text of s 33 reads:

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

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[1] It should be recalled that the Act was introduced to give effect to section 25(7) of the Constitution which reads:

> *"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".*

The applicant's argument was crafted primarily on the application of s 25 of the Constitution to the case. It seems that the underlined portion of s 25(7) requires the court, as with other legislation borne out of the Constitution, to have regard to the terms of the statute. Section 33" must *be seen as a suite of guidelines, when relevant to a particular matter*" (*Florence v Government of the Republic of South Africa* 2014 (6) SA 456 (CC) at para 122)

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.

As the trial progressed it became apparent that the plaintiff was not seeking compensation in excess of the amount which should have been received in a normal market (plus the additional losses). The allegations that the s 33 requirements are to be taken into account, which in its terms also requires that regard be had to s 9 of the Constitution (the equality provision)[2], were to buttress the case for compensation based on not less than a fair market value- not compensation in addition to that.[3]

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[2] 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.

[3] The method of pleading adopted by the plaintiff's legal team is the correct one: Firstly, s 33 of the Act obliges the court to have regard to all relevant factors and market value, as important as it is, is not the only factor in

9. It will be observed that the statement of case also refers to costs incurred by the Bellairs family, who were obliged to pay transfer duty and stamp duty in acquiring another property. Earlier in the pleading Pillay had alleged that the Hambridges "*shared occupation of the property with Annie Francis Hambridge's family, the Bellairs*".

10. This is significant because the statement of claim is clear that 112 Fairview was owned by Mr Hambridge, that on his death it was inherited by his wife and that Pillay is claiming compensation on behalf of her estate.

    Nowhere in the statement of claim is it alleged that the Bellairs had any rights in the property itself; only that they occupied the property as family members of Mrs Hambridge.

11. It will also be observed that the statement of claim seeks equitable redress in the form of monetary compensation, and not restitution as originally claimed by Mrs Hambridge. This is understandable since the length of time it has taken since 1996, when the claim was lodged, had resulted in the property, pursuant to being consolidated with at least one other stand, being part of a development on which there is now a Mercedes Benz car dealership.

12. The Chief Land Claims Commissioner, the Commission of Restitution of Land Rights, The Department of Rural Development and Land Reform as well as the Regional Land Claims Commissioner for the Eastern Cape were all cited as defendants (second to fifth respectively).

13. In the initial plea the only significant challenge was to the quantum claimed. The defendants contended that the market value at the time of the dispossession should have been R10 047.96 not the R4000 actually paid out, resulting in a shortfall in 1971 terms of R 6047. 96 which, based on current monetary values, equated to R 331 730.

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determining what is just and equitable compensation. Those 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 actual 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 Affairs LCC* 120/1999 at paras 32 and 33 *(unrep. Judgment on 6 January 2017- Justice.gov.za website).*

14. However, when Pillay commenced testifying on 14 September 2020 he revealed that there had existed what he termed "*a gentleman's agreement*" between Mr Bellairs and his brother-in-law, James Hambridge, to purchase the property together as a family since it could accommodate both families and, although it would be registered in the name of James Hambridge both would actually own it.

    Pillay said that in terms of this agreement both families contributed towards paying the bond, the upkeep and so forth for the property[4].

    He also said that the proceeds of the R4000 payout received from the CDB were divided equally between Mr Hambridge and his grandfather, Mr Bellairs.

15. This precipitated the defendants amending their plea to allege that Pillay (as executor) was not the only party to be dispossessed of 112 Fairview and that further claims may be lodged in the future by descendants of the Bellairs family- so that if the court finds that they were also dispossessed then the plaintiff's claim should be apportioned accordingly.

    Pillay filed a replication in which he admitted that the two families shared occupation of the property, that half the compensation received from the CDB was given to the Bellairs, alleged that Mrs Hambridge's will gave effect to the "*gentleman's agreement*" in that half of the proceeds of her claim was bequeathed to Gertrude Johanna Bellairs (who was

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[4] Record 14 September 2020 p 24 line 10 to p 25 line 21
Pillay also explained the background to the events which led to the purchase of 112 Fairview. The record reads as follows:

> *"But my grandfather wanted you know, to take his family, to take them out of the town and the idea was to offer them a better life by moving to Fairview where you had vast open spaces, fresh air and hoping that we enjoy it there which [indistinct] we could live off the land.*
> *So they joined forces, my grandfather as well as the Hambridge couple, they joined forces and they took out a bond and purchased the property for 650 pounds*
> .....
> *So this was a major achievement for my family at that point in time. They were the first of the family in fact to own property and you know my grandfather deemed it as progress. You know the money they had saved to buy the property. So you know, this was in actual fact an achievement for them as being the first to do that.*
> *MR KRIGE: To own property?*
> *MR PILLAY: Ja. I think what I would like to explain a little further. There was a gentleman agreement between my grandfather and his brother-in-law, James Hambridge that they will purchase this property together as a family but it could accommodate both families.*
> .....
> *They had a gentleman agreement that it would be registered in the name of James Hambridge but in terms of ownership [indistinct] but in actual fact [audio distortion]. You know they had this agreement, both families contributed towards the upkeep and to paying the bond, etcetera for the property.*
> (emphasis added)

Pillay's grandmother) or her issue by representation *per stirpes*. The replication then, echoing the position taken by Pillay in evidence, disquietingly stated:

> *"The gentleman's agreement was not enforceable in law, alternatively, it gave rise only to a personal claim against James Hambridge or his heirs for 50% of the nett value of the property received upon the sale for dispossession.".*

It should be added that Pillay confirmed in evidence that the final liquidation and distribution account had been approved and Mrs Hambridge's estate had been wound up. The indication the court received was that it was unlikely that the estate accounts would be re-opened any time soon and that Pillay's state of health may not enable him to complete doing so.

COMMON CAUSE

16. It is common cause that the Hambridge and Bellairs families were dispossessed of their right in land (at least in the broad sense) as a result of past discriminatory laws and practices which, as will appear later, were not confined to the expropriation of their property under the Group Areas Act.

    The Group Areas Act was part of a grid of repressive laws which, on the basis of racial discrimination, enabled the Government of the time to compel the removal of people from one area to another solely by reason of the colour of their skin. In some instances the removal was done in terms of the Expropriation Act 63 of 1975 which at face value suggested that the price paid for the land in question would be market related and therefore fair.

17. In the present case the State accepted that the expropriation had been preceded by regulations which declared the whole of Fairview a slum.

    This can only be described as a callous strategy to reduce the value of properties in the suburb so that when the properties were expropriated in pursuit of its policy of racial segregation the government would pay a much reduced value. This is because the calculation of a market value for property in a declared slum area would have regard to the unimproved land only: It would disregard the value of the homes built on the property and all other improvements such as outbuildings. In other words, because the area was

declared a slum any structures on it would have to be demolished and therefore had no value.

The defendants also accepted that the strategy was enabled by racially discriminatory laws and practices. This must be correct. One cannot look at the Slums Act in isolation. Its application in the present case could only have been enabled for an ulterior purpose that was neither contemplated nor intended because, by reason of the arsenal of racially discriminatory laws and practices at the State's disposal, those affected were subjugated and had no vote, no effective voice or representation at any effective level of government.

18. It is also common cause that the amount received pursuant to the expropriation did not reflect the actual market value of the property if only because no compensation was calculated for the dwelling on it.

Furthermore the plaintiff had properly deducted the amount actually received when 112 Fairview was expropriated from any compensation to which the estate is entitled,

In addition, the actuarial calculations employed to determine current values based on the CPI were also agreed on.

METHODOLOGY

19. Both parties purported to apply the test adopted by Gildenhuys J in *Ex Parte Former Highland Residents; In Re: Ash and others v Department of Land Affairs* [2000] 2 All SA 26 (LCC) when determining equitable compensation in cases where land is not restorable.

In terms of the judgment, the court first considers the market value, because that is one of the factors which s 33 of the Act as read with s 25 (3) of the Constitution requires to be taken into account. The other factors to which a court may have regard under the Act can then be added to or subtracted from the market value in order to provide *just* and equitable financial compensation. [5]

[5] See *Florence* at paras 125

The second leg of the enquiry may require relevant factors to be weighted and given a monetary value. Sometimes the value may be objectively determinable by reference to comparable benchmarkers, or it may more properly constitute a form of constitutional damages sanctioned by s 33 of the Act involving value judgments translated into an appropriate monetary sum. The enquiry would be similar to determining general damages in bodily injury cases; save that those calculations are based on an extensive body of comparable cases- which would not have been the case during the early development in that field of law.

The present case does however raise issues if the two stage enquiry is too rigidly applied.

Firstly, the objective is to provide compensation in the form of damages. [6]

The considerations which a court must take into account when determining damages are set out in s 33 as informed by the Constitution when required. They may be construed as a form of statutorily sanctioned constitutional damages arising from pre-1994 discriminatory legislation and practices. [7]

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[6] In *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC), at para 62 read with paras 60 and 61, Ackerman J used the term "*compensatory damages*" to describe "*damages to vindicate the fundamental rights of the plaintiff alleged to have been infringed*". Labelling the nature of the claim as one for compensatory damages, or even restitutionary damages may be problematic because, in their ordinary use to differentiate classes of damages under jurisdictions applying common law contractual or even delictual remedies, neither terms fully match the method for assessing compensation under s 33 of the Act in the manner required by Florence. See Bothma *& Others v Bothma N.O & Another* [2021] ZASCA 46 at paras 46 and 47; *Morris-Garner and another* v *One Step (Support) Ltd v* [2018] UKSC 20 at paras 11 and 120; Allen *v Scheibert* (unrep. case no 14136/2010 WC per Blignault J at paras 47 to 49.

The term "*damages*" has been defined as "*the diminution, as a result of a damage causing event, in the utility or quality of patrimonial or personality interest in satisfying the legally recognised needs of the person involved.*" See *Law of Damages* Visser and Potgieter p22 (1993). It therefore includes considerations of both patrimonial and non-patrimonial loss which the law (whether under the common law or statute) recognises as claimable. Compare Mphela *and others v Engelbrecht and others* 2005 JDR 0238 (LCC) where Moloto J referred to *S Leckie: Returning Home: Housing and Property Restitution Rights of Refugees and Displaced Persons* 2003 at p3 - 24. and the Permanent Court of International Justice case of *Chorzow Factory (indemnity case Germany v Poland)* (1927) P.I.C.J. (ser. A) No 17 at 47.

[7] Constitutional damages are said to arise in cases where no delictual remedy is available at the time of infringement or where the delictual remedy does not compensate for the infringement of personality rights. See van der Walt and Midgley *Principles of Delict* (4th) at para 65 when discussing *Fose* at paras 60-61, 67 and 74. The authors also refer to *MEC, Department of Welfare v Kate* 2006 (4) SA 478 (SCA) at para 27.

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. this therefore proceeds from the stand point of not a methodology which would commence.

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]. However the best source of *evidence* to determine the financial loss at the time of dispossession when using the comparative sales method (as the parties had agreed was the correct approach in the present case) is to be established by applying a "*but for*" test- but for the past discriminatory laws and practices, what would the position of the claimant (or the claimant's predecessors) have been?[12]

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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
[12] In *Florence* at para 125 Moseneke DP said: "*But compensation within the scheme of the Restitution Act is neither punitive nor retributive. It is not to be likened to a delictual claim aimed at awarding damages that are capable of precise computation of loss on a "but-for" basis.*

If regard is had to the focus of this passage, which was in answer to van der Westhuizen J's view that "*a claimant should generally be placed in the position that she would have been in, but for the dispossession*" and to the majority judgment as a whole, it is evident that the "*but for*" issue was raised in the context of whether the assessment of compensation should be determined by placing the claimant in the position he or she would have been in at time of judgment "*but for*" the dispossession, as opposed to compensating the claimant for the difference between the amount actually received at time of the dispossession and the amount that should have been received. See para 51 of the minority judgment and also the balance of para 125 read with para 124 and paras 130 to 132 of the majority judgment.

The method of assessment determined in *Florence* adopts the common law principles applicable to assessing the patrimonial portion of loss in delict by reference to negative *interesse* as opposed to placing the person in the position he or she would have been in if the event causing the loss had not occurred at all (i.e. positive *interesse*). See *Lillicrap, Wassenaar & Partners v Pilkington Bros (SA) (Pty) Ltd* 1985 (1) SA 475 (A) at 505H to

This would mean that, where the exercise undertaken establishes that property in the area where the dispossession occurred was similar to that in a comparable area which was not subject to such dispossession, there is no need to undertake a laborious exercise of first trying to establish a value for each of the component parts (as was done by the experts in this case) and only then have regard to the other factors mentioned in s 33.

By way of illustration; if there were two identical properties in close proximity to one other which are sold at the same time, the one subject to dispossession through the implementation of discriminatory laws and practices and the other not, then the fair market value for the former would be the price fetched by the latter. In this situation there is an immediate set-off (at least in determining the market value) because the effect of the discriminatory law which came into play in respect of the dispossession was not present in the case of the open market sale.

The same methodology is likely to be less speculative even if the comparable property is not identical as regards size or the nature of the improvements effected on it.

THE ISSUES

20. There are two main issues;

The one concerns the extent to which Pillay can claim full compensation on behalf of the Hambridge estate since the Bellairs family also have an interest in any compensation that may be awarded. I will refer to this loosely as the *locus standi* point

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506 E and compare the statements by Farlam J (at the time) in *Mainline Carriers (Pty) Ltd v Jaad Investments CC* 1998 (2) SA 468 (C) at paras 31 to32 and 57 to 59 in relation to the assessment of contractual damages.

Accordingly the reference in *Florence* to the "*but for basis*" was to the appropriate method of assessing damages (analogous to determining whether a negative or positive interesse assessment should apply). It was not a reference to the analytical tool used to establish the true market value at time of dispossession of the property but for the effect which the application of discriminatory laws or practices had on such value (i.e. the evidential evaluation). The just and equitable considerations referred to in s 33 will then be considered to the extent that they have not already been taken into account during the "*but for*" analysis. In this way the determination of just and equitable compensation under the Act is "*evaluated not only from the perspective of the claimant but also of the state as the custodian of the national fiscus and the broad interests of society as well as all those who might be affected by the order made*" (per *Florence* at para 125).

The other relates to identifying comparable values (the plaintiff refers to this as comparable substitution). This also involves whether, and if so to what extent, the evidence of witnesses who gave evidence regarding the market value of 112 Fairview and comparable properties ought to be received into evidence.

The parties are however at one with regard to the extent to which the dispossession took its toll on the Hambridges and Bellairs as well as Pillay and affected their human rights and dignity. A difficulty in bringing this into contention would only have arisen if an amount greater than the fair market value was used to determine the full amount of compensation allegedly due. It would have raised questions of whether the monetised value of such effects on the Hambridges or Bellairs can be passed on as part of the claim after their death or whether it is only the effect on the survivor in the family which is to be considered.

These issues do not arise because the amount claimed is based on the fair market value and the outcome we have reached meets all the criteria set out in s 33, including that the result is also fair having regard to the larger public interest and its impact on the *fiscus*.

THE EXECUTOR'S LOCUS STANDI

21. *Adv. Krige* for the plaintiff argued that Pillay was entitled to receive the full amount of compensation which may be awarded since Mrs Hambridge alone had made the claim and there were no surviving family members, while Pillay had been made the executor of her will and a beneficiary.

22. *Adv. Rawjee* for the State submitted that the executor was only entitled to 50% of the compensation awarded since, on Pillay's own evidence, he only represented the Hambridge estate and the Bellairs were half owners of 112 Fairview,

23. I have difficulty with each party's analysis of the factual and legal position

24. The factual position is straight forward.

Mr Bellairs who was Pillay's grandfather was married to Mr Hambridge' s sister. Her name was Gertrude Bellairs.

The Hambridges were childless whereas the Bellairs had eight children. Pillay testified that Mr Hambridge and Mr Bellairs joined forces to acquire 112 Fairview which was large

enough to accommodate both families. Prior to that the Bellairs lived in Korsten where Pillay was born.

It is evident that at the time the Hambridges were better off financially than the Bellairs and it was Mr Hambridge who was able to secure a bond in his name. However, both Mr Hambridge and Mr Bellairs contributed equally to servicing the bond. When the property was expropriated, although payment of the R4 000 compensation was made by the CDB to Mr Hambridge the amount was shared equally between the two family heads. Mr Hambridge used his R2000 as part payment to purchase a home in Bethalsdorp and Mr Bellairs used his portion of the proceeds in order to buy a residence in Korsten.

25. Mr Hambridge died in 1977. Mrs Hambridge died in 2005. In terms of her last will and testament, which was executed in August 1997 and in which Pillay was made executor, she provided specifically for the devolution of the proceeds of her restitution claim if it proved to be successful. Clause 2 of the will reads:

> *" Provided my application in terms of the Restitution of Land Rights Act (Act 22 of 1994) for the restitution of property being 2 Wattle Road, Fairview, Port Elizabeth (Erf 112 Fairview) of my late husband James Hambridge be successful, I give and bequeath the said fixed property to the following alive at the date of my death and in the proportions stated:*
>
> *a) 1 (one) part to my sister-in-law Gertrude Johanna Bellairs or her issue by representation per stirpes*
> *b) 1 (one) part to my nephew Gregory James Pillay"*

26. However Gertrude Bellairs had predeceased Mrs Hambridge. The former died on 19 January 2000.

27. This would mean that;

    a. if Mr Bellairs was the true joint beneficial owner of 112 Fairview with Mr Hambridge, then as he appears to have predeceased his wife she (Gertrude) would have been entitled to claim 50% of any award made pursuant to the claim.

       Since she died before the claim was finalised then it appears that s 2(3) of the Act would apply. The effect would be that;

i. if she had left a will then the executor of her estate, or failing such person the heirs of Gertrude, would have been substituted as claimants;

ii. if she had died intestate then the direct descendants alone would be substituted as claimants

and the substituted persons would be entitled to 50% of the total compensation awarded;

b. if alternatively, Mr Bellairs was not the true joint beneficial owner of the property then Mrs Hambridge alone would have been entitled to claim.

Since Mrs Hambridge died before the claim was finalised and Gertrude Bellairs had predeceased her, the application of s 2(3) of the Act would result in Pillay as executor of her estate being substituted for her, as in fact occurred.

But as regards the compensation to be awarded by this court, Pillay would have to distribute 50% of the total amount to Gertrude's surviving issue by representation *per stirpes*

c. In both scenarios Pillay would personally only be entitled to 50% of the total award.

28. Adv. Rawjee correctly submitted that Mrs Hambridge had completed the land claim form on the basis that her late husband had been the sole owner of the property and that there was no other family member who had an interest in the land or a claim to the land.

29. However I do not believe that the evidence volunteered by Pillay, that the Bellairs family had an interest, means that this court can make an award in these proceeding of no more than 50% of the compensation found to be due because the claim was submitted by Mrs Hambridge exclusively in her own name. There are a number of complimenting reasons for this;

a. If the claim was for restitution of the property then, even if she had not lodged her own claim, Gertrude Bellairs would have been an interested party and the court ultimately would have given the property back or, if it was no longer in State hands, the Commission would have paid out the new landowner. The underlying

principle and its application ought to benefit the same persons irrespective of whether the claim is for restitution or, if that is not possible (or if the claimants elect), equitable compensation- otherwise it would result in discriminatory treatment which may render the legislation or its application subject to constitutional scrutiny.

As a fact Mrs Hambridge's claim was for restoration on the basis that her late husband was the registered owner of the property from which they had been dispossessed as a result of past discriminatory laws and practices and in respect of which he had received only R4000 compensation at the time. Restoration might have been feasible at the time the claim was lodged in February 1996 but many years later the erf was consolidated and developed for commercial purposes.

On the basis that Pillay's evidence of the agreement between his grandfather (the late Mr Bellairs) and the late Mr Hambridge is to be accepted, then Mrs Hambridge had understood, and so directed in her will, that the property was to devolve as to 50% in favour of Gertrude Bellairs or her surviving issue *per stirpes* and the other half to Pillay. If that was a correct understanding of the rights she could dispose of, then the claim was properly made in her name for the benefit of both families. The fact that Pillay chose to call it a gentleman's agreement cannot influence the court. Firstly he was not even born at the time the property was acquired[13] and any information acquired would have been hearsay; secondly the determination of the binding nature of any agreement is a matter of law, not surmise on the part of a lay witness.

[13] 112 Fairview was registered in Mr Hambridge's name in December 1952. Pillay was born in June 1956 and only moved from Korsten with his mother to the Fairview property when already a youngster.

b. Secondly, although s 3 of the Act deals with a classic nominee situation which arose to overcome discriminatory laws [14] our common law as developed by the courts recognises a broader category of nominee type situations.[15]

Dadabhay v Dadabhay and another 1981 (3) SA 1039 (A) dealt pertinently with the issue as the judgment of Holmes AJA (at the time) at 1050A reveals:

> *"To sum up, in the present matter, on the case pleaded in the appellant's particulars of claim, there was an oral agreement that the respondent would buy an erf from the Board; that he would do so as "nominee" (which, as I have said, may well have been intended to mean "trustee") for the appellant; that there is no mention of monetary consideration for this service; and that, when called upon, he would sign all documents necessary to enable the erf to be registered in her name.*
>
> *Having regard to the authorities cited above, in my view the oral agreement is not hit by s 1 (1) of Act 68 of 1957; it is not a contract of sale or a cession in the nature of a sale.*

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[14] section 3 provides:

> *Claims against nominees*
>
> *Subject to the provisions of this Act a person shall be entitled to claim title in land if such claimant or his, her or its antecedent-*
>
> *(a) was prevented from obtaining or retaining title to the claimed land because of a law which would have been inconsistent with the prohibition of racial discrimination contained in section 9 (3) of the Constitution had that subsection been in operation at the relevant time; and*
> *(b) proves that the registered owner of the land holds title as a result of a transaction between such registered owner or his, her or its antecedents and the claimant or his, her or its antecedents, in terms of which such registered owner or his, her or its antecedents held the land on behalf of the claimant or his, her or its antecedents*

[15] See as far back as Lucas' *Trustee v Ismail and Amod* 1905 TS 230. Our law developed the principle of nominee holdings, allowing a property to be registered in the name of a person other than the beneficial owner (i.e. the nominee) but recognising the rights of the actual beneficial owner and his control over the nominee. These became legitimate ways to overcome the inequities which precluded ownership of property or other rights in land due to racial classification.

Finally, if the respondent purchased the erf in pursuance of the trust, the appellant is now entitled to demand of him that he complete the trust by signing the papers necessary to ensure registration in her name."[16]

In *Hadebe v Hadebe and another* [2000] 3 All SA 518 (LCC) at para 17 Gildenhuys J in applying *Dadabhay* said:

"The legal relationship between the plaintiff and the first defendant which emanated from the facts set out above, is that of an informal trust whereunder the first defendant (as "nominee", which could also mean trustee) would hold the property for the plaintiff."

c. Aside from recognising the nominee shareholder situation, our common law recognises the concept of undisclosed or silent partners where only one of them is disclosed while the other may remain anonymous.[17]

d. Both the nominee and the anonymous partnership situation in respect of land would result in the person who in fact has a beneficial interest having a "*right in land*" and entitled to restitution by reason of the provisions of s 2(1) of the Act read with the s 1 definition of "*right in land*". These sections provide as follows:

Section 2:

Entitlement to restitution. —
(1) A person shall be entitled to restitution of a right in land if—

(a) he or she is a person dispossessed of a right in land after 19 June, 1913 as a result of past racially discriminatory laws or practices; or

(b) it is a deceased estate dispossessed of a right in land after 19 June, 1913 as a result of past racially discriminatory laws or practices;

[16] See also *R J v M J* ZAGPJHC 565 at paras 8 and 9
[17] See generally LAWSA, Partnerships paras 433 and 434

The definition of "*right in land*" as provided for in s 1 means:

> " any right in land whether registered or unregistered, and may include the interest of a labour tenant and sharecropper, a customary law interest, the interest of a beneficiary under a trust arrangement and beneficial occupation for a continuous period of not less than 10 years prior to the dispossession in question

(emphasis added)

Section 3 does not restrict the right of the true beneficial owner to make a claim in a nominee type situation only in circumstances where all the requirements of the section have been met. Section 3 is concerned only with, and is restricted in its terms only to, cases where the true beneficial owner seeks "*title in the land*" (as stated in the preamble to the section). It therefore does not apply to the situation where a right in land is being claimed. Section 3 provides statutory recognition and an expedited form of redress in cases where due to racial segregation a nominee was appointed to hold title in the land on behalf of the beneficial owner.

e. Perhaps of equal importance; the disclosure of the agreement between the two families came up at a late stage. The prejudice to Pillay, and those descendants of Gertrude Bellairs who are entitled to claim if the trial was delayed further far outweighed the procedural regularity of requiring joinder of interested parties and then having the issue of which descendants are entitled to recover and under what regime decided within the main trial- bearing in mind that joinder would inevitably have been granted, In this regard, it was mentioned earlier that the claim was lodged as far back as 1996, a quarter of a century ago, and Pillay's poor state of health has been a concern.

f. The defendants' substantive concern is that by granting Pillay the award in full, the Commission may in the future be faced with further claims arising from the same dispossession of 112 Fairview. This could arise if Parliament extends the time for lodging claims as foreshadowed by the abortive Restitution of Land Right Amendment Act 15 of 2014 which was declared unconstitutional in the LAMOSA cases.[18]

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[18] See *Land Access Movement of South Africa and Others v Chairperson of the National Council of Provinces and Others* 2016 (5) SA 635 (CC); 2016 (10) BCLR 1277 at para 82 (LAMOSA 1) and *National Assembly and Another v*

Even if there was scope for other claimants to come forward in situations where there is only one registered owner of a single piece of land, the Commission can never be prejudiced if the court makes a suitable order to ensure that all those who may have an interest in the proceeds of the court award are afforded an opportunity to participate in its distribution.

I believe that these considerations address Adv. Rawjee' s submissions.

30. The court expressed concern with the position which Pillay appeared to adopt during the trial. He indicated that the Bellairs only had a personal right against the Hambridges and that Mr Hambridges was likely to have made the major contribution because he had secure employment with a transport company whereas Mr Bellairs could not secure stable employment as a bricklayer. Moreover Hambridge's deceased estate had been wound up, and as mentioned earlier Pillay did not show much enthusiasm for reopening the estate. In any event this court has a responsibility to ensure that those entitled to restitution in the form of equitable relief receive compensation and receive it expeditiously.

31. The difficulties that now present themselves in view of Pillay's testimony is that if there was co-ownership of the property, then;

    a. if there had been an agreement between the Hambridges and the Bellairs as volunteered by Pillay, then real rights of co-ownership accrued to Mr Bellairs as would have been evidenced by the splitting of the compensation received from the CDB after the expropriation.

       If this is the case, as contended for by Pillay, then he could not possibly distribute the proceeds to the Bellairs pursuant to the will since the 50% interest which the Bellairs had in 112 Fairview never fell into Mrs Hambridge's estate let alone that of her late husband;

    b. under the Act the descendants entitled to participate in 50% of the award made by the court are those who are direct descendants and they are not the same as those who are beneficiaries under the will- which requires only that they are the surviving issue of Gertrude Bellairs by representation *per stirpes.*

Land Access Movement of South Africa and Others 2019 (6) SA 568 (CC); 2019 (5) BCLR 619 (LAMOSA.2). See generally *Farao and Another v Regional Land Claims Commissioner and Others* [2020] ZALCC 16 at paras 3 to 6

It is therefore necessary that the Bellairs descendants are afforded a hearing. It will also be necessary to keep open the issue of whether there was an agreement between the Hambridges and the Bellairs that they both beneficially own the property. This is because Pillay's version is the only one on record as it was not advantageous for the State to challenge it (as evidenced by the contents of their amended plea).

32. In the circumstances it is advisable to ensure that notice be given to all the surviving descendants of Gertrude Bellairs who may be entitled to the other half of the award and bring to their attention the possible nature of their entitlement.

33. in anticipation of this contingency I made the following order on 11 April 2022:

> *"1. By the 22nd of April 2022, the Plaintiff must provide the names and contact details of the surviving members of the Bellairs family, and the contact details of the executors or executrices in the deceased estates of the deceased children of Gertrude Bellairs.*
>
> *2. The contact details shall include: addresses, electronic mail addresses and telephone and/or cellphone numbers.*

The list of descendants and contact details was supplied by Pillay pursuant to the order and is appendix 1 to the judgment.

34. Irrespective of the basis on which the 50% interest in the award accrues to the descendants of Gertrude Bellairs, the court should oversee its distribution directly to them. Accordingly the court will administer the distribution even if the Bellairs descendants are entitled to participate only by reason of Mrs Hambridge's bequest in her will.

In this regard, the submission by Adv. Krige that this is purely an internal matter concerning the executor fails to take into account Pillay's attitude which appeared to exclude them from the benefits and the overarching considerations of the Act- which are to ensure that those entitled to restitution, in whatever form it takes, in fact receive the benefits due to them directly by reason of the interest which the Act confers on them and which, in terms of the Act, must be addressed by this court.

Furthermore, the process may also take an inordinate time if the estate has to be re-opened bearing in mind that Pillay's own state of health has been a concern for some time. Should disputes arise then they would once again have to engage the court, only in a more protracted way. This would also defeat the purpose of expediting decisions on claims in an economic and effective manner as required by the Act .[19]

35. The Regional Land Claims Commissioner for the Eastern Cape, who is the fifth defendant, will be responsible for giving the required notice to the Bellairs descendants.

COMPARABLE VALUES

36. This issue really comes down to determining the amount Mr Hambridge should have received when 112 Fairview was expropriated. By the time all the evidence was led it turned out that the parties were not that far apart.

37. Although Pillay's expert, Mr Margolius, valued the house as built of brick and mortar it was evident that this construction was confined to the front façade. The rest, both interior (including partitioning "walls" between rooms) and exterior, was built out of corrugated iron. There was no electricity in the house and no provision for cabling, distribution board or plug points. However, the utility's power grid did extend to the property and was available for connection if required.

38. It was however clear that no sanitation was provided to the area. There was no running water or sewage. Rainwater was gathered in external tanks on the property while the municipality provided water bowsers which would come to the area during dry spells. A bucket and pail latrine system was provided by the municipality on a weekly basis.

39. The property had a number of livestock which would be slaughtered, rendering the two families reasonably self-sufficient.

40. The failure to provide running water and sewage can be attributed to the declaration of Fairview as a slum. Earlier I mentioned that this was done with the objective of reducing the amount that would have to be paid for the properties when they came to be expropriated under the provisions of the Community Development Act; by being declared a slum the value of the improvements would not be taken into account. This was

[19] See s 31 of the Act and rule 30.

common cause between the parties and is borne out by the valuation done for the CDB at the time for purposes of determining the compensation to be paid out for the property; the buildings being expressly valued at nil for this very reason.

41. If one applies the but for test, then the question to be asked is "*But for being declared a slum in pursuit of racially discriminatory legislation (being the Group Areas Act) and the practices associated with it, what compensation should have been paid on expropriation?"*

42. There are difficulties in accepting the methodology applied by all the experts called.

43. On the Plaintiff's side, Mr Margolius who is a sworn valuer with experience in the sale of property applied the comparable sales method by having regard to sales of property at the time (i.e. in 1971/2) in three other suburbs of the then Port Elizabeth. While accepting that in order to undertake a comparative analysis regard must be had to variations in size, location and services he did none of this for the case at hand, the reason given was that the "*apartheid factor*" makes it unnecessary to do so.

44. Firstly, Mr Margolius is a valuer of property. Mr Margolius is therefore well able by reason of his expertise to identify those factors relative to the dispossession under apartheid laws which would have resulted in a distortion of the fair market value, based on the willing buyer willing seller principle, and provide a monetary value as to its extent.

    However he does not have the necessary expertise to place a value on the human effect of apartheid. This would require an expert in the field of human behaviour and their sequelae who can monetarise the effect of a forced removal on an individual's dignity, helplessness particularly when one's family must also suffer the indignity and humiliation, being degraded, and having to rebuild a life and community structures among other things. The fact that Mr Margolius may have testified in other cases involving dispossessions pursuant to claims lodged under the Act does not provide the qualifications necessary to extend his expertise into fields of human behaviour and the invasion of personal rights.

45. Mr Margolius adopted a method whereby the sales in the three other areas were considered and then a land only value was determined from which a figure for the improvements was extrapolated. He determined the land value at R3.56 m2 and the value of the buildings at R6 739.

46. The immediate difficulty with this form of analysis is that in determining the value of the land no deductions were made at all. In respect of the buildings Margolius in his report and in evidence persisted that the residence was constructed of brick and mortar. As stated earlier, this is not so as is evident from certain photographs of the property Pillay had produced. 112 Fairview was therefore of inferior construction because the others were built with bricks and mortar.

    Furthermore, by making no provisions to account for variances, due to the apartheid factor, the methodology appears to involve too many assumptions and imponderables bearing in mind the limited facts available regarding the other properties in the other areas due to the lapse of time. In short the analysis may appear to be comprehensive on paper but on closer analysis becomes somewhat artificial.

    Perhaps more problematic, is the contention that the apartheid factor must offset any other comparative differences between the subject property and its comparators. There was no explanation as to how this conclusion is arrived at and it would appear that irrespective of the degree of variance, if the plaintiff's position is adopted, it will always be accounted for by the apartheid factor. This cannot be so if, for example, the sizes of or construction materials on the other properties are materially different.

47. Mr Margolius recognised three of the important factors which are ordinarily taken into account when applying a comparative analysis of properties to determine a fair market value for the subject property. They are; location, the provision of municipal services and size:

    a. Location. In other words; whether it was more desirable to live in the one suburb rather than in the other.

    b. Municipal Services. It was agreed that properties in the area which did not have such services would be less desirable and fetch a lower value than those which did.

    c. Size. Although it was agreed that accepted practice was to discount for larger sized properties, the parties were not agreed as to the method to be applied.

    Margolius was not able to say much about the impact of location in regard to all three of the comparable areas save from the point of view of distance from the city centre.

Mr Margolius considered that at best a 13% overall deduction for property greater than 1 000 m2 should be made.

He however was not prepared to allow any deduction for lack of services. He contended that they were not provided because Fairview had been declared a slum and all development in the area had been frozen.

48. Mr Margolius provided a detailed report which was of great assistance to the court. The summary of archival material was most helpful in relation to the impact of the Slums Act on the services provided by the local authority to the area. The court also accepts that the comparative method is appropriate in the present case. However there are aspects which are problematic, particularly with reference to best use, the apartheid factor and having regard to areas other than Lorraine which may not necessarily be comparable (and which would yield a lower result than if sales in Lorraine alone were considered). Finally, although Margolius' report accepts the two step approach it does not in fact apply it, but rather has regard to the other s 33 considerations when performing the initial market value analysis.

49. Finally there is no triangulation. Margolius accepted, and it was common cause that, that Lorraine property prices would be higher than those which could be realised on the open market for 112 Fairview. Lorraine was well serviced with all the necessary infrastructure and amenities. It had a good road infrastructure, electricity, the provision of running water and a proper sewage system. The houses were built with brick and mortar and were more modern. The history of property sales in Lorraine for 1971 and 1972 reveal that the lowest price fetched was R14 000.

Margolius 'calculation however would result in the fair market value for 112 Fairview being R17 000 at the relevant time. Clearly this cannot be when Lorraine properties were conceded to be more valuable on the open market.

50. Mr Gouws had originally been called to testify as an expert valuer but it was established that he had sat for, but not passed, the qualifying examinations. He had however conducted the field work and other research on which comparable valuations had been extracted. Adv. Rawjee elected to call him to testify on the factual side of the report and not as an expert valuer. Although Adv. Krige objected to his evidence on the grounds that it was of no value to the court, Mr Margolius had in fact relied on certain of the factual details contained in Gouws' report as the basis for his own opinion.

In my view the value of Gouws' evidence lies in the empirical elements of his report which he corroborated.

51. Mr Ferreira was called by the defendant as an expert valuer. He had considered the report prepared by Gouws and in his opinion all but one of Gouws' conclusions were correct. He differed from Gouws in relation to the deduction for the size of the property. He was of the view that a deduction of 25% should be made for the second 1000 m2 and after that the deduction should be 13%. Ferreira had direct experience in the valuing of property in Gqeberha during the period in question. He then provided for a deduction of 35% in respect of the lack of municipal services on the property when compared to sales in other areas.

52. There were a number of criticisms raised in respect of Ferreira's evidence. The one was that he had come to testify in support of Gouws' report yet deviated from it in relation to deductions for the size of land. Far from being a valid criticism, I consider it a factor in favour of his general objectivity. He did not support that part of the report he disagreed with, even if it was prepared by someone on his own team, so to speak, whose findings he had been called on to consider.

    Another criticism was that Ferreira, who had been working for Government in at the time of the dispossession and had in fact been involved in valuations of properties which were subject to expropriation under the Group Areas Act. He was challenged on the basis that he had been responsible for undervalued property. While he sought to downplay his roll this was due to the extent he was personally uncomfortable with regard to what he had participated in at the time. He however readily conceded that properties subject to Group Areas expropriation had been significantly undervalued.

53. The most serious criticism of Ferreira's testimony was the two step deduction in respect of size. His only justification was that it was fair because it was fair. Clearly this is not an acceptable explanation. An expert must provide a rational basis for concluding that the basis selected is fair. At best it might be deduced that the witness meant that in his experience during the time he undertook valuations in the area the accepted norm was 25% on the first 1000m2 and 13% after that. However it is difficult to test that, particularly where the deductions may vary from area to area. He did however confirm that land in Lorraine would produce a value of R3.96 m2 for the first 1000 m2. Gouws had valued the buildings at R7400 but this could not be taken into account as it would amount to expert

opinion. Ferreira's total value for land and building in respect of 112 Fairview was R10 493. Obviously Ferreira was higher.

54. During the testimony presented on behalf of the defendants it became evident that the only valid comparator were sales in Lorraine. It adjoined Fairview and although newer and fully serviced its location was identical to all intents and purposes.

55. Lorraine was also a direct comparator when applying the" *but for* "test. Despite its proximity to Fairview it was not subject to Group Areas removals as it was demographically a "*white suburb* "enjoying the municipal services which came with the privilege of race. It's growth and land values would not have been impeded as was Fairview when the latter was declared a slum. In my view, the other areas considered by Margolius and Ferreira would distort the analysis. A factor that may also have unnecessarily distorted the analysis if the other areas are taken into account is their respective desirability, or want of it, which was not considered in any depth, and which would include location by reference to schools and better facilities.

    On the evidence before the court, but for declaring Fairview a slum (which it was not) in order to reduce the amount which would have to be paid on expropriation pursuant to the application of the Group Areas Act in order to remove those classified as coloured from there, Fairview would have enjoyed the same developmental milestones as Lorraine. Lorraine is the best comparator. It also follows that the lowest valued sales in that area would represent the upper limits of what could be fetched in Fairview.

56. Accordingly, the fair market value comparator is the value of Lorraine residential properties sold at about that time.

57. It is accepted that the locations should have been comparable but for the fact that apartheid laws and practices resulted in the degradation of land values in Fairview. Accordingly, there should be no deduction made for location.

58. In respect of municipal services, which is comprised of electricity, water and sewage, it is evident that the failure to upgrade the area by providing water and sewage was as a consequence of freezing all development in the area. The issue of electricity is more problematic. It is clear that the Hambridges and Bellairs could have accessed the municipal power grid. The property had been bought in December 1952 and the area was declared a white Group Area in June 1965 after which it was declared a slum. There

would have been little incentive to electrify the stand if the family was to be forcibly dispossessed, as they were, and no compensation was payable for improvements.

By the time of the dispossession it is apparent that the Hambridge and Bellairs could have afforded to electrify the house: In the case of Mr Bellairs the value of the property purchased after dispossession was more than twice the R2000 he received from the expropriation (via Hambridge). On the probabilities, they would have been well able to electrify the property but for the government's decision to declare Fairview a white Group Area and slum. Considering that it would be an act of supererogation to formulate a deduction for the electricity component when the very legislation which resulted in their dispossession also resulted in their not providing the family with the advantages of electricity when it was within their means, justifies the court not making any deduction in this regard.

59. This leaves the question of whether there should be any deduction for the size of the property.

Firstly, the size issue is unrelated to the apartheid factor. While Margolius contended that, if any deduction was to be made, it would be at 13%, Ferreira was at 25% for the first 1000m2 in excess and 13% after that. The Lorraine stands were 1000m2.

It is evident that Margolius' figures would result in the value of 112 Fairview far exceeding that of property values in Lorraine. Even in 1975 a property in Lorraine could not fetch more than R14 500.

However, it is also evident that it is necessary to have regard to factors which rendered Fairview undesirable and which were attributable exclusively to the area being declared a slum and its freezing for development until the forced removal of residents by reason of their race had occurred.

60. To the extent that the degradation of property and in consequence its effect on fair market values for properties in Fairview was due to apartheid laws and practices in the manner described, the court agrees with Margolius. It appears that having regard to the property being a corner stand and being known to have some potential value to a developer at the time when development was still occurring in Lorraine indicated that we should take the lower limit of Lorraine sales over the immediate period from 1972. This

would mean that the fair market value for the property in issue is R14 000 in 1972 terms. [20]

61. This is not the type of case where the value of large tracts of land is being assessed or where bringing the amounts to current values distorts the position.

62. Although Margolius testified about the best use assessment of the property and contended that the Hambridges (and Bellairs) could have themselves developed the property into what it is now, or even have erected flats at the time it was still zoned residential, the plaintiff in fact did not seek more that the difference between the fair market value which should have been paid and the amount in fact paid brought to current values. Furthermore too many vagaries would have intervened, requiring significant contingency deductions to be made.

63. Perhaps the first hurdle that would have to be overcome is that 112 Fairview required to be consolidated with erf 111 before any feasible development could take place. Neither Mr Hambridge nor Mr Bellairs was a developer and the likelihood is that they would have sold the land to one. The second hurdle is that despite the removal of so-called coloured people from Fairview rendering the area once again available for development there in fact was none for some 30 years since then. Development only took place more recently. The court therefore is only prepared to take into account that the property was a corner st and, was more accessible with the widening of the main road being commenced (now the William Moffatt) and the potential of selling to a developer at some better margin than other properties in Fairview. Indeed the valuation done at the time specifically mentioned the attributes of its position.

64. There is no basis for claiming ancillary losses in respect of transfer duty and stamp duty for the properties subsequently bought. They were properties which at some stage will be sold and a benefit derived. [21]

65. In order to establish the compensation payable, it is necessary to first deduct the R4000 actually received from the R14 000 and the amount of compensation to be awarded will be the present day value of the resultant figure based on the CPI calculated by Mr Lowther.

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[20] The actual dispossession, i.e. when the Hambridges and Bellairs had to vacate 112 Fairview, was in 1972.
[21] The swings and roundabouts therefore exclude these amounts from consideration.

66. The court sat with an assessor, Reverend Stemela, who is in agreement with the factual outcome and the reasons for it

67. The court wishes to thank both counsel and their attorneys for their remarkable work and dedication in the formulation of the issues, the production of relevant material regarding the history of the area and the forced removals which took place as well as the overall presentation of their respective cases.

ORDER

68. The following order is made:

THE AWARD

1. *The compensation to be paid in respect of the dispossession relating to erf 112 Fairview situated at 2 Wattle Road Fairview, corner 17th Avenue Fairview, Gqeberha (formerly Port Elizabeth) pursuant to its expropriation under the Group Areas in about 1971 is calculated as follows:*

    a. *The fair market value of erf 112 Fairview was R14 000 at 1972 values;*

    b. *The difference between the amount of compensation which should have been paid of R14 000 and which was paid of R4000 is R10 000 determined at 1972 values.*

    c. *Mr Lowther shall actuarially calculate the current value of the R10 000 net amount based on the agreed CPI.*

2. *The amount so determined shall be presented to the presiding judge who will then make an order in its terms and determine the date from when interest at the prescribed rate is to commence running*

3. *The Defendants shall pay the costs of suit jointly and severally*

NOTICE TO BELLAIRS DESCENDANTS

4. *The Regional Land Claims Commissioner for the Eastern Cape shall serve a notice in terms of para 5 hereof on each of the persons identified in Appendix 1(being the list of the surviving descendants of Gertrude Bellairs)*

5. *The notice in terms of para 4 shall notify each of the persons that;*

    a. *this court has award 50% of the compensation due to the claimant in the matter to those descendants of Gertrude Bellairs entitled to such proceeds;*

    b. *the descendants of Gertrude Bellairs who are entitled to such proceeds are either;*

        i. *her direct descendants as contemplated in terms of the s 2(1) (c) or (3) of the Restitution of Land Rights Act 22 of 1994; or*

        ii. *the issue of Gertrude Johanna Bellairs by representation per stirpes who were alive at the date Mrs Annie Francis Hambridge died, being on 22 September 2006, as provided for in terms of the latter's last will and testament;*

    c. *the determination of whether the descendants entitled to such proceeds are those falling into the category identified in para 5(b)(i) or those identified in para 5(b) (ii) will depend on whether;*

        i. *the late Mr Hambridge and the late Mr Bellairs bought the property situate at erf 112 Fairview as co-owners albeit that it was only registered in the name of the former (being the evidence of Mr Pillay during the trial of this matter) in which case the descendants identified in para 2(b)(i) alone shall be entitled to participate in the proceeds;*

        ii. *the entitlement to the proceeds arises because they are beneficiaries in terms of Mrs Annie Francis Hambridge's will in*

which case the descendants identified in oara 2 (b)(ii) alone shall be entitled to participate in the proceeds

d. they are afforded 20 days from the date of receipt of the notice to file an affidavit in which they set out;

i. the grounds. on which they contend for an entitlement to participate in the proceeds of the award;

ii. the grounds on which they contend that any other descendant is not entitled to participate in the award, or state that it is irrelevant to them;

iii. whether they agree or disagree with Mr Pillay's evidence that the Hambridges and Bellairs were equal co-owners of erf 112 Fairview albeit that the property was registered in the name of only Mr Hambridge;

e. they are to provide an email address for future service of all documents and notifications including for notification of pretrial conferences and virtual hearings on MS-Teams or other audio visual platforms;

f. if they fail to file an affidavit within the period set out in subpara (d) hereof they will be precluded from further participation in the proceedings, unless just cause is shown for such non-compliance with this order;

g. a pretrial conference will be held on a date to be notified after affidavits have been filed.

6. A copy of this judgment shall accompany the notice.

POSTEA: 8 August 2022

69. On 8 July the plaintiff brought an application under rule 64 (1) to rectify what was contended to be an ambiguity in the order.

Rule 64(1) also provides that an order may be rescinded or varied in order to rectify a patent error or omission. Moreover the court is entitled to suspend, rescind or vary an order either of its own accord or upon the application of a party.

70. I have great sympathy for the position in which the plaintiff and his legal representatives believed they found themselves. Under rule 64(2)(a) the application must be delivered within 10 days from the date upon which a party becomes aware of the order. In this case the judgment and order were read out in open court although only the order was printed and handed down on the day. The 10 day period was however during the court recess which compelled the plaintiff to bring the application without waiting for the court to respond of its own motion.

71. The plaintiff has two concerns with paras 4 and 5 of the order:

    a. the first is whether their effect results in that part of the compensation awarded to the descendants (i.e. 50% of the total award) being paid to them directly or whether it is to be paid through the deceased estate of Mrs Hambridge;

    b. the other, which is said to be allied to the first, may be paraphrased as to whether the effect of the court order is to award the total amount of compensation to the deceased estate and vary the distribution of the estate to persons other that those named in clause 2 (a) of the will, or whether the effect of the court order is to award 50% of the total compensation to the deceased estate and the other 50% to the Bellairs descendants determined by the court.

The answer to the first is that it is to be paid directly, and to the latter that Pillay is to personally received 50% of the award and the determined Bellairs descendants the other 50%.

DISCUSSION

72. It appears that at the heart of the perceived ambiguity are the issues of Pillay's personal entitlement to compensation, whether the issue of beneficial ownership of 112 Fairview

has been finally determined and the route the distribution of the compensation award is to take.

73. The judgment itself recognises that Pillay is personally entitled to 50% of the compensation awarded while the other 50% is to go the Bellairs descendants either because that is what the will says or because the Bellairs had a 50% beneficial interest in 112 Fairview; an interest which Mrs Hambridge respected and gave effect to in her will. The difficulty which arises is to determine who are the Bellairs descendants entitled to that part of the award. Under the will they are the late Gertrude Johanna Bellairs' issue by representation *per stirpes*. But if the Bellairs were already joint beneficial owners of the property at the time of dispossession then the descendants entitled to the other 50% of the award must be determined under the Act.

74. Considering these issues and the concerns raised regarding the need to expedite the finalisation of the claim, the fact that Hambridge's estate had been finalised and closed as well as the position and health of Pillay, the court took a pragmatic approach which it found to be consistent with the purpose, objective and spirit of the Act and which would not cause prejudice to any interested party.

75. The assessor, Reverend Stemela, agrees with the factual matters contained in these paragraphs and the changes to be made in the revised order.

Pillay's personal entitlement to compensation

76. The court regrets its oversight in not expressly dealing in the order with Pillay's personal entitlement to compensation although it is to be found in the body of the judgment.

    In para 27 of the judgment we determined that irrespective of whether the Hambridges and Bellairs were both the true beneficial owners of 112 Fairview at the time of the dispossession or only Mr Hambridge was, in "*both scenarios Pillay would personally only be entitled to 50% of the total award.* "[22]

    Pillay's personal entitlement to 50% of the total award should have been included in paragraph 2 of the order under the heading "*Award".* There also should have been greater clarity in the framing of the order that the Bellairs descendants are entitled only to

[22] See para 27(c)

participate in the other 50% of the compensation award. This can be rectified by suitable amendments to paras 5(b)(ii), (c) and (d) of the order.

Whether beneficial ownership of 112 Fairview has been determined

77. The issue of beneficial ownership arose in the context of the defendants' argument that the plaintiff (i.e. Pillay in his representative capacity as executor of Mrs Hambridge's estate) could claim no more than 50% of the total compensation award since the Hambridges beneficially owned no more than half the property.

78. In finding that it could deal with the distribution of the entire compensation award in the present proceedings, the court identified in para 29 of its judgment a number of complimenting reason which, aside from the framework of the Act and its objective, included as a significant ground that:

> *On the basis that Pillay's evidence of the agreement between his grandfather (the late Mr Bellairs) and the late Mr Hambridge is to be accepted, then Mrs Hambridge had understood, and so directed in her will, that the property was to devolve as to 50% in favour of Gertrude Bellairs or her surviving issue per stirpes and the other half to Pillay. If that was a correct understanding of the rights she could dispose of, then the claim was properly made in her name for the benefit of both families.*[23]

79. While that secured the court's jurisdiction to deal with the entire claim for compensation, the court also stated that it could not make a final determination on the point insofar as the Bellairs descendants are concerned because they were not before the court. I quote from para 31 of the judgment:

> *"It is therefore necessary that the Bellairs descendants are afforded a hearing. It will also be necessary to keep open the issue of whether there was an agreement between the Hambridges and the Bellairs that they both beneficially own the property. This is because Pillay's version is the only one on record as it was not advantageous for the State to challenge it (as evidenced by the contents of their amended plea)."*

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[23] At para 29(a)

80. Accordingly, unless the Bellairs descendants agree on whether the distribution of their 50% of the total award should be under the Act or *per stirpes* by reference to the will, the question remains open.

    The outcome will depend on whether Mr Bellairs was a joint beneficial owner of 112 Fairlawns and whether any of the non-financial considerations set out in s 33 of the Act ought to reduce the amount a particular descendant receives in relation to the others[24]. If not, then the distribution of their 50% part of the award will be made in terms of clause 2(a) of the will- which will result in that part of the award being divided among the issue by representation *per stirpes* of the late Gertrude Johanna Bellairs.

    The other provisions of s 33 may impact on Pillay should he fall into the category of a descendant entitled to benefit. At present he does not seem to since his mother, Mrs Skorbinski, is alive and she is one of eight direct descendants of Gertrude and Dietrich Bellairs.[25]

    While this may appear to be a storm in a teacup considering the amount involved *per capita*., it is necessary to afford the Bellairs descendants a hearing. Nonetheless it is hoped that they will be able to resolve the distribution fairly among themselves as the cost of litigation may exceed any individual entitlement.

81. The court does not consider that any clarification need be provided in the body of the order itself, since para 31 of the judgment confirms that no decision on the point has been taken *vis a vis* any *lis* which may arise on this issue between the Bellairs descendants *inter se*.

Distribution of the compensation award

82. In paras 30 and 32 to 34 of the judgment the court explained why it, and not the executor of Hambridge's estate, should determine which Bellairs descendants are entitled to participate in the Bellairs' portion of the compensation award and why the distribution should not be via the estate.

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[24] See *Florence* at para 137

[25] Pillay is also one of eight siblings

83. While the order makes it clear that the court, and not the executor of Hambridge's estate will determine which descendants are entitled to 50% of the total compensation award, being that portion which would have otherwise fallen under clause 2(a) of her will, it does not order the Regional Land Claims Commissioner to be responsible for the distribution to those Bellairs descendants entitled to participate in the award as determined by the court. This will therefore be added to the order.

REVISED ORDER

84. The order of 24 June 2022 is therefore revised and will now read:

THE AWARD

1 *The compensation to be paid in respect of the dispossession relating to erf 112 Fairview situated at 2 Wattle Road Fairview, corner 17th Avenue Fairview, Gqeberha (formerly Port Elizabeth) pursuant to its expropriation under the Group Areas in about 1971 is calculated as follows:*

a. *The fair market value of erf 112 Fairview was R14 000 at 1972 values;*

b. *The difference between the amount of compensation which should have been paid of R14 000 and which was paid of R4000 is R10 000 determined at 1972 values.*

c. *Mr Lowther shall actuarially calculate the current value of the R10 000 net amount based on the agreed CPI.*

2. *The amount so determined shall be presented to the presiding judge who will then make an order;*

a. *in its terms and determine the date from when interest at the prescribed rate is to commence running;*

b. *awarding 50% of the amount so determined to Mr Gregory James Pillay personally;*

c. *awarding 50% of the amount so determined to those descendants of Gertrude Bellairs entitled to such proceeds;*

3. *The Defendants shall pay the costs of suit jointly and severally*

NOTICE TO BELLAIRS DESCENDANTS

4. *The Regional Land Claims Commissioner for the Eastern Cape shall serve a notice in terms of para 5 hereof on each of the persons identified in Appendix 1(being the list of the surviving descendants of Gertrude Bellairs)*

5. *The notice in terms of para 4 shall notify each of the persons that;*

a. *this court has award 50% of the compensation due to the claimant in the matter to those descendants of Gertrude Bellairs entitled to such proceeds;*

b. *the descendants of Gertrude Bellairs who are entitled to such proceeds are either;*

i. *her direct descendants as contemplated in terms of the s 2(1) (c) or (3) of the Restitution of Land Rights Act 22 of 1994; or*

ii. *the issue of Gertrude Johanna Bellairs by representation per stirpes who were alive at the date Mrs Annie Francis Hambridge died, being on 22 September 2006, as provided for in terms of clause 2(a) of the latter's last will and testament;*

c. *the determination of whether the descendants entitled to that portion of the award set out in prara 2 (c) above are those falling into the category identified in para 5(b)(i) or those identified in para 5(b) (ii) will depend on whether;*

i. *the late Mr Hambridge and the late Mr Bellairs bought the property situate at erf 112 Fairview as co-owners albeit that it was only registered in the name of the former (being the evidence of Mr Pillay during the trial of this matter) in which case the descendants identified in para 5(b)(i) alone shall be entitled to participate in such part of the award;*

ii. *the entitlement to the proceeds arises because they are beneficiaries in terms of Mrs Annie Francis Hambridge's will in which case the descendants identified in para 5 (b)(ii) alone shall be entitled to participate in such part of the award;*

d. *they are afforded 20 days from the date of receipt of the notice to file an affidavit in which they set out;*

i. *the grounds. on which they contend for an entitlement to participate in that portion of the award set out in para 2(c) above;*

ii. *the grounds on which they contend that any other descendant is not entitled to participate in such portion of the award, or state that it is irrelevant to them;*

iii. *whether they agree or disagree with Mr Pillay's evidence that the Hambridges and Bellairs were equal co-owners of erf 112 Fairview albeit that the property was registered in the name of only Mr Hambridge;*

e. *they are to provide an email address for future service of all documents and notifications including for notification of pretrial conferences and virtual hearings on MS-Teams or other audio visual platforms;*

f. *if they fail to file an affidavit within the period set out in subpara (d) hereof they will be precluded from further participation in the proceedings, unless just cause is shown for such non-compliance with this order;*

g. *a pretrial conference will be held on a date to be notified after affidavits have been filed.*

6. *A copy of this judgment shall accompany the notice.*

DISTRIBUTION OF THE AWARD

7. *Distribution of the award as ordered under paras 2(b) and 2(c) hereof shall be made directly to the respective persons by the Regional Land Claims Commissioner for the Eastern Cape*

SPILG, J

DATES OF HEARINGS:	14-16 September 2020; 10 to 12 November 2021; 31 January 2022; 23 to 25 February 2022; 7 to 8 April 2022
DATE OF JUDGMENT:	24 June 2022
REVISED:	8 August 2022
FOR PLAINTIFF:	Adv. LJ Krige Chennells Albertyn
FOR 2nd to 5th DEFENDANTS:	Adv. A Rawjee The State Attorney