IN THE LAND CLAIMS COURT OF SOUTH AFRICA

HELD AT RANDBURG

(1) REPORTABLE: YES	
(2) OF INTEREST TO OTHER JUDGES: YES	
(3) REVISED. NO	
SIGNATURE	DATE: 20 October 2022

CASE NUMBER: LCC16/2022

In the matter between:

NELSON SIPHO DANGAZELE	FIRST APPLICANT
NOSIPHO MILDRED NONKONYANA	SECOND APPLICANT
VUYISILE NYEZI	THIRD APPLICANT
BAFO MAYARHA MHLAMBISO	FOURTH APPLICANT
VULAMASANGO SINGENE CAMPAIGN	FIFTH APPLICANT

And

MINISTER OF AGRICULTURE, LAND REFORM AND RURAL DEVELOPMENT	FIRST RESPONDENT
CHIEF LAND CLAIMS COMMISSION	SECOND RESPONDENT
THE REGIONAL LAND CLAIMS COMMISSION EASTERN CAPE	THIRD RESPONDENT

AND

CASE NUMBER: LCC17/2022

In the matter between:

GILBERT MPETSHENI	FIRST APPLICANT
MABEL NTOMBENTSHA BUWA	SECOND APPLICANT
NOLOYISO VIRGINIA NKOLISA	THIRD APPLICANT
VULAMASANGO SINGENE CAMPAIGN	FOURTH APPLICANT

And

MINISTER OF AGRICULTURE, LAND REFORM AND RURAL DEVELOPMENT	FIRST RESPONDENT
CHIEF LAND CLAIMS COMMISSION	SECOND RESPONDENT
THE REGIONAL LAND CLAIMS COMMISSION EASTERN CAPE	THIRD RESPONDENT

AND

CASE NUMBER: LCC18/2022

In the matter between:

NOLOYISO VIRGINIA NKOLISA	FIRST APPLICANT
VULAMASANGO SINGENE CAMPAIGN	SECOND APPLICANT

And

MINISTER OF AGRICULTURE, LAND REFORM AND RURAL DEVELOPMENT	FIRST RESPONDENT
CHIEF LAND CLAIMS COMMISSION	SECOND RESPONDENT
THE REGIONAL LAND CLAIMS COMMISSION EASTERN CAPE	THIRD RESPONDENT

JUDGMENT

COWEN J

Introduction

1. There are three consolidated applications before us.[1] In each case, the applicants ask this Court to authorise the Commission on the Restitution of Land Rights (the Commission):

   1.1. to commence processing restitution claims lodged between 1 July 2014 and 28 July 2016 by claimants who say they were dispossessed of rights in land as a result of 'betterment' schemes implemented in the former Transkei and Ciskei, and

   1.2. to allow potential claimants who have not yet lodged any such claims to do so.

2. The applications have their genesis in the fact that during the initial period of lodgement of restitution claims, the Eastern Cape Regional Land Claims Commissioner actively dissuaded claimants from lodging 'betterment' restitution claims, as appears more fully below. In these proceedings, it is common cause that 'betterment' schemes, which were implemented in the former homelands, resulted in the dispossession of rights in land after 19 June 2013 as a result of past racially discriminatory laws or practices as contemplated by section 2 of the Restitution of Land Rights Act 22 of 1994 (the Restitution Act). I return to these issues below.

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[1] LCC16/22, LCC17/22 and LCC18/22.

3. The founding affidavits in the three applications are in similar terms. In each case, one of the applicants is an association known as the Vulamasango Singene Campaign (Vulamasango). The isiXhosa words 'vulamasango singene' mean 'open the door so we can go in'. Vulamasango was formed in 2003 by various communities in the Eastern Cape whose principal mandate is to campaign for the fair treatment of victims that were affected by 'betterment' dispossession and for the communities that were excluded from participation in restitution programmes. Vulamasango is organised across various municipal areas in the Eastern Cape, each of which were affected by 'betterment' schemes. Vulamasango acts in the interests of its members, being various communities within the former Transkei and Ciskei areas in the Eastern Cape.

4. In each case there are also individual applicants, who live, respectively, in Bhencuth Village, Majuba Village and in Tyeni Location in the Eastern Cape. These are villages that, it is alleged, were subject to 'betterment' schemes. These applicants bring the application in their own interests and on behalf of the community that reside in their villages. In LCC 16/2022, there are four individual applicants living in Bhencuth Village: Nelson Sipho Dangazele, Nozipho Mildred Nonkonyana, Vuyisile Nyezi and Bafo Mayarha Mhlambiso. In LCC 17/2022 there are three individual applicants living in Majuba Village: Mr Gilbert Mpetsheni, Ms Mabel Ntombentsha Buwa and Ms Noloyiso Virginia Nkolisa. In LCC 18/2022 there is only one individual applicant, Ms Noloyiso Virginia Nkolisa. She lives in Tyeni Location in the Kwa-Bhaca district of the Eastern Cape.

5. The Chief Land Claims Commissioner is the second respondent. The Minister of Agriculture, Land Reform and Rural Development (the Minister) is cited with her as the first respondent and the Regional Land Claims Commissioner of the Eastern Cape (the Regional Commissioner) is cited as the third respondent. These respondents, to whom I collectively refer as the State respondents, oppose the application.

6. The Commission is, at present, unable to process restitution claims lodged between 1 July 2014 and 28 July 2016 as a result of an interdict the Constitutional Court granted in a judgment that is colloquially referred to as *LAMOSA 1*.[2] The Commission is in receipt of 163 383 restitution claims lodged country-wide between those dates, of which 12 654 were lodged in the Eastern Cape.[3] I refer to these 163 383 claims as 'preserved claims', a term best understood with reference to *LAMOSA 1* and the case that followed it, colloquially referred to as *LAMOSA 2*.[4]

7. In brief, when the Restitution Act was enacted in 1994, it required claimants to lodge restitution claims by 31 December 1998 (the initial phase). As at October 2021, there remained some 7 148 claims lodged during the initial phase that the Commission had to finalise. Of those, 684 concern land in the Eastern cape. I refer to these as old claims. The date 1 July 2014 marks the commencement of what can be regarded as a second phase of lodgement of restitution claims. The second phase was enabled by the enactment of the Restitution of Land Rights

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[2] *Land Access Movement of South Africa and others v Chairperson of the National Council of Provinces and others* 2016(5) SA 635 (CC) (LAMOSA 1).
[3] 6 180 in East London and 6 474 in Queenstown.
[4] *Speaker, National Assembly and another v Land Access Movement of South Africa and others* [2019] ZACC 10; 2019 (5) BCLR 619 (CC); 2019 (6) SA 568 (CC) (LAMOSA 2).

Amendment Act 15 of 2014 (the Amendment Act), which extended the cut-off date to lodge claims to 30 June 2019. However, the second phase was cut short when, on 28 July 2016, the Constitutional Court delivered its decision in *LAMOSA I,* declaring the Amendment Act to be invalid because Parliament had failed to satisfy its obligation to facilitate public involvement in accordance with section 72(1)(a) of the Constitution. The declaration of invalidity operated prospectively, with the result that restitution claims lodged from 1 June 2014 to 28 July 2016 remained intact. But the Constitutional Court interdicted the Commission from processing them at that stage. Thus the term 'preserved claims'.

8. The processing of the preserved claims is interdicted in paragraphs 4 to 7 of the Constitutional Court's order in *LAMOSA I* in the following terms:

> '4. Pending the re-enactment by Parliament of an Act reopening the period of lodgement of land claims envisaged in s25(7) of the Constitution, the Commission on Restitution of Land Rights, represented in these proceedings by the Chief Land Claims Commissioner (Commission) is interdicted from processing in any manner whatsoever land claims lodged from 1 July 2014.
>
> '5. The interdict in para 4 does not apply to the receipt and acknowledgement of receipt of land claims in terms of s6(1)(a) of the Restitution Act.
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> '6. Should the processing, including referral to the Land Claims Court, of all land claims lodged by 31 December 1998 be finalised before the re-enactment of the Act referred to in para 4 above, the Commission may process land claims lodged from 1 July 2014.
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> '7. In the event that Parliament does not re-enact the Act envisaged in para 4 within 24 months from the date of this order, the Chief Land Claims Commissioner must, and any other party to this application or person with a direct and substantial interest in this order may, apply to this court within two months after that period has elapsed for an appropriate order on the processing of land claims lodged from 1 July 2014.'

9. As matters transpired, Parliament did not enact any legislation within the 24 months, and has still not done so.[5] After the 24 months had lapsed, the Speaker of the National Assembly and the National Council of Provinces applied to the Constitutional Court to extend the 24-month period. The application to extend the time period failed in *LAMOSA 2*. However, the applicants in *LAMOSA 1* instituted a counter-claim aimed at dealing with the position of preserved claims and their processing thereby triggering paragraph 7 of the order, referred to above. Other parties also made proposals regarding those claims. The Commission abided the Court's decision reporting on their progress dealing with old claims. The Constitutional Court held that as there is no clarity as to when Parliament will enact any new legislation which may provide a procedure for dealing with preserved claims and prioritisation of claims, it would be unfair to perpetuate the interdict against processing them until all old claims have been finalised.[6] In the result, in *LAMOSA 2,* the Constitutional Court granted a new order regulating how they would be dealt with, while expressly preserving Parliament's right to legislate.[7]

10. The *LAMOSA 2* order lifted the supervisory role of the Constitutional Court but made provision for judicial oversight by the Land Claims Court.[8] Prayer 2 of the *LAMOSA 2* order, which was subject to Parliament legislating otherwise (and to date it has not), provides in relevant part:

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[5] In *LAMOSA 1*, The Constitutional Court expressly contemplated the possibility that this might occur either because of a shift in government policy or for some other reason. Supra n 2 at para 90.
[6] Supra n 4 at para 55.
[7] Id at para 55 and 60
[8] Id at para 59.

'(a) The [Commission] is prohibited from processing in any way any claims lodged in terms of section 10 of the [Restitution Act] between 1 July 2014 and 28 July 2016 (interdicted claims) until the earlier of the dates when –

(i) It has settled or referred to the Land Claims Court all claims lodged on or before 31 December 1998 (old claims) by way of a referral of the claim in terms of s 14; or

(ii) The Land Claims Court, upon application by any interested party, grants permission to the Commission to begin processing interdicted claims, whether in respect of the whole or part of the Republic of South Africa and whether in respect or part or all of the process for administering an interdicted claim.

(b) Until the date referred to in para (a), no interdicted claim may be adjudicated upon or considered in any manner whatsoever by the Land Claims Court in any proceedings for the restitution of rights in land in respect of old claims, provided that interdicted claimants may be admitted as interested parties before the Land Claims Court solely to the extent that their participation may contribute to the establishment or rejection of the old claims or in respect of any other issue that the presiding judge may allow to be addressed in the interests of justice.

(c) Notwithstanding the provisions of s 11(5) and 11 (5A) of the Restitution Act, no interdicted claimant shall be entitled to any relief having the effect of –

(i) altering or varying –

(a) the relief granted to any claimant in terms of section 35 of the Restitution Act in respect of a finalised old claim;

(b) the terms of an agreement concluded in terms of s 42 of the Restitution Act; or

(c) an award in terms of s 42E(1)(a) or (b) of the Restitution Act, unless the Land Claims Court in exceptional circumstances orders otherwise; and / or

(ii) awarding to such interdicted claimant land or a right in land that is subject to a pending claim for restoration by an old claimant.

(d) The Chief Land Claims Commissioner must file a report with the Land Claims Court, to be dealt with as the Judge President of that Court may deem fit, at six-monthly intervals from the date of this order, setting out –

(i) The number of outstanding old claims in each of the regions on the basis of which the Commission's administration is structured;

(ii) The anticipated date of completion in each region of the processing of the old claims, including short-term targets for the number of old claims to be processed;

(iii) The nature of any constraints, whether budgetary or otherwise, faced by the Commission in meeting its anticipated completion date.

(iv) The solutions that have been implemented or are under consideration for addressing the constraints; and

(v) Such further matters as the Land Claims Court may direct, until all old claims have been processed.

(e) The Land Claims Court may make such order or orders as it deems fit to ensure the expeditious and prioritised processing of old claims.'

11. This Court's competence to entertain the applications before us arises centrally from paragraph 2(a)(ii) of the *LAMOSA 2* order and the Restitution Act.

The relief sought and issues arising

12. In the notices of motion, the applicants ask for wide ranging relief. However, at the hearing, Mr Xozwa, who appeared for the applicants, informed the Court that the applicants are abandoning several prayers.[9] In the circumstances, it is not necessary to allude to these. The only substantive relief the applicants persist with are prayers 2 and 7, being orders:

12.1. That the Court permit the Commission to begin processing interdicted claims lodged in terms of the Restitution Act between 1 July 2014 and 28 July 2016 and those claims that were never lodged in respect of people

[9] Prayers 3 to 5 and 8 to 10 were abandoned.

dispossessed of land rights through the implementation of 'betterment' in the former Transkei and Ciskei areas;

12.2. Alternatively declaring that the applicants' members have the right to lodge claims and must have their claims dealt with in a comparable manner to that set out in the Restitution Act.

13. The State respondents delivered an answering affidavit deposed to by Angela Thokozila Didiza, the Minister. The Minister, who speaks for all of the State respondents, explains that she is sympathetic to the applicants, but she adopts the view that the relief sought is not competent, and in any event, if granted, would cause an 'administrative nightmare' with dire budgetary consequences.

14. The issues that arise for decision in the cases before us are the following:

14.1. First, whether the applicants have standing. We conclude that as potential beneficiaries of 'betterment' claims, some of which are preserved claims, they do.

14.2. Second, whether it is competent for this Court to grant any relief in respect of claims that have never been lodged, whether during the initial phase or after the Amendment Act was implemented. We conclude that it is not.

14.3. Third, whether the Court should permit the Commission to start to process interdicted betterment claims lodged between 1 July 2014 and 28 July 2016 in respect of the former Transkei and Ciskei areas. We

conclude that the Court is not able to make this decision on the information supplied and we direct that the Court must be supplied with further information about the likely extent of such claims before any decision can be duly taken. To the extent necessary, we authorise the Commission to process interdicted claims in the Eastern Cape to enable that information to be supplied.

15. Before dealing with these issues, we deal briefly with 'betterment' schemes in the context of the Restitution Act and why it is that the applicants seek relief specifically in respect of 'betterment' claims in the former Transkei and Ciskei.

'Betterment' and the Restitution Act

16. In terms of section 2 of the Restitution Act, the persons or communities who are entitled to restitution of rights in land must have been dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices.[10] As mentioned, it is common cause in these proceedings that 'betterment' schemes, which were applied in the former homelands, dispossessed persons of rights in land as a result of past racially discriminatory laws or practices in the sense contemplated by section 2. Moreover, this Court has previously awarded restitution of land arising from a 'betterment' claim,[11] and the Commission has settled 'betterment' claims on the basis that 'betterment' gave rise to

[10] In turn, the Restitution Act gives effect to section 25(7) of the Constitution which provides: '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.'
[11] *Mazizini Community and Others v Minister for Rural Development and Land Reform and Others* [2018] ZALCC 5; [2018] 3 All SA 164 (LCC) at paras 243 to 245.

dispossessions of land as contemplated by section 2.[12] It is not necessary for us to deal in these proceedings with the circumstances in which a 'betterment' claim gives rise to a restitution claim. However, some appreciation of what is at stake is warranted, given the nature of the relief sought and its potential impact on the process of land restitution promised by the Constitution.

17. 'Betterment' schemes were implemented in the former homeland areas and as such, it can be emphasised that the schemes only applied to black persons. According to the applicants, the legislative basis for betterment is found in the notorious Native Land Act 27 of 1913, the Black Administration Act 38 of 1927 and the Native Trust and Land Act 38 of 1936 and in subordinate legislation made thereunder.[13] Further homeland specific legislation is also relevant such as the Transkei Agricultural Development Act 10 of 1965. Stated at a high level, the schemes entailed the proclamation or deeming of an area as a 'betterment' area and the division of land into three types: residential, arable and grazing land. Affected residents were then relocated from their previous homesteads to these residential areas (where necessary), and arable and grazing areas in 'betterment' areas were then allocated and strictly regulated.

18. What is immediately apparent from the information before us is that the impact of 'betterment' schemes was felt by rural black South Africans in large numbers. In the founding papers, Ms Noloyiso Ntloko, the Chairperson of Vulamasango

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[12] See for example the settlement described in *Gongqose and Others v Minister of Agriculture, Forestry and Others, Gongqose and S* [2018] ZASCA 87; [2018] 3 All SA 307 (SCA); 2018 (5) SA 104 (SCA); 2018 (2) SACR 367 (SCA). The applicants explain that the State settled various betterment claims lodged in the Keiskammahoek District of the former Ciskei between 2000 and 2002. This includes a claim known as the Chata claim which was referred to this Court by way of direct access under case number LCC 154/1998.

[13] The subordinate legislation the applicants identify as relevant, including to the former Transkei and Ciskei, are Proclamation 302 of 1928 made by the Governor General in terms of section 25 of the Black Administration Act. Proclamation 117 of 1931 and Proclamation 31 of 1939, Proclamation 116 of 1949.

explains that in late 2003, the then Minister of Agriculture and Land Affairs estimated that 375 villages in the Ciskei and 900 villages in the Transkei representing between 190 000 and 320 000 households were dispossessed of land rights through the implementation of 'betterment' schemes in those areas. Nationally, she says, it is estimated that betterment policies 'dispossessed' about 2.5 million South Africans. The applicants explain that although 'betterment' was effected in the name of conservation and agricultural development, the implementation of the schemes was at least in some cases coerced and might better be described as forced removals. The description the applicants supply regarding what ensued depicts systematic control over the rural population in a process that, at least in some cases, resulted in loss of land, productive capacity and grazing, increased poverty and reliance on migrant labour earnings and even environmental degradation.

19. For present purposes, and without making findings on the legal nature of 'betterment' or any rights affected thereby, it is clear that the issues at stake are very serious ones concerning the promises of the Constitution relating to land justice, and may affect numerous vulnerable rural people.

The position of claimants in the Eastern Cape

20. A notable feature of these proceedings is that relief is sought only in respect of claimants or potential claimants in the former Transkei and Ciskei areas, which form part of the Eastern Cape. In this regard, it is common cause that during the initial phase of lodgement of restitution claims, the Commission actively dissuaded potential 'betterment' scheme claimants in the Eastern Cape from lodging claims

with the Commission, with the result that many did not.[14] The stance was apparently informed both by a view that laws and practices to which people were subjected while in the former homelands were not racially discriminatory and the view that since the removal of persons occurred ostensibly 'for the public good', this could not be remedied under the Restitution Act. The approach resulted in the rejection, in practice, of claims sought to be submitted and officials routinely advising people from the former Transkei and Ciskei that they were not entitled to lodge claims and turning them away. The applicants refer to a specific occasion in 1998 during an interview on Umhlobo Wenene Radio Station, which broadcast in the Eastern Cape mainly in the isiXhosa language in which an official of the Commission from the Eastern Cape, a Mr Zonyane allegedly stated that claims emanating from the former homelands did not qualify for restitution. The view appears to have been that while the Restitution Act addresses laws and practices that resulted in people moving to the former homelands, it does not address laws and practices to which people were subjected while in the homelands. A different view was apparently taken in Gauteng. It can be noted that the suggestion that 'betterment' schemes may not give rise to restitution claims was at least indirectly endorsed by excerpts of the 1997 Department of Land Affairs' White Paper on South African Land Policy.[15]

21. The State respondents thereafter changed their view on the matter and explain that the position adopted in the Eastern Cape was based on a '*bona fide*

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[14] This process has provoked academic debate. See G Minkley and A Westaway (2005) The Application of Rural Restitution to Betterment Cases in the Eastern Cape, Social Dynamics, 31:1, 104-128 at 115, DOI: 10.1080/02533950508628698 accessed on Https://doi.org/10.1080/02533950508628698 (Minkley and Westaway)..

[15] The White Paper stated: 'The claims of those dispossessed under 'betterment' policies, which involved forced removal and loss of land rights for millions of inhabitants of the former Bantustans, should be addressed through tenure security programmes, land administration reform and land redistribution support programmes.' See pp 55-6. The applicants refer to the White Paper in the founding affidavits.

misunderstanding' of the Restitution Act. However, it was too late for many claimants who had missed the 31 December 1998 deadline. Their exclusion was one concern that informed the extension of the period to lodge claims in terms of the Amendment Act, which enabled claimants again to lodge claims. But that reprieve was cut short due to the Constitutional Court decision in *LAMOSA 1*.

22. The applicants' evidence on these matters is not disputed by the State respondents. On the information before us, we can accept that those who resided in the Eastern Cape, and thus in the former Transkei and Ciskei, were disproportionately affected by the Commission's active dissuasion against the lodgement of 'betterment' claims during the initial phase. Indeed, according to the Commission's own estimations, in the former Transkei, approximately 900 villages were dispossessed through 'betterment' of which at least 800 did not lodge claims in the initial period and in the former Ciskei, 'betterment' was implemented in approximately 250 locations, comprising approximately 375 villages, of which at least 320 did not lodge claims in the initial period.

23. It is against this background of active dissuasion that the applicants call upon this Court to prioritise preserved 'betterment' claims and say that at this juncture, the Commission must be permitted at least to commence processing these claims. Although the State respondents accept the plight of 'betterment' claimants in the Eastern Cape, they contend that their position is not *sui generis* because many of the claimants who lodged preserved claims failed to lodge claims in the initial period 'as a result of government's failure to reach all people who wanted to lodge claims' and their 'inadequate outreach programmes prior to 31 December 1998.'

The first issue: Standing

24. The first issue for consideration is whether the applicants have standing to institute these proceedings. Mr Majozi, who appeared for the State respondents, submitted that they do not. In its order in *LAMOSA 2*, the Constitutional Court ruled that any interested party may apply to this Court to permit the Commission to process interdicted claims.[16] In *SARDA*, the Constitutional Court held that a Court ought to grant leave to intervene to a party with a direct and substantial interest in the subject matter of the case: [17]

> "What constitutes a direct and substantial interest is the legal interest in the subject-matter of the case which could be prejudicially affected by the order of the court. This means that the applicant must show that it has a right adversely affected or likely to be affected by the order sought.'

25. I have referred to Vulamasango's position in paragraph 3 above. In my view, Vulamasango is an interested party as contemplated by section 38(c) and (e) of the Constitution, which confers the right on various persons to approach a competent court alleging that a right in the Bill of Rights has been infringed or threatened. Section 38(c) confers the right on anyone acting in the interests of a group or class of persons. Section 38(e) confers the right on an association acting in the interests of its members, and I accept that members of Vulamasango and the persons whose interests they advance have a direct and substantial interest in the subject matter of this case. That is so both in instances where a person has

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[16] See above para 9.

[17] South African Riding for the Disabled Association v Regional Land Claims Commissioner and Others [2017] ZACC 4; 2017 (8) BCLR 1053 (CC); 2017 (5) SA 1 (CC) at para 9 to 11.

lodged a 'betterment' restitution claim that is a preserved claim and where a person has not lodged any 'betterment' restitution claim.

26. In my view, the individual applicants also have standing to seek relief sought in the application in their own interests or in the interests of those of their village community who were also affected by 'betterment'. The individual applicants have asserted that they and those whose interests they assert are victims of 'betterment' dispossession in the named areas of the Eastern Cape and who did not lodge claims in the initial lodgement period (pre December 1998) because it was announced on 'Radio Xhosa' that they were not entitled to lodge a claim. They assert that they have a direct and substantial interest in the relief sought 'as described in *LAMOSA 1*'. The difficulty with their founding affidavits is that it is not stated expressly whether their position is that they lodged claims which now constitute preserved claims or whether their position is that they are yet to lodge claims if so allowed. However, in the answering affidavit, the Minister accepts, from the context of the application that at least some of the applicants lodged preserved claims and others have not lodged claims at all. While it would have been better if the applicants had indicated their precise interests, we can accept in these circumstances that the applicants have standing, albeit that they may not all have a legal interest in the same relief. Some will have a legal interest in the relief aimed at processing interdicted preserved 'betterment' claims and others will have a legal interest in the relief aimed at authorising lodgement of new 'betterment' claims.

The second issue: claims not yet lodged

27. The second issue is whether it is competent for this Court to grant any relief in respect of claims that have never been lodged, whether during the initial phase or after the Amendment Act was implemented. As indicated, we conclude that it is not.

28. This Court is a creature of statute. Its jurisdiction in respect of restitution matters is framed by the Restitution Act. In terms of section 2(1)(e) of the Restitution Act a person is entitled to restitution of a right in land if the claim for such restitution was lodged by 31 December 1998. Its jurisdiction in respect of preserved claims is, at present, constrained by the terms of the Constitutional Court order in *LAMOSA 2*. This Court does not itself have the power to re-open restitution claims, for 'betterment' claims or any other claims: at least absent a challenge to constitutional validity of the cut-off dates, that is a matter for the legislature. Indeed, Mr Xoswa conceded as much.

The third issue: should the Court permit the Commission to process preserved 'betterment' claims in the former Transkei and Ciskei areas

29. The third issue is whether the Court should, in terms of paragraph 2(a)(ii) of the Constitutional Court's order in *LAMOSA 2*, grant permission to the Commission to begin processing interdicted claims, whether in respect of the whole or part of the Republic of South Africa and whether in respect of part or all of the process for administering an interdicted claim. The relief is sought specifically in respect of preserved 'betterment' claims in respect of the former Transkei and Ciskei areas. The case advanced in respect of these claims is that they should be prioritised given the Commission's active dissuasion in respect of lodgement of 'betterment'

claims in the Eastern Cape, which had dire implications for the realisation of important constitutional rights and in view of the extensive ongoing delays encountered in finalising old claims.

30. In response, the Minister contends that commencing to process preserved claims would result in administrative chaos with dire financial implications and would result in further delaying the processing of old claims, which must be prioritised according to the Constitutional Court's orders in *LAMOSA 1* and *LAMOSA 2*. To substantiate this, the Minister explains that as at the end of October 2021, the total projected settlement cost for the outstanding 7 148 restitution claims nationally is some R65.5 billion. As indicated, 684 (<10%) of these concern land in the Eastern Cape. The projected settlement cost of these claims is said to be some R8 139 billion (a figure that appears also to include the cost of some additional 181 recently finalised and settled claims in that province). The Eastern Cape is said to be understaffed and faces budgetary constraints particularly in the 'human resource intensive research phase'. The Minister explains further that the Commission, nationally, requires a staff complement of 1544 people but currently only has 784 staff. In the Eastern Cape, there are only some 70 staff of a required staff complement of 196 people. There is at present a moratorium on post-filling. In the current three-year budget cycle, there is an allocation of only some R9 billion for land claims. As at the end of October 2021, no province had completed processing old claims. This lamentable state of affairs calls for urgent rectification. Unattended, the noble intentions of the restitution project elude those whom the Restitution Act was intended to benefit.

31. The respective positions of the provinces are indicated in the table below, which, according to the Commission's statistics, indicate that 76% of total outstanding claims are in the three provinces of KwaZulu Natal, Limpopo and Mpumalanga. However, the outstanding claims in the Eastern Cape represent close to 10% and as the Minister indicates, numerical indicators do not reveal the complexity of claims nor do they provide insight into the resource challenges faced in a particular province such as the Eastern Cape.

EC	FS	GP	KZN	LP	MP	NC	NW	WC	Total
684 (10%)	6 (<0.5%)	386 (5%)	2386 (33%)	1438 (20%)	1610 (23%)	42 (1%)	208 (3%)	388 (5%)	7148

32. Importantly, the State respondents are currently unable to inform this Court how many preserved 'betterment' claims there are, nor indeed, how many preserved claims there are in respect of the former Transkei and former Ciskei or the parts thereof where 'betterment' schemes were implemented.

33. In this regard, the Commission has adopted the view that, save for acknowledging receipt of preserved claims in terms of s6(1)(a) of the Restitution Act, the Constitutional Court's interdict prohibits it from administratively sorting the preserved claims in any way until such time as the date referred to in paragraph 2(a) of the order in LAMOSA 2 arrives. The Minister has said in her answering affidavit that it would take roughly a year just to determine which of the 163 383 preserved claims lodged nationally are 'betterment' claims and which are not. The Minister estimates that that process on its own will incur a cost of R8 billion for 'human resources, resource mobilisation and outreach.' Notably, however, the

estimated cost is in respect of all preserved claims lodged nationally, not those lodged in the Eastern Cape generally, the former Transkei and Ciskei specifically or those parts of these former homelands where 'betterment' schemes were implemented. When queried about the cost, Mr Majozi indicated his instructions to be that the cost relates to what would be incurred in the process of accepting and investigating claims in the sense contemplated by Rules 3 and 5 of the Rules regarding the Procedure of the Commission made under section 16(1) of the Restitution Act.[18] Rule 3 governs acceptance of claims for investigation[19] and Rule 5 governs investigations by the Regional Commissioner.[20] Acceptance and investigation are two steps in the formal processing of claims.

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[18] Published in GoN R703, G16407 on 12 May 1995 as amended.

[19] Rule 3 reads:

(1) A regional land claims commissioner having jurisdiction over the land in respect of which a claim is instituted shall accept the claim for investigation where he or she is satisfied –
   (a) Subject to the provisions of section 11(2) of the Act, that the claim was lodged –
      (i) Substantially in the form of Annexure A together with such additional documents as are relevant to substantiate the claim; and
      (ii) With any regional office or the Head Office of the Commission or the Department of Land Affairs not later than 31 December 1998;
   (b) That the claimant has reasonable grounds for arguing that the claim meets the criteria set out in section 2 of the Act; and
   (c) That the claim is not frivolous or vexatious,

   Whereupon he or she shall advise the claimant accordingly.

(2) In the case of an informal land right, the documents contemplated in paragraph (a)(i) of subrule (1) may include a sworn statement by the claimant, giving a full description of the land in question and the nature of the right being claimed.

[20] Rule 5 reads: On acceptance of a claim for investigation, the Regional Land Claims Commissioner or a person designated by him or her, shall –

(a) Ensure that the outstanding information required in respect of the claim is obtained;
(b) Establish if the land is State-owned and, if not, obtain particulars of the owner, and the history of the acquisition of the land by the owner;
(c) Establish the purpose for which the land is used at that stage and the conditions of such use;
(d) Establish the date and circumstances of the dispossession of the right in such land;
(e) Establish whether any compensation or compensatory land has been received, the amount of such compensation, the basis on which such amount was calculated, and whether the compensation was properly determined and comparable to the value of the land dispossessed;
(f) Establish which Government Department or institution deal with the dispossession, and which racially discriminatory law or practice gave rise to the dispossession;
(g) Investigate the nature of the right in land claimed, and obtain proof thereof;
(h) Establish whether or not the claimant is a person, deceased estate, direct descendant, community or part of a community as contemplated in section 2(1) or (3) of the Act;
(i) Establish whether there is more than one claim in respect of a specific area or property;
(j) See to it that a topographical or compilation map indicating the location of the land is obtained from the Government Printer or the Surveyor-General;
(k) Establish factors should could give rise to priority treatment as contemplated in section 6(2)(d) of the Act;
(l) ...
(m) Investigate options and make recommendations to the Minister in terms of section 6(2)(b) of the Act for appropriate alternative relief in respect of claimants who do not qualify for the restitution of land rights;

34. I accept that the Commission would only be in a position to provide reasonably accurate information to this Court about the number of 'betterment' claims in the Ciskei and Transkei if claims were formally processed in this way. And while the figure of R8 billion is unsubstantiated, I accept that embarking on the formal process of accepting and investigating claims under Rules 3 and 5 would both require a very significant budget, even if limited to the Eastern Cape, and that this would impede the finalisation of old claims in those areas. This is because according to the Commission's process, it is the investigation of the claims in terms of Rule 5 through which the Commission establishes the date and circumstances of the dispossession of the right in such land, the nature of the right in land claimed, whether there are competing claims on the same land, and which racially discriminatory law or practice gave rise to the dispossession.[21]

35. But it does not follow that pursuing the formal process of acceptance and investigation of the claims under Rules 3 and 5 are the only ways in which relevant information can be gleaned about the likely number of preserved 'betterment' claims lodged by those actively dissuaded from lodging claims in the Eastern Cape. While the exercise may be imperfect, it may rationally be assumed that the vast majority of persons affected by the dissuasion are amongst the 12 654 preserved claims that were lodged in the Eastern Cape. As indicated above, the legislative scheme that governed 'betterment' entailed, *inter alia,* the proclamation or deeming of areas as 'betterment' areas. Even on the information supplied by the Minister,

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(n) Establish in terms of section 13(1)(c) of the Act whether the current owner or holder of rights in land claimed is opposed to the claim;
(o) ...
(p) Obtain information regarding any other matter which is deemed to be necessary or desirable to be investigated in order to facilitate the task of the Regional Land Claims Commissioner.

[21] See specifically Rules 5(d), (f), (g) and (i).

it is known how many villages are affected, and in any event, it can readily be ascertained what villages were affected by 'betterment' schemes in the former Transkei and Ciskei. If that is so, as it appears to be, then it would be a relatively simple exercise to ascertain how many of the 12 654 preserved claims lodged in the Eastern Cape affect land in areas of the former Transkei and Ciskei where 'betterment' was implemented. While the figure could not be treated as an accurate determination of the number of 'betterment' claims in the Eastern Cape, absent any contrary indication, it could serve as a reasonable estimate.

36. Moreover, it cannot be assumed that useful information relevant to estimating the number of preserved 'betterment' claims in the former Transkei and Ciskei could not be gleaned from a preliminary administrative sorting of the preserved claims forms lodged under section 10 of the Restitution Act.[22] While claim forms will, in the nature of things, vary in their specificity, level of detail and accuracy, the forms themselves ought to reveal at the very least whether the claim is in respect of property that fell within a 'betterment' area and some forms will reveal pointed information about the rights in land allegedly dispossessed. In addition, the applicants and specifically Vulamasango, have tendered their support to assist the Commission to ascertain the approximate number of preserved 'betterment' claims in the Eastern Cape. This co-operation would alleviate the administrative burden involved in making this assessment.

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[22] Section 10(1) provides: ' Any person who or the representative of any community which is entitled to claim restitution of a right in land, may lodge such claim, which shall include a description of the land in question, the nature of the right in land of which he, she or such community was dispossessed and the nature of the right or equitable redress being claimed, on the form prescribed for this purpose by the Chief Land Claims Commissioner under section 16.'

37. Mr Majozi contended that this Court could not expect the Commission, in these proceedings, to have embarked on any exercise of administrative sorting of claims to estimate the number of 'betterment' claims in the affected areas, for two reasons. First, he contended that the case pleaded did not warrant such a response. I disagree. Indeed, the Minister sought to provide one albeit at a very high level.[23] An applicant seeking relief under paragraph 2(a)(ii) will in the ordinary course not be in a position to provide information relevant to the administration of preserved claims and its cost. That information resides with the State respondents. And from the Court's perspective, absent provision of such information, this Court is unable sensibly to determine if there is a proper basis for permitting such claims to be processed and if so, where and in what manner. Rather, this Court would be substantially constrained to wait until a province has completed, or nearly completed processing all old claims before allowing the commencement of the processing of preserved claims in that province.

38. Second, the Commission understands that to do the work entailed in providing even a reasonable estimate of affected claims would entail a breach of the Constitutional Court's prohibition on processing preserved claims 'in any way'.[24] On this interpretation, the affected claims and forms must, in effect, not be sorted in any way while the prohibition on processing is in place. I accept that the Constitutional Court's prohibition on processing preserved claims would preclude the Commission from embarking on the processes entailed in Rules 3 and 5 of its Rules. But in my view, it is doubtful that the Constitutional Court's prohibition precludes some level of administrative sorting as a prior process, at least to enable

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[23] See above para 33.
[24] See para 2(a) of the *LAMOSA 2* order, above para 10.

accounting to this Court under the *LAMOSA 2* order. On the other hand, even if such administrative sorting is permitted, on the facts of this case, the line between what is then permissible and what is not, may become somewhat blurred and it would be wholly undesirable for the Commission and its officials to be placed in a position where they may not know on which side of the line they are treading.

39. This Court is entitled to conduct any part of its proceedings on an inquisitorial basis.[25] Moreover, paragraph 2(a)(ii) of the Constitutional Court's order in LAMOSA 2 expressly contemplates that this Court can grant permission to the Commission to begin processing preserved claims in respect of part of the process of administering claims. In our view, the interests of justice demand that to the extent necessary, we make such an order, and, that we invoke our inquisitorial powers to permit and require the Commission to conduct administrative sorting of the relevant claims so as to supply this Court with a reasonable estimate of the number of preserved claims in the former Transkei and Ciskei generally, and the specific areas thereof where 'betterment' schemes were implemented. Upon receipt of that information, and any further relevant information, this Court can then assess whether to permit the formal processing of such claims in light of all of the information before us.

40. We also direct the applicants to deliver a supplementary affidavit supplying related information.

Order

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[25] Section 32(3)(b) of the Restitution Act. See too *Mlifi v Kingenberg* 1999 (2) SA 674 (LCC).

41. The following order is made:

41.1. The Commission is directed, within four months of the date of this order, to deliver an affidavit supplying the Court with:

41.1.1. a description of the areas and villages in the former Transkei and Ciskei in respect of which betterment schemes were implemented;

41.1.2. a reasonable estimate of the number of preserved claims lodged in the Eastern Cape in respect of land in those areas and villages; and

41.1.3. any other relevant information.

41.2. To the extent necessary, the Commission is permitted to process preserved claims lodged in the Eastern Cape by embarking on a process of administrative sorting and capturing relevant information.

41.3. The applicants are directed:

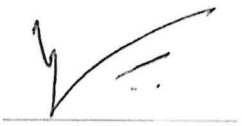
41.3.1. to co-operate with the Commission in the above process;

41.3.2. to deliver an affidavit within three months of the date of this order supplying such information as may be available or obtained relating to the matters in paragraph 41 above.

41.4. Either party may set the application down for further hearing after the Commission has delivered the affidavit referred to in paragraph 41, or request a conference in terms of the Rules of the Land Claims Court.

41.5. Costs are reserved for later determination.

S J Cowen
Judge
Land Claims Court



Y S Meer
Acting Judge President
Land Claims Court

Date of hearing: 18 August 2022

Date of judgment: 20 October 2022

Appearances:

For the applicants: Mr MMJ Xozwa instructed by Siyathemba Sokutu Attorneys Inc East London

For the respondents: Mr MM Majozi and Ms AF Ashton instructed by the State Attorney, Port Elizabeth