IN THE LAND CLAIMS COURT OF SOUTH AFRICA

HELD AT RANDBURG

CASE NO: **LCC171/2021**

Before: **The Honourable Acting Judge Muvangua**

Heard on: 18 November 2022

Delivered on: 31 March 2023

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
(3) REVISED: ~~YES~~ / NO

31 March 2023
DATE

SIGNATURE

In the matter between

THAMSANQA DAVIS BISSET	First Applicant
and	
MINISTER OF THE DEPARTMENT OF RURAL DEVELOPMENT AND LAND REFORM	First Respondent
DIRECTOR GENERAL OF RURAL DEVELOPMENT AND LAND REFORM	Second Respondent
CHIEF LAND CLAIMS COMMISSIONER	Third Respondent
REGIONAL LAND CLAIMS COMMISSIONER: EASTERN CAPE PROVINCE	Fourth Respondent
OFFICE OF THE VALUER GENERAL	Fifth Respondent

JUDGMENT

MUVANGUA AJ

Introduction

[1] The main issue before this Court concerns the reviewing and setting aside of a settlement agreement that was signed by the applicant,[1] ostensibly in terms of section 42D of the Restitution of Land Rights Act 22 of 1994 ("**Act**"). That provision empowers the first respondent ("**Minister**") to enter into agreements with claimants whose claims were lodged by 30 June 2019, if she is satisfied that a claimant is entitled to restitution of a right in land in terms of section 2 of the Act.

[2] There are, however, two preliminary issues that I must also deal with. The one relates to condonation. The application is brought in terms of the in terms of the Promotion of Administrative Justice Act 3 of 2000 ("**PAJA**"). Section 7(1) of PAJA requires judicial review proceedings to be instituted within 180 days from the date on which the applicant became aware of the decision. The agreement that is at the heart of these proceedings was entered into on 18 April 2008. Under PAJA, the applicant had 180 from that date to institute review proceedings. He instituted review proceedings some 13 ½ years out of time. The applicant thus prays for an order condoning the late institution of these proceedings.

[1] The Commissioner is identified as the other party to the agreement on behalf of the Department, but s/he did not in fact sign the agreement.

[3] The other preliminary issue raised by the applicant concerns an alleged non-compliance with the rules of this Court by the fourth respondent ("**Commissioner**").

[4] For the review, the applicant prays for an order remitting the matter to Commissioner for reconsideration within 30 days, taking into consideration: (a) the history of the land dispossession; and (b) the hardship that the dispossession caused. In the alternative, the applicant prays for an order compelling the Commissioner to refer the matter to this Court, in terms of sections 14(3A) and (4) of the Act.

4.1 In the further alternative, the applicant prays for an order directing the respondents to deliver a revised offer to the applicant's attorneys of record within 20 days from the date of this Court's decision. The idea of a revised offer was suggested to the applicant by the Commission, through a letter dated 11 July 2019.

[5] I commence first with some background facts.

BACKGROUND

<u>The applicant's case</u>

[6] The applicant is a descendant of Bhutana and Mickey Bisset who owned land in Port Elizabeth (Gqeberha). The said land was situated at Erf 477, Veeplaas (now known as Erf 477, Bethelsdorp) and measured 2,1414 hectares. The Bisset family was dispossessed of the right of ownership of property in 1972, as a result of racially discriminatory laws and practices in the country at the time.

[7] On or before 31 December 1998, one Nzimeni Dennis Bisset (deceased) duly lodged a land claim in respect of Erf 477, Bethelsdorp on behalf of the Bisset family. The Bisset family claim was captured under claim reference number 6/2/3/D/51/792/974/4. It was gazetted some 9 years from the date of claim – on 17 November 2006.

[8] According to the applicant, he was paid a visit in 2008 by a representative from the Commissioner's office – one Ms Vanessa Daniels, who made him sign what purported to be a settlement agreement in respect of the land claim. Clause 4.3 of the agreement reads:

> "*The value of the claimed property viz. ERF 477 Veeplaas is R78 702.56 which constitutes the Restitution Award to the Bisset family* . . ."

[9] The applicant alleges that the content of the document was never explained to him. The answering affidavit on behalf of the Commissioner is deposed to by one Lebjane Harry Maphutha ("**Mr Maphutha**"). Mr Maphutha denies that Ms Daniels did not explain the content of the agreement to the applicant.

[10] The difficulty with Mr Maphutha's denial is this: he does not allege that he was present during the relevant periods and/or meetings. He alleges authority to depose to the answering affidavit by virtue of the position that he holds (he is the Regional Commissioner). He alleges that the facts to which he deposes are within his personal knowledge but does not say on what basis. Where information is not within his personal knowledge, the allegation is that he acquired knowledge of it from documents within in control. There are no confirmatory affidavits provided. It is therefore difficult to conceive of the basis for denying what the applicant describes as an in-person interaction between himself and Ms Daniels.

[11] The applicant also alleges that he has never received the settlement payment. This allegation is not denied. In late 2008, he communicated to Ms Daniels by telephone that the Bisset family no longer wished to settle their claim, because the family was not involved in the determination of the property value, or in the determination of what a just and equitable compensation would be for them. Ms Daniels undertook to revert to the applicant about further process, but never did. These allegations are also not denied by the Commissioner.

[12] The applicant instructed his present attorneys of record when it became apparent that the Commissioner's office was not getting back to him (and his family). Once instructed, the attorneys came upon a valuation report by Saratoga Trading CC ("**Saratoga Report**"), which placed the value of the property at R157 405.00, taking into account the consumer price index for the 2006 year. At any rate, the applicant's attitude is that Saratoga Trading is not authorized (by the Act) to recommend restitution compensation.

[13] The applicant does not say when he instructed lawyers to act for him, but he narrates that his attorneys were invited by Mrs Laetitia Jansen of the from the Commissioner's office on 21 and 22 February 2019. The purpose of the invitation was for them to meet with the then Valuer General, Mr Christopher Gavor regarding the rejected offer. The meeting took place on 25 February 2019. At that meeting, the applicant's legal representatives were tasked by the Valuer General to propose an offer that took into account the loss suffered as a direct result of the dispossession. In turn, and on 8 March 2019, the applicant's attorney requested the Commissioner's office to appoint a professional who is better skilled and placed to undertake that task. This request was again made to the Commissioner's legal representatives on 2 April 2019.

Respondent's case

[14] The Commissioner's office filed an answering affidavit which raises two defences:

14.1 The first is that the Commissioner is not required by law to take into account the history of the dispossession and the hardship caused by the dispossession when determining an amount to offer as financial compensation.

14.2 The second is that the applicant was at all times aware of how the valuation process was conducted and how the compensation would be implemented. The kernel of this averment is that the applicant agreed with full knowledge of what the settlement entailed. I have observed above that the deponent does not say that he was directly involved with the process of settling with the applicant. The applicant's version is that Ms Daniels did not explain the agreement to him. It might be so that the applicant did not communicate to Ms Daniels that he did not know what he was being made to sign. But that takes the matter nowhere.

[15] On this basis, the Commissioner contends that the applicant's review application is without merit and must be dismissed.

[16] I turn now to deal in turn with the issues raised in this application.

NON-COMPLIANCE WITH THE RULES

[17] The applicant alleges that the Commissioner did not complied with the rules of this Court that would allow them to participate in the proceedings. He states that the Commissioner did not comply with rule 25, in that he filed an

answering affidavit without having filed a notice of appearance. This, according to the applicant, is a violation of rule 26(2), because only a participating party is entitled to deliver or file documents.

[18] Rule 25(1) does indeed provide as follows:

> *"Any party that wants to participate in a case must, within 10 days after service on him or her of the process by which the case is initiated, file a notice of appearance based on form 10 of Schedule 1 and furnish a similar notice to the applicant or plaintiff, or if there is more than one, to the first applicant or plaintiff."*

[19] Rule 25(1) makes use of the peremptory "must". It follows that the filing of a notice of appearance is a prerequisite to participation in a matter before this Court. Rule 26(1) establishes that a party that has filed a notice of appearance is a "participating party" – a broad concept that allows for the involvement of interested parties who need not be cited. This is in contrast to the narrower approach of Rule 12 of the Uniform Rules of Court.[2]

[20] Rule 26(2) sets out the powers that such a party has:

> "*Only a participating party in a case is entitled to—*
>
> *(a) deliver or file documents;*
>
> *(b) have documents delivered to him or her;*
>
> *(c) participate in any procedures before the hearing;*
>
> *(d) participate in or be represented at the hearing; and*
>
> *(e) apply for leave to appeal or participate in any appeal against any order of the Court, unless the Court orders otherwise*."

[2] *Ex parte Beukes and Bekker* [1998] 1 All SA 34 (LCC) at fn 35.

[21] What I discern from these rules is that the delivery of a notice of appearance is a requirement if a party wishes to deliver or file documents. There is no indication that one respondent would be able to deliver a notice of appearance on behalf of another. Only the party who has delivered such a notice becomes a "participating party", and only a participating party can deliver documents. It was therefore irregular for notices of appearance to be delivered by the first and second respondents only, while it was the third and fourth respondents who delivered an answering affidavit. They did this in their own name, not in the name of any other respondent. The first and second respondents did not purport to act in the name of any other respondents in delivering notices of appearance – nor would this have been competent, given peremptory nature of rule 25(1).

[22] This Court is empowered to condone such non-compliance. Rule 28(4) says that:

> "*The Court may, on good cause—*
>
> *(a) deviate from these Rules or from the Uniform Rules and act in a manner which it considers to be appropriate in the circumstances; and*
>
> (b) *condone any deviation from or non-compliance with these Rules*".

[23] Rule 28(4) was interpreted in by this Court in *Mthembu v Venter*.[3] It held that subrule 28(4)(b) functions similarly to the Uniform Rules of Court, in that it allows the court to condone non-compliance with the rules on good cause shown. According to the Court in *Mthembu*, this power is also set out in rule 32(4)(b) and section 38E of the Restitution of Land Rights Act.[4]

[24] Rule 32(4)(b) provides:

[3] *Mthembu v Venter* [2015] 2 All SA 618 (LCC).
[4] *Mthembu* at para 84.

"*The Court may, upon application and on good cause shown at any stage of the proceedings—*

. . .

(b) condone any irregular step or any non-compliance with these Rules or with any order or direction of the Court."

[25] Section 38E(c) of the Restitution of Land Rights Act provides:

"*The Court may, during proceedings under this Chapter and subject to such terms and conditions as it may determine—*

. . .

(c) on good cause shown condone any deviation from or non-compliance with the provisions of this Chapter or the rules."

[26] It follows that this Court is empowered to condone the respondents' deviation from the Rules, much as is seen in rule 27(3) of the Uniform Rules of Court. However, given the existence of Rule 28(4)(a), this power goes beyond what is possible in ordinary High Courts. Again in *Mthembu*, the Court stated:

> *"It is evident that despite the Court's ordinary broad powers to enable the real issues to be canvassed through the process of granting condonation, it in addition may act in a manner which it considers appropriate in the circumstances.*
>
> *In other words, aside from condoning a procedural failure by allowing a defaulting party the opportunity to comply with the terms of the applicable rule, the Court can "deviate" from the Rules themselves and "act in a manner which it considers to be appropriate in the circumstances".*
>
> *This broader power under adjectival law also appears to go beyond the inherent jurisdictional powers assumed by High Courts; the reason being that all the common law procedural powers of a High Court are already conferred on the Land Claims Court under rule 28(2) (see also section 22(2)(a) of the Restitution Act)."*[5]

[5] Id at paras 86-7.

[27] The exceptionally broad powers given to this Court in terms of procedure are justifiable. Land claims are often associated with complexities. This point is also made in *Mthembu* as follows:

> *"The extensive procedural discretionary powers conferred on this Court are consistent with the objects of the enabling Acts and the role assigned to the Court in realising them. Land and all forms of rights in land are sensitive issues requiring expeditious, economic and effective disposal in a fair manner (for example rule 30(1)). The extent of its powers is illustrated by 32(3)(b) of the Restitution Act which allows the Land Claims Court to "conduct any part of any proceedings on an informal or inquisitorial basis". Section 22(2)(b) of the Restitution Act also gives the Court very broad ancillary powers to perform its functions. In addition, section 32 provides that the President of the Land Claims Court may make rules which include, under subsection (1)(d), those providing for:*
>
> > *'. . . generally, any matter which may be necessary or useful to be prescribed for the proper despatch and conduct of the functions of the Court.'"*[6]

[28] The applicant did not allege any prejudice. He also did not take any steps to have the respondents' notice of appearance or answering affidavit set aside, whether in terms of rule 32 or otherwise. The first time that he raised the issue of the respondents' non-compliance with rule 25 and 26 was in his replying affidavit.

[29] I am in the circumstances inclined to condone the Commission's non-compliance with the rules and allow the answering affidavit.

[6] Id at para 88.

THE APPLICANT'S DELAY IN BRINGING THIS APPLICATION

[30] The applicant instituted review proceedings some 13 ½ years after it became aware of the decision under review. Section 9 of PAJA permits this Court to condone a delay in the institution of judicial review proceedings. It reads as follows:

> "*(1) The period of—*
>
> . . .
>
> *(b) 90 days or 180 days referred to in sections 5 and 7*
>
> *may be extended for a fixed period, by agreement between the parties or, failing such agreement, by a court or tribunal on application by the person or administrator concerned.*
>
> *(2) The court or tribunal may grant an application in terms of subsection (1) where the interests of justice so require*."

[31] Therefore, the criterion for an extension of the 180 period by this Court is whether it is in the interests of justice. The court in *Camps Bay Residents' and Ratepayers Association v Harrison*[7] had the following to say about that:

> *"Section 9(2) however allows the extension of these time frames where 'the interests of justice so require'. And the question whether the interests of justice require the grant of such extension depends on the facts and circumstances of each case: the party seeking it must furnish a full and reasonable explanation for the delay which covers the entire duration thereof and relevant factors include the nature of the relief sought, the extent and cause of the delay, its effect on the administration of justice and other litigants, the importance of the issue to be raised in the intended proceedings and the prospects of success."*[8]

[7] [2010] JOL 25040 (SCA).
[8] Id at para 54.

[32] Moreover, the principles applicable to the granting of condonation are settled in law. The Constitutional Court in *Mphephu-Ramabulana*[9] summarised the legal position as follows:

> *". . . compliance with this Court's Rules and timelines is not optional, and . . . condonation for any non-compliance is not at hand merely for the asking. The question in each case is "whether the interests of justice permit" that condonation be granted. Factors such as the extent and cause of the delay, the reasonableness of the explanation for the delay, the effect of the delay on the administration of justice and other litigants, and the prospects of success on the merits if condonation is granted, are relevant to determining what the interests of justice dictate in any given case*."[10]

[33] The court may take the following factors into account when determining whether the interests of justice permit the granting of condonation: the nature of the relief sought;[11] the extent and cause of the delay;[12] the reasonableness of the explanation for the delay;[13] the importance of the issue to be raised;[14] the effect of the delay on the administration of justice and other litigants;[15] and the prospects of success on the merits if condonation is granted.[16]

[34] The Constitutional Court in *Mphephu-Ramabulana* also noted that "*the extremity of the delay, coupled with the paucity of the explanation provided, justify the immediate refusal of condonation*", but "*lateness and inadequacy of the explanation provided are not necessarily dispositive of the question*

---

[9] *Mphephu-Ramabulana and Another v Mphephu and Others* (CCT 121/20) [2021] ZACC 43; 2022 (1) BCLR 20 (CC); 2021 JDR 2796 (CC).
[10] *Mphephu-Ramabulana* at para 33.
[11] *Grootboom v National Prosecuting Authority and Another* (CCT 08/13) [2013] ZACC 37; 2014 (2) SA 68 (CC); 2014 (1) BCLR 65 (CC); [2014] 1 BLLR 1 (CC); (2014) 35 ILJ 121 (CC) at para 22.
[12] *Brummer v Gorfil Brothers Investments (Pty) Ltd* [2000] ZACC 3; 2000 (2) SA 837 (CC); 2000 (5) BCLR 465 (CC) at para 3
[13] *Van Wyk v Unitas Hospital (Open Democratic Advice Centre as Amicus Curiae)* [2007] ZACC 24; 2008 (2) SA 472 (CC); 2008 (4) BCLR 442 (CC) at para 20.
[14] *Grootboom* at para 22.
[15] *Brummer* at para 3.
[16] *Mankayi Mankayi v AngloGold Ashanti Ltd* [2011] ZACC 3; 2011 (3) SA 237 (CC); 2011 (5) BCLR 453 (CC) at para 8.

of condonation. This is because the other factors relevant to condonation may favour its granting and tilt the interests of justice to the other side of the scale."[17] [Underlining added].

[35] The period of delay is excessive and the explanation for it is thin. All that the applicant says is that he had limited financial resources but was forced by the Commissioner's disposition to find lawyers and litigate.

[36] In my view, the explanation provided falls short of the required standard of good cause. The applicant does not explain the entire period of delay or anything of the sort.

[37] While that is, the Commissioner also does not complain of prejudice. The conduct of his office after the settlement agreement was signed suggests that he was not resolved on enforcing it at any rate. But that does not excuse the 13 ½ year delay.

[38] I am, however, minded to grant the application, because it is (in the circumstances of this case), in the interests of justice to do so. The nature of the relief sought in these proceedings sits at the core of land reform, a multitude of constitutional rights, and the personal traumas experienced by land claimants. Land claimants (as people who have suffered dispossession and victimisation) are vulnerable by their very nature. This may mean that they face significant barriers in accessing courts.

[39] In the case of a review of administrative action, an important consideration is the imperatives of legality. A refusal to grant an extension of time in terms of section 9(2) of PAJA might have the effect that administrative action stands despite the risk that it might be invalid.[18]

[17] *Mphephu-Ramabulana* para 38.
[18] Quinot *Administrative Justice in South Africa* (Oxford University Press, Cape Town 2015) at 229.

[40] This consideration is aligned to that of the prospects of success. The Constitutional Court held that prospects of success weigh heavily when condonation is considered, and may in fact make up for the failure to properly explain the delay.[19] The Court in *Senwedi v S* stated:

> *"While the applicant's justification of his delay is somewhat tenuous, the strong prospects of success and the importance of the constitutional rights involved, compensate for that shortcoming."*[20]

[41] A similar point was made in *Mzizi v S*:[21]

> *"Good cause is a well-known test applicable to condonation applications. It has two requirements. First, the applicant must furnish a satisfactory and acceptable explanation for the delay. Secondly, he or she must show that there are reasonable prospects of success on the merits of the appeal. If there are no prospects of success the court may refuse leave even if the explanation given is satisfactory, for it would be futile for the court to grant condonation where it is clear that, on the merits, the case would fail.*
>
> . . .
>
> *In the circumstances of this case the unsatisfactory explanation furnished is, however, not fatal to condonation. In a matter such as this condonation may still be granted if there are strong prospects of success on the merits."*[22]

GROUNDS FOR INVALIDITY OF THE SETTLEMENT AGREEMENT

[42] The applicant's case is that the settlement agreement between the land claimants and the respondents falls to be reviewed and set aside, on the following grounds:

---

[19] *Senwedi v S* 2022 (1) SACR 229 (CC) at paras 11-4.
[20] *Senwedi* at para 14.
[21] *Mzizi v S* [2009] 3 All SA 246 (SCA).
[22] *Mzizi* at paras 9 and 16.

42.1 Relevant factors were not considered, specifically the history of the land claimant's dispossession and the associated trauma;

42.2 The company that determined the compensation offered to the land claimants was not authorised by law to do so;

42.3 The amount offered to the land claimants in compensation was arbitrary and capricious, or irrational; and

42.4 For all of the reasons given above, the settlement agreement was not reasonable.

[43] I deal with these below.

Relevant factors were not considered

[44] The first ground relied upon by the applicant is that the respondents did not take all relevant considerations into account when making a decision on the compensation that was offered them. This ground of review is recognised in section 6(2)(e)(iii) of PAJA, as follows:

> *"A court or tribunal has the power to judicially review an administrative action if—*
>
> *(e) the action was taken—*
>
> . . .
>
> *(iii) because irrelevant considerations were taken into account or relevant considerations were not considered*."

[45] This ground of review has been held to fall under lawfulness, and to give effect to the concept of material mistake of fact. In *Pepcor Retirement Fund v Financial Services Board*,[23] the Court held as follows:

> *"The national legislation envisaged in section 33(3) of the Constitution has now been enacted in the Promotion of Administrative Justice Act 3 of 2000; but that Act came into operation well after the present proceedings were instituted. Nevertheless it is relevant to note in passing that section 6(2)(e)(iii) provides that a court has the power to review an administrative action inter alia if "relevant considerations were not considered". It is possible for that section to be interpreted as restating the existing common law; it is equally possible for the section to bear the extended meaning that material mistake of fact renders a decision reviewable.*
>
> *In my view a material mistake of fact should be a basis upon which a court can review an administrative decision. If legislation has empowered a functionary to make a decision, in the public interest, the decision should be made on the material facts which should have been available for the decision properly to be made. And if a decision has been made in ignorance of facts material to the decision and which therefore should have been before the functionary, the decision should (subject to what is said in paragraph [10] above) be reviewable at the suit of inter alios the functionary who made it – even although the functionary may have been guilty of negligence and even where a person who is not guilty of fraudulent conduct has benefited by the decision. The doctrine of legality which was the basis of the decisions in Fedsure, SARFU and Pharmaceutical Manufacturers (supra) requires that the power conferred on a functionary to make decisions in the public interest, should be exercised properly ie on the basis of the true facts; it should not be confined to cases where the common law would categorise the decision as ultra vires*."[24]

[46] There are many examples in case law where this principle was applied and considered.[25] For example, in *Earthlife Africa v Minister of Environmental*

[23] *Pepcor Retirement Fund v Financial Services Board* [2003] 3 All SA 21 (SCA).
[24] Id at paras 46-7.
[25] See for example: *Media 24 Holdings (Pty) Limited v Chairman of the Appeals Board of the Press Council of South Africa* [2014] JOL 32209 (GJ) and *Afriforum v Minister of Trade and Industry* [2013] 3 All SA 52 (GNP).

Affairs,[26] the Court set aside an environmental authorization on the basis that a climate change impact assessment had not been conducted.[27] In *Chairman, State Tender Board v Digital Voice Processing (Pty) Limited*,[28] a decision of the State Tender Board was set aside in part because they had not considered all the information before them.[29]

[47] In the context of this matter, the factors to be considered are set out in section 33 of the Act as follows:

> "*In considering its decision in any particular matter the Court shall have regard to the following factors:*
>
> *(a) The desirability of providing for restitution of rights in land to any person or community dispossessed as a result of past racially discriminatory laws or practices;*
>
> *(b) the desirability of remedying past violations of human rights;*
>
> *(c) the requirements of equity and justice;*
>
> *(cA) if restoration of a right in land is claimed, the feasibility of such restoration;*
>
> *(d) the desirability of avoiding major social disruption;*
>
> *(e) any provision which already exists, in respect of the land in question in any matter, for that land to be dealt with in a manner which is designed to protect and advance persons, or categories of persons, disadvantaged by unfair discrimination in order to promote the achievement of equality and redress the results of past racial discrimination;*
>
> *(eA) the amount of compensation or any other consideration received in respect of the dispossession, and the circumstances prevailing at the time of the dispossession;*
>
> *(eB) <u>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</u>;*

[26] [2017] 2 All SA 519 (GP).
[27] Id at para 101.
[28] [2012] 2 All SA 111 (SCA).
[29] Id at para 34 and 39.

(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." [Underlining added].

[48] The above are the factors to be considered when the court makes its "decision in any particular matter". The factors in section 33 of the Act are relevant to a determination of compensation. In *Hermanus v Department of Land Affairs*,[30] this held as follows:

> "*Although the Restitution Act contains no directive on the make-up of the compensation, the Court is enjoined in section 33 to have regard to certain factors when making its orders. The following of those factors may be relevant to an award of compensation in this matter:*
>
> *'(b) the desirability of remedying past violations of human rights;*
>
> *(c) the requirements of equity and justice;*
>
> *(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.*'"[31]

[49] In addition, the Court held that regard should be had to the factors in section 25(3) of the Constitution when compensation is calculated.[32]

[30] [2000] 4 All SA 499 (LCC).
[31] Id at para 9.
[32] Id at para 10.

[50] Section 25(3) provides as follows, in relation to compensation following expropriation:

> "*The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including—*
>
> *(a) the current use of the property;*
>
> *(b) the history of the acquisition and use of the property;*
>
> *(c) the market value of the property;*
>
> *(d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and*
>
> *(e) the purpose of the expropriation*."

[51] The court in *Hermanus* noted, however, that hardship and the history of dispossession are not included in the list of considerations in section 25(3).[33] This might be so because the list in the Constitution relates to compensation in response to expropriation, not as a result of a land claim. Nevertheless, this Court in *Hermanus* made it clear that hardship and the history of dispossession must be considered, stating:

> *"In determining compensation for purposes of equitable redress, a Court must have regard to the history of the dispossession and to the hardship caused by the dispossession. These two factors are not on the list of factors to be considered for determining compensation under section 25(3) of the Constitution. Regard to them may well result in a higher award than would have been the case if cognisance had to be taken only of the factors listed in the Constitution."*[34]

[33] Id at para 11.
[34] Id.

[52] I accept the applicant's invitation to follow this Court's decision in *Hermanus*. It is clear that hardship and the history of dispossession are relevant factors to be taken into account when compensation is determined in the context of a land claim. The Commissioner readily admits that they did not consider these factors, and in fact state that they did not need to do so. Therefore, they failed to consider relevant considerations in taking the decision of how much compensation to offer the land claimants in this matter, and the resulting settlement agreement falls to be reviewed and set aside in terms of section 6(2)(e)(iii) of PAJA.

[53] The Commissioner relies on *Florence v Government of the Republic of South Africa*[35] to argue that compensation for land restitution should be a purely financial measure, based on the consumer price index. This is unfortunately a misinterpretation of the findings in *Florence*. The relevant portion of the judgment is broader than what is quoted in the respondents' heads of argument. The Constitutional Court held as follows in *Florence*:

> "*Farjas correctly held that a claim for compensation under the Restitution Act is in a class of its own (sui generis). It is a claim against the State and has a reparatory and restitutionary character. It is neither punitive in the criminal justice sense nor compensatory in the civil sense. It advances major public purpose and deploys public funds in an equitable way to deal with the egregious and identifiable forms of historic hurt. Fair compensation is not necessarily equal to the monetary value of the dispossessed property and restitution has little or nothing to do with investing or commercial transactions. It has to do with addressing massive social and historical injustice. Beyond a mere calculation of financial loss a court must have regard to several non-financial considerations listed in section 33 of the Restitution Act.*
>
> *The reasoning in Farjas is correct that the application of compound interest or of capital-gain on a historical loss will threaten the overarching purpose of the Restitution Act and the pointed object of*

[35] [2014] ZACC 22.

compensation envisaged in sections 33 and 35. It is likely to result in over-compensation of claimants, an outcome which is at odds with the purpose of the Restitution Act.

The Land Claims Court was indeed entitled to take judicial notice of the CPI for the good reasons detailed in Farjas. In this matter, the trial court did not need to resort to that judicial aid. Ample evidence was led on what the CPI is and why it would be an appropriate measure to compensate for inflation but not for a capital-gain on property which would have been held as a long-term investment. I find no misdirection in the trial court preferring the expert evidence of Professor Viruly. He explained cogently:

> *'The value of money for consumption purposes is thus typically adjusted over time by the CPI [which] compensates for the diminishing value of money.'"*[36]

[54] From the above, it is clear that the court in *Florence* was answering a different question to the one that is before this Court. The issue in *Florence* was whether the consumer price index was the correct measure for the monetary element of compensation for purposes of land restitution, or whether a more generous measure such as "*compound interest or capital gain on a historic loss*" should be used. There issue was not whether non-financial considerations such as hardship play a role, and in fact the Court confirmed that they must, in the first paragraph quoted above. Therefore, while the Court held that they were entitled to take "judicial notice" of the consumer price index, they also held that "non-financial considerations" form a part of the calculation of compensation. The court recognised that there are various elements that together make up what should be offered to land claimants as compensation, and specifically held that the factors in section 33 of the Act must be considered.

[36] *Florence* above n 46 at paras 137-9.

[55] The Constitutional Court in *Florence* relied on, and endorsed this Court's decision in *Farjas (Pty) Limited v Minister of Agricuture and Land Affairs*.[37] Notably, and in line with the argument above, that judgment was concerned only with section 33(eC) of the Act, according to which "*changes over time in the value of money*" must be considered. The main finding of the court in that matter, with respect to section 33, was as follows:

> *"There appears to be no fail proof method of ascertaining the value of money over time having regard to section 33(eC) of the Restitution Act. Each of the plaintiff's experts had difficulty with a particular method. This included the CPI. However I am of the view that CPI adequately caters for the change in the value of money over time and is an appropriate method to determine compensation to place the plaintiffs' in as close a position as possible to the position had they not been expropriated."*[38]

[56] *Farjas* was also concerned with a different question to the one that is central to this matter.[39] The court there only sought to interpret section 33(eC), not any of the other non-financial factors in section 33. In the result, the case law cited by the respondents does not assist them.

[57] This Court – and the respondents as decision-makers – must consider both the financial and non-financial factors listed in section 33 of the Restitution of Land Rights Act, when determining compensation. The fact that this was not done means that the settlement agreement between the respondents and

[37] [2012] JOL 28584 (LCC).
[38] Id at para 27.
[39] The decision was appealed to the Supreme Court of Appeal, but that appeal failed (see *Farjas (Pty) Limited v Minister of Agriculture and Land Affairs for the Republic of South Africa* [2013] JOL 29829 (SCA)).

the land claimants represented by the applicant should be reviewed and set aside in terms of section 6(2)(e)(iii) of PAJA.

[58] I need not go further than this to consider the other grounds.

CONCLUSION

[59] I conclude that the Commissioner was misdirected in adopting the attitude that he was under no obligation to take into account the history of the dispossession and the effect that that dispossession has had, when determining a just and equitable compensation in a land claim.

[60] In the circumstances, the I make an order as follows.

ORDER

[61] The following order is made:

61.1 The Commissioner's non-compliance with the rules of this Court is condoned.

61.2 The applicant's institution of the judicial review proceedings outside the 180 days period set out in PAJA is condoned, and that period is extended in terms of section 9 of PAJA.

61.3 The settlement agreement that was signed by the applicant on 18 April 2008 is declared invalid, reviewed and set aside.

61.4 The matter is remitted to the fourth respondent for reconsideration within thirty (30) days from the date of this order.

61.4.1 In reconsidering the matter, the fourth respondent is directed to take into account the following factors when determining compensation to the applicant:

(a) The history of the dispossession; and

(b) The hardship caused by the dispossession.

61.5 The fourth respondent is to pay for the costs of this application.

N Muvangua

Acting Judge

Land Claims Court

Appearances

Counsel for the applicant:	Adv Amon Nyondo
Instructed by:	Maci Incorporated
Counsel for the respondents:	L Hesselman
Instructed by:	State Attorney, Gqeberha