CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 19/03

ALEXKOR LIMITED First Appellant

THE GOVERNMENT OF THE REPUBLIC
OF SOUTH AFRICA Second Appellant

versus

THE RICHTERSVELD COMMUNITY AND OTHERS Respondent

Heard on: 4 and 5 September 2003

Decided on: 14 October 2003

JUDGMENT

THE COURT:

Introduction

[1] This appeal concerns a claim for restitution of land by the Richtersveld Community under the provisions of the Restitution of Land Rights Act (the Act).[1] The claim was dismissed by the Land Claims Court (LCC).[2] That court also dismissed an

---

[1] Act 22 of 1994.

[2] The judgment of the LCC is reported as *Richtersveld Community and Others v Alexkor Ltd and Another* 2001 (3) SA 1293 (LCC).

application for leave to appeal.[3] The Supreme Court of Appeal (SCA) granted leave, set aside the order of the LCC and granted relief to the respondent (the Richtersveld Community).[4] Initially, only the first appellant (Alexkor)[5] sought special leave to appeal to this Court. That application succeeded.

[2] Some three weeks prior to the hearing of this appeal, the second appellant (the government) sought condonation for its failure to apply timeously for special leave to appeal against the order of the SCA. The government was directed to file its heads of argument, and its condonation application was heard together with the argument on the merits of the appeal. This application is referred to below.[6] Suffice it to say at this stage that the relief sought by the government was granted, and it was admitted as the second appellant.

[3] The facts and issues raised in this appeal appear from the earlier judgments of the LCC and SCA. It is thus not necessary to set them out in detail in this judgment. We will refer only to those facts necessary to make what follows intelligible.

---

[3] The judgment is reported as *Richtersveld Community and Others v Alexkor Ltd and Another* [2001] (4) All SA 563 (LCC). All references to the judgment of the LCC will be to the main judgment referred to above, n 2.

[4] The judgment of the SCA is reported as *Richtersveld Community and Others v Alexkor Ltd and Another* 2003 (6) BCLR 583 (SCA).

[5] Alexkor is a public company established in terms of the Alexkor Limited Act 116 of 1992. It is wholly owned by the second appellant, the Government of the Republic of South Africa and conducts business in the diamond mining sector.

[6] Paras 11-7.

[4] The Richtersveld is a large area of land situated in the north-western corner of the Northern Cape Province. For centuries it has been inhabited by what is now known as the Richtersveld Community. The application was launched by the Community as such, its members in the main centres of the Richtersveld and in the names of all of the present members of the Community. In the SCA, nothing turned on standing and it was the Richtersveld Community's claim that was upheld. We follow the example of the SCA and refer to the respondent simply as "the Richtersveld Community" or "the Community".

[5] The claim does not relate to the whole of the Richtersveld, but only to a narrow strip of land along the west coast from the Gariep (Orange) River in the north to just below Port Nolloth in the south. We shall refer to this as "the subject land". It is registered in the name of Alexkor.

[6] The relevant provisions of the Act are to be found in section 2(1). It provides that:

> "A person shall be entitled to restitution of a right in land if –
>
> . . . .
>
> *(d)* it is a community or part of a community dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices; and
>
> *(e)* the claim for such restitution is lodged not later than 31 December 1998."

In terms of section 1 of the Act "restitution of a right in land" means:

> "*(a)* the restoration of a right in land;[7] or

[7] In turn, section 1 defines "restoration of a right in land" to mean: "the return of a right in land or a portion of land dispossessed after 19 June 1913 as a result of past racially discriminatory laws or practices".

(b) equitable redress;"

"right in land" 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;"

and "racially discriminatory practices" means:

> "racially discriminatory practices, acts or omissions, direct or indirect, by –
>
> *(a)* any department of state or administration in the national, provincial or local sphere of government;
>
> *(b)* any other functionary or institution which exercised a public power or performed a public function in terms of any legislation."

[7] By agreement between the parties, the LCC confined itself to deciding the question whether the Richtersveld Community met the requirements of section 2(1) of the Act, and in particular whether it constituted a community or part of a community dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices. The Richtersveld Community claimed that it was dispossessed of ownership (under common law or indigenous law)[8] or the right to exclusive beneficial occupation and use of the subject land including the exploitation of its natural resources.

[8] The LCC held that the Richtersveld Community constituted "a community" for the purposes of the Act, and had beneficially occupied the subject land for a

[8] In this judgment we prefer to use the term "indigenous law" which has the same meaning as "customary law".

continuous period of not less than ten years prior to its dispossession after 19 June 1913. However, it held further that the Community had failed to prove that this dispossession was the result of discriminatory laws or practices.

[9] In upholding the appeal, the SCA, in a comprehensive and helpful judgment, found that the Richtersveld Community had been in exclusive possession of the whole of the Richtersveld, including the subject land, prior to and after its annexation by the British Crown in 1847. It held that those rights to the land (including minerals and precious stones) were akin to those held under common law ownership and that they constituted a "customary law interest" as defined in the Act. It further found that in the 1920s, when diamonds were discovered on the subject land, the rights of the Richtersveld Community were ignored by the state which dispossessed them and eventually made a grant of those rights in full ownership to Alexkor. Finally, the SCA held that the manner in which the Richtersveld Community was dispossessed of the subject land amounted to racially discriminatory practices as defined in the Act. The SCA accordingly made the following order:

> "In result the appeal succeeds with costs including the costs of two counsel. The orders of the LCC are set aside and replaced with an order in the following terms:
>
> > '(a) It is declared that, subject to the issues that stand over for later determination, the first plaintiff [the Richtersveld Community] is entitled in terms of section 2(1) of the Restitution of Land Rights Act 22 of 1994 to restitution of the right to exclusive beneficial occupation and use, akin to that held under common-law ownership, of the subject land (including its minerals and precious stones);

> (b) The defendants are ordered jointly and severally to pay the plaintiffs' costs including the costs of three counsel.'"[9]

[10] Alexkor and the government contend that any rights in the subject land which the Richtersveld Community might have held prior to the annexation of that land by the British Crown were terminated by reason of such annexation. They contend further that, in any event, the dispossession of the subject land after 19 June 1913 was not the consequence of racially discriminatory laws or practices. Accordingly they seek to set aside the order made by the SCA.

Admission of the government as a second appellant

[11] The government participated actively as a party to the proceedings in the LCC and the SCA. The judgment of the SCA was delivered on 24 March 2003. The time provided in Rule 20 of the rules of this Court for lodging an application for special leave to appeal expired on 14 April 2003.[10] By agreement between the parties that time was extended by the Chief Justice to 30 April 2003.

[12] By letter dated 24 April 2003, the state attorney advised the attorneys for the Richtersveld Community that, as Alexkor was appealing the judgment of the SCA, the

---

[9] SCA judgment above n 4 at para 111.

[10] Rule 20 (1) and (2) reads as follows:

> (1) An appeal to the *Court* on a constitutional matter against a judgment or order of the Supreme Court of Appeal shall be granted only with the special leave of the *Court* on *application* made to it.
>
> (2) A litigant who is aggrieved by the decision of the Supreme Court of Appeal on a constitutional matter and who wishes to appeal against it to the *Court* shall, within 15 days of the judgment against which appeal is sought to be brought and after giving notice to the other *party* or parties concerned, lodge with the *registrar* of the *Court* an *application* for leave to appeal.

government had decided that it would not actively participate in the proceedings and had opted to abide the decision of this Court. Thereafter the government pursued attempts to settle the claim of the Richtersveld Community. Discussions to that end were held between 8 April 2003 and 26 May 2003. They were not successful.

[13] It appears from the affidavit filed on behalf of the government that on 4 August 2003 the Chief State Law Adviser instructed senior counsel to prepare an application for special leave to appeal and for condonation of the late application for that relief. The delay is ascribed to the number of departments of state that were involved in the matter and to the fact that "no co-ordinated evaluation of the order of the SCA was undertaken before the Cabinet decision of 11 June 2003." The affidavit goes on to record that: "[i]t was only at the meeting of 16 July 2003 that serious consideration was given to the possibility of seeking special leave to appeal on behalf of the Applicant." The application for condonation was filed in this Court on 13 August 2003.

[14] We were informed by counsel for the Richtersveld Community that it would abide the decision of the Court in respect of the government's application. However, counsel pointed out that according to the government's own affidavit, it took a decision after the delivery of the judgment of the SCA not to appeal against it and thereby perempted the right to do so. Thereafter the government changed its mind and now seeks special leave to appeal.

[15] Had the government been the only party in this matter, the peremption of its right to appeal might well have brought an end to the litigation. However, Alexkor, which is wholly owned by the government, has been granted special leave to appeal. The joinder of the government in the lower court proceedings has the consequence that any order made by this Court against Alexkor would be binding on the government. It was not submitted that the Richtersveld Community would be prejudiced if this Court received the heads of argument submitted on behalf of the government or if we heard oral argument from its counsel.

[16] In these circumstances we decided that we should receive the government's heads of argument. As the heads of argument substantially traversed the same ground covered by those submitted on behalf of Alexkor, we restricted the oral submissions of the government to responding to any questions that might be put to them by members of the Court.

[17] We heard argument on the question as to whether a special order for costs should be made against the government in respect of its condonation application. The proceedings in the LCC were instituted at the end of 1998 and at all times since then the government has been actively involved in the litigation. The delay in applying for special leave to appeal is unacceptable and has not been adequately explained. There can be no question that the costs incurred by the Richtersveld Community with regard to the application must be paid by the government. To mark its displeasure at the delay, this Court will order those costs be paid on the attorney client scale.

The issues that arise in this appeal

[18] The following questions were argued in this appeal:

(a) The identification of the issues that fall within the jurisdiction of this Court;

(b) The law to be applied to relevant events that antedate the interim Constitution;[11]

(c) The nature of the rights in land of the Richtersveld Community prior to annexation;

(d) The legal consequences of annexation of the subject land;

(e) The nature of the rights in the subject land held by the Richtersveld Community after 19 June 1913;

(f) The steps taken by the state in respect of the subject land after 19 June 1913;

(g) Whether the dispossession was the result of racially discriminatory laws or practices.

We shall consider each of these issues in turn.

(a) The identification of the issues that fall within the jurisdiction of this Court

[19] To found an entitlement to restitution of a right in land under section 2(1)(d) and (e) of the Act, quoted in paragraph 6 above, the following have to be established:

(a) that the Richtersveld Community is a "community" or "part of a community" as envisaged by the subsection;

(b) that the Community had a "right in land" as envisaged;

[11] Act 200 of 1993.

(c) that such a right in land continued to exist after 19 June 1913;

(d) that the Community was, after 19 June 1913, "dispossessed" of such "right in land";

(e) that such dispossession was the "result of past racially discriminatory laws or practices"; and

(f) that the Community's claim for "restitution" was lodged not later than 31 December 1998.

[20] Issues (a) and (f) are now common cause and, as will emerge in the course of the judgment, so too are aspects of the other issues.

[21] The issue of jurisdiction relates in part to the division of final jurisdiction between the Constitutional Court and the Supreme Court of Appeal. Section 167(3) of the Constitution, after providing in paragraph (a) that the Constitutional Court "is the highest Court in all constitutional matters", proceeds in paragraph (b) to define the Constitutional Court's jurisdiction by providing that it

> ". . . may decide only constitutional matters, and *issues connected with decisions on constitutional matters*".
> (Emphasis supplied.)

This latter provision must be read together with section 167(3)(c) which provides that the Constitutional Court

> ". . . makes the final decision whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter",

with section 167(7) which states that

> "[a] constitutional matter includes any issue involving the interpretation, protection or enforcement of the Constitution",

and with section 168(3) which states that the Supreme Court of Appeal is "the highest court of appeal except in constitutional matters".

[22] It thus becomes necessary to consider whether, and to what extent, this Court has the power to determine any of the issues referred to in paragraph 19(b) to (e) above. Section 25(7) of the Constitution 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."

This provision is, in relation to matters relevant to the present case, and with one exception, mirrored in the provisions of section 2(1)(d) of the Act, quoted in paragraph 6 above. The exception relates to the fact that in the Constitution the dispossession relates to "property" whereas in the Act it relates to "a right in land." Nothing turns on this difference in the present case. A similar 'mirroring' occurred between the relevant provisions in the interim Constitution and those in the Act, prior to its amendment by section 3(1) of Act 63 of 1997.[12]

[12] The relevant provision in section 121(2) of the interim Constitution reads as follows:

> "A person or a community shall be entitled to claim restitution of a right in land from the state if –
> (a) such person or community was dispossessed of such right at any time after a date to be fixed by the Act referred to in subsection (1); and

[23] In *NEHAWU v University of Cape Town and Others*[13] this Court held that where a statute has been enacted to give content to a constitutional right or to meet the legislature's constitutional obligations, the proper construction of such statute is a constitutional matter for purposes of section 167(3)(b) of the Constitution.[14] The provisions of section 2(1) of the Act are clearly statutory provisions enacted to give content to the section 25(7) constitutional right and to fulfil Parliament's obligations expressly referred to in the subsection. It follows, therefore, that the issues in this appeal, detailed above and relating to the interpretation and application of section 2(1) of the Act, are all "constitutional matters" over which this Court has jurisdiction.

[24] A more difficult question is to determine whether this Court has jurisdiction to deal with all issues bearing on or related to establishing the existence of these matters. For example, the question might be asked whether the issue concerning the existence of the Community's rights in land prior to the colonisation of the Cape, or the content

---

> (b) such dispossession was effected under or for the purpose of furthering the object of *a law which would have been inconsistent with the prohibition of racial discrimination contained in section 8(2), had that section been in operation at the time of such dispossession.*"
> (Emphasis supplied.)

The relevant part of section 3 of the Act reads:

> ". . . 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 8(2) of the Constitution had that subsection been in operation at the relevant time . . .*"
> (Emphasis supplied.)

[13] 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC).

[14] Id at paras 14 and 15.

or incidence of such rights, constitute in themselves "constitutional matters"; the same might be asked concerning the continued existence of such rights after the British Crown's annexation of the Cape in 1806, or after the 1847 Proclamation or the subsequent statutory and other acts thereafter.

[25] The question is whether such matters are "issues connected with decisions on constitutional matters" for purposes of section 167(3)(b) of the Constitution.

[26] This Court is declared to be the highest court in respect of constitutional matters in terms of section 167(3)(a) of the Constitution. It has not yet, in so many words, decided whether "issues connected with decisions on constitutional matters", constitute a "constitutional matter" for purposes of section 167(3)(a). We are mindful of the cautionary observation by this Court in *S v Boesak*[15] that, although the jurisdiction of this Court is "clearly . . . extensive",[16] it ought not to be so construed as to render "illusory" the distinction drawn in the Constitution between the jurisdiction of this Court and that of the SCA.[17]

[27] Nevertheless, when one adopts a purposive approach to the harmonising of section 167(3) and (7) and section 168(3) referred to in paragraph 21 above, as *Boesak* enjoins us to do,[18] it is evident that this Court is the highest court in respect of issues

[15] *S v Boesak* 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) at para 15.

[16] Id at para 14.

[17] Id at para 15.

[18] Id

connected with decisions on constitutional matters. The contrary conclusion would be anomalous and contrary to the Constitution's structure of jurisdiction and its division between this Court and the SCA. It would mean that, although this Court is granted jurisdiction in respect of "issues connected with decisions on constitutional matters," those would be the only matters under its jurisdiction in respect whereof its judgment would not be final. This would moreover give rise to a serious hiatus in the Constitution, since there is no appeal from this Court.

[28] The conclusion that this Court is the highest court also in relation to "issues connected with decisions on constitutional matters" is in our view placed beyond doubt by the fact that section 167(3)(c) provides that this Court also makes the final decision on "whether an issue is connected with a decision on a constitutional matter."

[29] This opens the way to considering more directly how broadly or narrowly the phrase "issues connected with decisions on constitutional matters" must be construed, more particularly the words "connected with". "Connected", defined variously by the *Oxford English Dictionary* as "linked together" or "joined together in order or sequence (as words or ideas)" or "related, associated (in nature or idea)", is clearly a word of wide import, connoting a relationship between, amongst other things, ideas or concepts. It is not limited by any sense of immediacy or close relationship.

[30] This wide construction is consistent with the purpose of the provision. It is intended to extend the jurisdiction of this Court to matters that stand in a logical

relationship to those matters that are primarily, or in the first instance, subject to the Court's jurisdiction. The underlying purpose is to avoid fettering, arbitrarily and artificially, the exercise of this Court's functioning when obliged to determine a constitutional matter. If any anterior matter, logically or otherwise, is capable of throwing light on or affecting the decision by this Court on the primary constitutional matter, then it would be artificial and arbitrary to exclude such consideration from the Court's evaluation of the primary constitutional matter. To state it more formally, when any *factum probandum*[19] of a disputed issue is a constitutional matter, then any *factum probans*, bearing logically on the existence or otherwise of such *factum probandum,* is itself an issue "connected with [a] decision[] on [a] constitutional matter[]".

[31] In conclusion, on this jurisdictional issue, it is necessary to apply the above analysis and conclusion to the issues in this appeal relating to section 2(1) of the Act. This is best done by considering, for example, the issue whether, after 19 June 1913, the Richtersveld Community had a "right in land" as envisaged by section 2(1) of the Act.

[32] One of the relevant questions is whether the Community had such a right or rights prior to the British Crown acquiring sovereignty over the subject land in 1847. Determination of this issue, for the reasons just stated, is connected with the decision on a constitutional matter, namely, the question as to whether the Community, after 19

[19] As to the distinction between a *factum probandum* and a *factum probans*, but in a different context, see *King's Transport v Viljoen* 1954 (1) SA 133 (C).

June 1913, had such a "right in land". It follows from what has been said above, that this Court does have jurisdiction to determine this anterior question. For the same reason, this Court has jurisdiction in relation to all intervening events in relation to which it could be suggested that the Community had lost such a "right in land". The Court likewise has jurisdiction to determine all issues relevant to the matters that have to be established under section 2(1) of the Act, whether anterior thereto or not.

(b) The law to be applied to relevant events that antedate the interim Constitution

[33] Where appropriate, this Court has consistently made use of comparative law. At the same time it has cautioned against the uncritical use of comparative material and pointed to its potential dangers.[20]

[34] Courts in other jurisdictions have in recent times been faced with the complex and difficult problems of dealing, after the event, with the injustices caused by dispossessions of land, or rights in land, from indigenous inhabitants by later occupiers of the land in question.[21] These later occupiers claimed political and legal sovereignty over the land, and such dispossessions invariably took place in a racially discriminatory manner. They often occurred centuries ago, when the legal norms and principles of the later occupiers differed substantially from those of today.

[20] See, for example, *Bernstein and Others v Bester and Others NNO* 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC) at para 133.

[21] See, for example, *Calder v Attorney-General of British Columbia* (1973) 34 DLR (3d) 145 (SCC); *Hamlet of Baker Lake v Minister of Indian Affairs and Others* (1979) 107 DLR (3d) 513 (SCC); *Mabo and Others v The State of Queensland (No. 2)* (1992) 175 CLR 1 (HCA); *R v Adams* (1996) 138 DLR (4th) 657 (SCC); *R v Van der Peet* (1996) 137 DLR (4th) 289 (SCC); *Delgamuukw and Others v British Columbia and Others* (1997) 153 DLR (4th) 193 (SCC); *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58.

[35] In this regard, our situation in this country differs substantially from that of the jurisdictions referred to above in that both our interim Constitution and the Constitution have dealt expressly with this problem. The general rule established by this Court in *Du Plessis and Others v De Klerk and Another*[22] is that the interim Constitution did not operate retroactively, in the sense that

> "'. . . as at a past date the law shall be taken to have been that which it was not, so as to invalidate what was previously valid, or vice versa.
>
> . . . .
>
> . . . the [interim]Constitution does not turn conduct which was unlawful before it came into force into lawful conduct."[23]

The consequences of this general principle are not invariable, so it has been stated, and the possibility has been left open that

> ". . . there may be cases where the enforcement of previously acquired rights would in the light of our present constitutional values be so grossly unjust and abhorrent that it could not be countenanced, whether as being contrary to public policy or on some other basis."[24]

To date there has been no occasion when the above general principle has not been applied, either by this or any other Court.[25]

---

[22] 1996 (3) SA 850 (CC); 1996 (5) BCLR 658 (CC) at para 13.

[23] Id at paras 13 and 20, respectively.

[24] Id at para 20.

[25] See, for example, *Pharmaceutical Manufacturers Association of SA and Another: In Re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at para 29.

[36] However, both the interim Constitution and the Constitution have provided expressly for their retroactive application to dispossessions of rights in land that took place after 19 June 1913. The interim Constitution, in section 121(2), provided that

> "[a] person or a community shall be entitled to claim restitution of a right in land from the state if –
>
> (a) such person or community was dispossessed of such right at any time after a date to be fixed by the Act referred to in subsection (1); and
>
> (b) such dispossession was effected under or for the purpose of furthering the object of a law which would have been inconsistent with the prohibition of racial discrimination contained in section 8(2), had that section been in operation at the time of such dispossession."

and section 121(3) provided that the date fixed by subsection (2)(a) should not be a date earlier than 19 June 1913. Section 25(7) of the 1996 Constitution provides that

> "[a]person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practice is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress."

[37] For present purposes it is only necessary to deal with the provisions of the Constitution. The date chosen, 19 June 1913, is of course the date on which the Natives Land Act 27 of 1913 came into operation. This Act deprived black South Africans of the right to own land and rights in land in the vast majority of the South African land mass. It is quite apparent that section 25(7) and the implementing provisions of the Act have retroactive effect until at least 19 June 1913, because the very purpose behind their provisions is to provide redress for dispossessions that were valid under the law of that time.

[38] The question that arises, however, is whether these provisions have retroactive effect antedating 19 June 1913. There are strong indications that they do not. It must be assumed that, in the light of the judgment in *Du Plessis and Others v De Klerk and Another*,[26] the drafters of the Constitution were aware of the general rule against retroactivity. They obviously applied their minds to this aspect in relation to the restoration of land and land rights, which has always been an issue of supreme importance. This was highlighted by the different approaches of the negotiating parties to the problem. The limit of retroactivity agreed upon and enacted in the Constitution is set at 19 June 1913. Had there been any desire for the provisions of the 1996 Constitution to have retroactive effect beyond this date, one would have expected this to have been so enacted. It was not. It is however not necessary to express a definitive view on this particular issue in the present case. There has been no contention that any provision of the Constitution has retrospective effect antedating 19 June 1913. The present case can be dealt with effectively on the assumption that none of the provisions has such effect. The question whether a court, when considering the common law applicable at a time before both the interim Constitution and the Constitution came into force,[27] may develop the common law in the light of provisions of the Constitution as provided for by section 39(2) of the Constitution,[28]

---

[26] Above n 22.

[27] The Constitution of the Republic of South Africa Act 200 of 1993 came into force on 27 April 1994 and the current Constitution came into force on 4 February 1997.

[28] Section 39(2) reads:

> "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

does not, in the view we have taken of the matter, arise in this case. This is a complex matter which we leave open for future decision, as we have done before.[29]

[39] It is not so clear how this time limitation is to be applied to the requirement that such dispossession must be "as a result of past racially discriminatory laws or practices." One purpose is, no doubt, to make clear that the dispossession must have occurred before the interim Constitution came into operation.

[40] Whatever the phrase might mean, it cannot have the effect of making a dispossession actionable that took effect before 19 June 1913. This does not mean that regard may not be had to racially discriminatory laws and practices that were in existence or took place before that date. Regard may indeed be had to them if the purpose is to throw light on the nature of a dispossession that took place thereafter or to show that when it so took place it was the result of racially discriminatory laws or practices that were still operative at the time of the dispossession.

[41] However, when it comes to the legal effect of other events prior to 19 June 1913, these must be adjudged according to the law then prevailing. So, for example, when considering the effect of the British annexation of the Cape in 1806 and its impact on acquired rights, or of the 1847 Proclamation or other legislative or administrative acts, the then prevailing law must be applied. This does not mean that

---

[29] See *Du Plessis and Others v De Klerk and Another* above n 22 at paras 65-6; *Amod v Multilateral Motor Vehicle Accidents Fund* (10) BCLR 1207 (CC); 1998 (4) SA 753 (CC) at para 31.

when evaluating rights, including the indigenous rights of the Richtersveld Community, as to their existence or content, use may not be made of later evidence or scholarship in regard to such rights or their content.

(c) The nature of the rights in land of the Richtersveld Community prior to annexation

[42] In this Court Alexkor contended that the SCA erred in holding that the Richtersveld Community held "a customary law interest" in the subject land which was akin to ownership under common law and that this right included the ownership of minerals and precious stones. But, according to the judgment of the SCA, Alexkor and the government conceded this issue.[30] The preliminary question which arises is whether it is open to Alexkor to revive this issue on appeal in this Court.

[43] The applicable rule is that enunciated in *Paddock Motors (Pty) Ltd v Igesund.*[31] In that case, the Appellate Division held that a litigant who had expressly abandoned a legal contention in a court below was entitled to revive the contention on appeal. The rationale for this rule is that the duty of an appeal court is to ascertain whether the lower court reached a correct conclusion on the case before it. To prevent the appeal court from considering a legal contention abandoned in a court below might prevent it from performing this duty. This could lead to an intolerable situation, if the appeal

[30] SCA judgment above n 4 at para 26.

[31] 1976 (3) SA 16 (A) at 23D-24G.

court were bound by a mistake of law on the part of a litigant.[32] The result would be a confirmation of a decision that is clearly wrong.[33] As the court put it:

> "If the contention the appellant now seeks to revive is good, and the other two bad, it means that this Court, by refusing to investigate it, would be upholding a wrong order."[34]

[44] It is therefore open to Alexkor and the government to raise in this Court the legal contention which they abandoned in the SCA. However, they may only do so if the contention is covered by the pleadings and the evidence and if its consideration involves no unfairness to the Richtersveld Community.[35] The legal contention must, in other words, raise no new factual issues. The rule is the same as that which governs the raising of a new point of law on appeal.[36] In terms of that rule "it is open to a party to raise a new point of law on appeal for the first time if it involves no unfairness . . . and raises no new factual issues."[37]

[45] We are concerned here with a legal contention relating to the nature and the content of the rights held by the Richtersveld Community in the subject land. That contention does not raise new factual issues. Its consideration will not involve any

---

[32] See *Van Rensburg v Van Rensburg en Andere* 1963 (1) SA 505 (A) at 510A.

[33] See *Cole v Government of the Union of South Africa* 1910 AD 263 at 272-3.

[34] *Paddock Motors v Igesund* above n 31 at 24F.

[35] Compare *Cole v Government of the Union of South Africa* above n 33 at 272.

[36] *Paddock Motors v Igesund* above n 31 at 23G-H.

[37] *Naude and Another v Fraser* 1998 (4) SA 539 (SCA) at 558A; 1998 (8) BCLR 945 (SCA) at 960 (footnotes omitted).

unfairness to the Richtersveld Community, which has been able to deal with it fully. The determination of the nature and the content of the land right of the Richtersveld Community prior to and after annexation is basic to the adjudication of the central question presented in the appeal, namely, whether the Richtersveld Community was dispossessed of its land rights after 19 June 1913 as a result of discriminatory laws or practices. In addition, the proper characterisation of the title is crucial to any order that the LCC may ultimately make.[38]

[46] For all of these reasons, we are entitled to determine firstly, the nature and the content of the land rights that the Richtersveld Community held in the subject land prior to annexation; and secondly, whether such rights survived annexation. It now remains to consider these issues.

[47] In the SCA, the Richtersveld Community contended that, as at 19 June 1913, it possessed (a) a right of ownership; (b) the right to exclusive beneficial occupation and use; or (c) the right to use the subject land for certain specified purposes, including exploitation of natural resources.[39] In the main, the Community contended that it possessed these rights under indigenous law and, after annexation, under the common law of the Cape Colony or international law which protected the rights acquired under

[38] The Act envisages a number of rights that claimants may have in the subject land. These rights range from ownership to interests in land such as that of a beneficiary under a trust arrangement or beneficial occupation for a period of not less than 10 years or a customary law interest in the land. In terms of section 35 of the Act, the LCC may order, amongst other things, the restoration of the land or a portion of the land, or a right in land. The nature of the right found will therefore determine the nature of the restitution to be ordered. Thus where the right of ownership in the land has been found, the LCC may order the restitution of the land. Where only a right to occupy has been found, the court may order the restoration of that right or the equivalent compensation.

[39] SCA judgment above n 4 at para 10.

indigenous law. In the alternative, it was contended that the rights which the Community held in the subject land under its own indigenous law constituted a "customary law interest", a right in land within the meaning of the Act, even if these rights were not recognised or protected.[40] These rights were also asserted in relation to the right of beneficial occupation for a continuous period of not less than 10 years that had been found by the LCC.

[48] As pointed out above, the SCA found that the Richtersveld Community

> ". . . had a 'customary law interest' in the subject land within the definition of 'right in land' in the Act. The substantive content of the interest was a right to exclusive beneficial occupation and use, akin to that held under common-law ownership . . . ."[41]

[49] In this Court the Richtersveld Community persisted in the claims that it had asserted in the SCA. It contended that its indigenous law ownership constituted a real right in land in indigenous law or at the very least "a customary law interest" within the definition of a right in land.

[50] The nature and the content of the rights that the Richtersveld Community held in the subject land prior to annexation must be determined by reference to indigenous law. That is the law which governed its land rights.[42] Those rights cannot be determined by reference to common law. The Privy Council has held, and we agree,

---

[40] Id at para 11.

[41] Id at para 29.

[42] Compare *Oyekan and Others v Adele* [1957] 2 All ER 785 at 788G-H.

that a dispute between indigenous people as to the right to occupy a piece of land has to be determined according to indigenous law "without importing English conceptions of property law."[43]

[51] While in the past indigenous law was seen through the common law lens, it must now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the Constitution.[44] Its validity must now be determined by reference not to common law, but to the Constitution.[45] The courts are obliged by section 211(3) of the Constitution to apply customary law when it is applicable, subject to the Constitution and any legislation that deals with customary law. In doing so the courts must have regard to the spirit, purport and objects of the Bill of Rights.[46] Our Constitution

> ". . . does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill [of Rights]."[47]

It is clear, therefore that the Constitution acknowledges the originality and distinctiveness of indigenous law as an independent source of norms within the legal system. At the same time the Constitution, while giving force to indigenous law,

---

[43] Id

[44] Compare *Pharmaceutical Manufacturers Association of South Africa and Another in re Ex Parte the President of the Republic of South Africa and Others* above n 25 at para 44.

[45] Section 2 of the Constitution, see *Mabuza v Mbatha* 2003 (7) BCLR 43 (C) at para 32.

[46] Section 39(2) of the Constitution.

[47] Section 39(3) of the Constitution.

makes it clear that such law is subject to the Constitution and has to be interpreted in the light of its values. Furthermore, like the common law, indigenous law is subject to any legislation, consistent with the Constitution, that specifically deals with it.[48] In the result, indigenous law feeds into, nourishes, fuses with and becomes part of the amalgam of South African law.

[52] In 1988,[49] the Law of Evidence Amendment Act provided for the first time that all the courts of the land were authorised to take judicial notice of indigenous law.[50] Such law may be established by adducing evidence.[51] It is important to note that

---

[48] Section 211(3) of the Constitution.

[49] After the abolition of the Commissioners' Courts and their courts of appeal and the unification of all courts into a single hierarchy.

[50] Law of Evidence Amendment Act 45 of 1988, provides in s1:

> " Judicial notice of law of foreign state and of indigenous law.—
> (1) Any court may take judicial notice of the law of a foreign state and of indigenous law in so far as such law can be ascertained readily and with sufficient certainty: Provided that indigenous law shall not be opposed to the principles of public policy and natural justice: Provided further that it shall not be lawful for any court to declare that the custom of lobola or bogadi or other similar custom is repugnant to such principles.
>
> (2) The provisions of subsection (1) shall not preclude any party from adducing evidence of the substance of a legal rule contemplated in that subsection which is in issue at the proceedings concerned
> . . . .
> (4) For the purposes of this section "indigenous law" means the law or custom as applied by the Black tribes in the Republic.
> [Sub-s (4) amended by s. 4 of Act 18 of 1996]."

In terms of s1(1) indigenous law is to be applied if it is not "opposed to the principles of public policy and natural justice". In *Mabuza v Mbatha* above n 45 para 32, the court held that the test for the validity of indigenous law is no longer consistency with public policy and natural justice, but consistency with the Constitution. It is not necessary to express any opinion on the correctness of that decision.

[51] T.W. Bennett, *A Sourcebook of African Customary Law for Southern Africa* (Juta and Co. Ltd, Cape Town, 1991) Preface at (vi), points to the need for caution in this respect. Although a number of text books exist and there is a considerable body of precedent, courts today have to bear in mind the extent to which indigenous law in the pre-democratic period was influenced by the political, administrative and judicial context in which it was applied. Bennett points out that, although customary law is supposed to develop spontaneously in a given jural community, during the colonial and apartheid era it became alienated from its community origins. The result was that the term "customary law" emerged with three quite different meanings: the official body of law

indigenous law is not a fixed body of formally classified and easily ascertainable rules. By its very nature it evolves as the people who live by its norms change their patterns of life. As this Court pointed out in the *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996*:[52]

> "The [Constitutional Assembly] cannot be constitutionally faulted for leaving the complicated, varied and ever-developing specifics of how . . . customary law should develop and be interpreted, to future social evolution, legislative deliberation and judicial interpretation."[53]

[53] In applying indigenous law, it is important to bear in mind that, unlike common law, indigenous law is not written. It is a system of law that was known to the community, practised and passed on from generation to generation. It is a system of law that has its own values and norms. Throughout its history it has evolved and developed to meet the changing needs of the community.[54] And it will continue to evolve within the context of its values and norms consistently with the Constitution.

[54] Without attempting to be exhaustive, we would add that indigenous law may be established by reference to writers on indigenous law and other authorities and sources, and may include the evidence of witnesses if necessary. However, caution

---

employed in the courts and by the administration (which, he points out, diverges most markedly from actual social practice); the law used by academics for teaching purposes; and the law actually lived by the people.

[52] 1996 (4) SA 744; 1996 (10) BCLR 1253 (CC).

[53] Id at para 197.

[54] In some parts of the country codification of indigenous law interfered with this process, raising questions as to the accuracy of such codification, its appropriateness and its possible stultification of the development of indigenous law.

must be exercised when dealing with textbooks and old authorities because of the tendency to view indigenous law through the prism of legal conceptions that are foreign to it. In the course of establishing indigenous law, courts may also be confronted with conflicting views on what indigenous law on a subject provides.[55] It is not necessary for the purposes of this judgment to decide how such conflicts are to be resolved.[56]

[55] This case does not require us to examine the full range of problems concerned. In the present matter extensive evidence exists as to the nature of the indigenous law rights exercised by the Richtersveld Community as they evolved up until 1913. As we stressed above, to understand them properly these rights must be considered in their own terms and not through the prism of the common law.

[56] The dangers of looking at indigenous law through a common law prism are obvious. The two systems of law developed in different situations, under different cultures and in response to different conditions. In this regard we are in agreement with the observations of the Privy Council in *Amodu Tijani v The Secretary, Southern Nigeria*:[57]

[55] See, for example, *Mabuza v Mbatha* above n 45.

[56] The question of the test to be applied in establishing indigenous law does not arise in this case. Nor is it necessary for us to consider whether the test enunciated in *Van Breda v Jacobs* 1921 AD 330 at 334 is applicable in determining the content of indigenous law.

[57] 2 AC [1921] 399 (PC).

> "Their Lordships make the preliminary observation that in interpreting the native title to land, not only in Southern Nigeria, but other parts of the British Empire, much caution is essential. There is a tendency, operating at times unconsciously, to render that title conceptually in terms which are appropriate only to systems which have grown up under English law. But this tendency has to be held in check closely. . . The title, such as it is, may not be that of the individual, as in this country it nearly always is in some form, but may be that of a community. . . To ascertain how far this latter development of right has progressed *involves the study of the history of the particular community and its usages* in each case. Abstract principles fashioned a priori are of but little assistance, and are as often as not misleading."[58]

[57] The determination of the real character of indigenous title to land therefore "involves the study of the history of a particular community and its usages."[59] So does the determination of its content.

[58] Under indigenous Nama law, land was communally owned by the community. Members of the community had a right to occupy and use the land. In this regard the SCA found:

> "One of the components of the culture of the Richtersveld people was the customary rules relating to their entitlement to and use and occupation of this land. The primary rule was that the land belonged to the Richtersveld community as a whole and that all its people were entitled to the reasonable occupation and use of all land held in common by them and its resources. All members of the community had a sense of legitimate access to the land to the exclusion of all other people. Non-members had no such rights and had to obtain permission to use the land for which they sometimes had to pay. There are a number of telling examples. A non-member using communal grazing without permission would be fined 'a couple of head of cattle'; the Reverend

[58] Id at 402-4 (emphasis supplied).

[59] Id at 404.

> Hein, who settled in the Richtersveld in 1844, recorded in his diary three years later a protest by the community that Captain Paul (Bierkaptein) Links had, without the consent of the 'raad', let ('verpacht') some of its best grazing land at the Gariep River Mouth; and the trader McDougal established himself at the mouth of the Gariep River in 1847 only after obtaining the permission of Captain Links on behalf of the community and agreeing to pay for the privilege. The captain and his 'raad' enforced the rules relating to the use of the communal land and gave permission to newcomers to join the community or to use the land."[60]

[59] On this issue the LCC similarly found that the Richtersveld Community "considered the Richtersveld to be their land, held by them in common."[61] These findings are supported by the evidence and we accept them.

[60] The content of the land rights held by the Community must be determined by reference to the history and the usages of the community of Richtersveld. The undisputed evidence shows a history of prospecting in minerals by the Community and conduct that is consistent only with ownership of the minerals being vested in the Community.

[61] The witnesses on behalf of the Richtersveld Community testified that long before the annexation the Nama people in Little Namaqualand had mined and used copper for purposes of adornment. The witnesses testified that visitors to the Namaqualand were reported to have observed Nama people in the neighbourhood of Gariep smelting copper and using molten metal to make rings; working in copper and

[60] SCA judgment above n 4 at para 18.

[61] LCC judgment above n 2 at para 68.

iron; and making copper beads and copper plates as ornaments. One writer concluded from eyewitness accounts that they showed a Nama "industry in two metals, copper and iron, materials available locally and in quantity."[62] The record includes a text describing the long history of copper mining in Namaqualand by the indigenous people prior to the annexation in 1847.[63] In addition, outsiders were not entitled to prospect for or extract minerals. The evidence established that the Richtersveld Community granted mineral leases to outsiders between the years 1856 and 1910.[64]

[62] In the light of the evidence and of the findings by the SCA and the LCC, we are of the view that the real character of the title that the Richtersveld Community possessed in the subject land was a right of communal ownership under indigenous law. The content of that right included the right to exclusive occupation and use of the subject land by members of the Community. The Community had the right to use its water, to use its land for grazing and hunting and to exploit its natural resources, above and beneath the surface. It follows therefore that prior to annexation the Richtersveld Community had a right of ownership in the subject land under indigenous law.[65]

---

[62] AJH Goodwin 'Metal Working among the early Hottentots' in *South African Archaelogical Bulletin* (1956).

[63] J.M. Smalberger *Aspects of the History of Copper mining in Namaqualand 1846 – 1931* (Struik, Cape Town, 1975).

[64] See SCA judgment above n 4 at paras 85-7. See also lease agreement between Kling and Wrensch, dated 23 February 1910.

[65] In the light of this finding, it is unnecessary to decide whether the reference by the SCA to *Van Breda v Jacobs* above n 56 was appropriate. It is important that indigenous law be allowed to develop consistently with the Constitution and that the approach adopted in *Van Breda* should not be allowed to inhibit this.

[63] However, Alexkor contended that whatever land rights the Richtersveld Community may have held, such rights did not include ownership of the minerals and precious stones. This contention was apparently based on the assumption that the Community did not engage in mining and that, even if they did, this became unlawful after annexation. The fallacy in this argument is that it ignores the undisputed evidence on the mining activities of the Community. The submission that if there was any mining, such mining was unlawful after annexation, simply begs the question.

[64] We are satisfied that under the indigenous law of the Richtersveld Community communal ownership of the land included communal ownership of the minerals and precious stones. Indeed both Alexkor and the government were unable to suggest in whom ownership in the minerals vested if it did not vest in the Community. Accordingly, we conclude that the history and usages of the Richtersveld Community establish that ownership of the minerals and precious stones vested in the Community under indigenous law.

(d) The legal consequences of the annexation of the subject land in 1847

[65] The principal contention by Alexkor was that upon annexation British law became applicable to the subject land. Consequently the British Crown became the owner of all land that had not been granted by it under some form of tenure. As the subject land was such land, so the argument went, it became the property of the British Crown. In this manner, it was submitted, the Richtersveld Community lost all title to the subject land. As this occurred prior to 19 June 1913, the claim must fail.

[66] The subject land was annexed by the British Crown in 1847 pursuant to the Annexation Proclamation which incorporated Richtersveld as part and parcel of the Cape Colony. Under that Proclamation, the British Crown acquired sovereignty over Richtersveld, including the subject land. This gave the British Crown the power to make new laws, recognise existing rights or extinguish them and create new rights. In *Oyekan and Others v Adele* the Privy Council described the effect of acquisition of sovereignty over a territory as follows:

> "Their Lordships desire to point out that the Treaty of Cession was an Act of State by which the British Crown acquired full rights of sovereignty over Lagos . . . The effect of the Act of State is to give to the British Crown sovereign power to make laws and to enforce them, and, therefore, the power to recognise existing rights or extinguish them, or to create new ones."[66]

[67] In order to ascertain what rights passed to the British Crown or were retained by the indigenous people at the time of and subsequent to annexation, we must look to both the Annexation Proclamation and other relevant conduct of the British Crown such as legislative acts or acts of state.[67]

[68] In our view there is nothing either in the events preceding the annexation of Richtersveld or in the language of the Proclamation which suggests that annexation

---

[66] *Oyekan and Others v Adele* above n 42 at 788B-C.

[67] Compare *Oyekan and Others v Adele* above n 42 at 788C-D. The Privy Council took the view that "in order to ascertain what rights passed to the British Crown or are retained by the inhabitants the courts of law look, not to the treaty, but to the conduct of the British Crown". In our view the starting point must be the terms of the Annexation Proclamation if it throws light on the matter.

extinguished the land rights of the Richtersveld Community. The contention to the contrary by Alexkor was rightly rejected by the SCA.

[69] The SCA held that the terms of the Annexation Proclamation do not purport to terminate any right over the annexed territory.[68] It found that the majority of colonial decisions favoured an approach that a mere change in sovereignty is not meant to disturb the rights of private owners,[69] and appeared to favour the approach by the Privy Council that:

> "In inquiring, however, what rights are recognized, there is one guiding principle. It is this: The courts will assume that the British Crown intends that the rights of property of the inhabitants are to be fully respected. Whilst, therefore, the British Crown, as Sovereign, can make laws enabling it compulsorily to acquire land for public purposes, it will see that proper compensation is awarded to every one of the inhabitants who has by native law an interest in it; and the courts will declare the inhabitants entitled to compensation according to their interests, even though those interests are of a kind unknown to English law . . . ."[70]

The SCA adopted the rule that indigenous rights to private property in a conquered territory were recognised and protected after the acquisition of sovereignty and concluded that the rights of the Richtersveld Community survived annexation.[71] We endorse that conclusion.

---

[68] SCA judgment above n 4 at para 34.

[69] Id at paras 58-9.

[70] *Oyekan and Others v Adele* above n 42 at 788E-I.

[71] SCA judgment above n 4 at para 61.

(e) The nature of the rights in the subject land held by the Richtersveld Community after 19 June 1913

[70] After annexation, the right of the Richtersveld Community to indigenous law ownership could have been extinguished in a number of ways. The Richtersveld Community would have lost its indigenous law ownership if:

(a) the laws of the Crown expressly extinguished the Community's customary law ownership of the land;

(b) the laws of the Crown applicable to the Richtersveld rendered the exercise of any of the material incidents of the indigenous law right to ownership unlawful;

(c) the Community was granted limited rights in respect of the land by the Crown in circumstances where the only reasonable inference to be drawn is that the rights of indigenous law ownership were extinguished; or

(d) the land was taken by force.

This case is not concerned with the forcible taking of land. We must therefore decide whether the indigenous law ownership of the Richtersveld Community was extinguished by any law or conduct that had the consequence described in (a), (b) or (c) above.

[71] Alexkor relied on the Crown Lands Acts of 1860 and 1887[72] (the Acts) in support of the proposition that the rights of the Richtersveld Community had been extinguished. All the submissions in relation to these two Acts were premised on the starting point that all annexed land had become Crown land by reason of the

[72] Crown Lands Act 2 of 1860 and Crown Lands Disposal Act 15 of 1887.

annexation. We have already held that this was not so. It was also contended that both the 1860 and the 1887 Acts were based on the assumption that all the land to which it applied was land owned by the Crown. However as pointed out by the SCA:

> "At best for them it can be said that the legislature assumed that all land not allocated by means of the grant of title deeds belonged to the Crown but the implied assumption cannot be elevated to a legislative act with that consequence."[73]

[72] In any event, there are indications in both the Acts and in the prior legislative measures that point decisively away from any intention of the British Crown to extinguish the rights of the Richtersveld Community. As an initial matter, any doubt as to the competency of the indigenous people to purchase or possess land in the Cape Colony was removed by Ordinance 50 of 1828.[74] Significantly, the Ordinance also recognised the equality in this regard between the indigenous people and the British subjects.[75]

[73] Furthermore, the Acts themselves clearly left open the possibility for recognition of the Richtersveld Communuity's claim to the subject land. Section 12

[73] SCA judgment above n 4 at para 66.

[74] Section 3 of Ordinance 50 of 1828 provided as follows: "And whereas doubts have arisen as to the competency of the Hottentots and other free Persons of colour to purchase or possess land in this Colony: Be it therefore enacted and declared, That all Grants, Purchases, and Transfers of Land or other Property whatsoever, heretofore made to, or by any Hottentot or other free Person of colour, are and shall be, and the same are hereby declared to be of full force and effect, and that it is, and shall and may be lawful for any Hottentot or other free Person of colour, born, or having obtained Deeds of Burghership in this Colony, to obtain and possess by Grant, Purchase, or other lawful means, any Land or Property therein—any Law, custom, or usage to the contrary notwithstanding."

[75] Specifically, the Ordinance repealed laws that discriminated against the indigenous people describing such laws as containing "certain obnoxious usages and customs which are injurious to those persons." Ordinance 50 of 1828, Section I.

of the 1887 Act, which does not differ materially from the provision in the 1860 Act, provides:

> "Land . . . occupied bona fide and beneficially without title deed at the date of the extension of the colonial limits beyond it . . . shall not be considered or treated as Crown land for the purpose of this Act, until the claim thereto, in each case, shall have been decided on by the Governor, who shall have the power of satisfying such claim, by grant of the land or compensation out of the purchase money when the said land shall have been sold or otherwise, as shall appear equitable: Provided, always, that due notice of the nature of the claim, and reasonable proof that it can be substantiated, be received at the office of the Commissioner in sufficient time to admit of the withdrawal of the lot from sale, and that the claimant use reasonable diligence to lay the proofs in support thereof before the person or persons to whom the question may be referred by the Governor. "[76]

[74] The Richtersveld Community was the indigenous law owner of the Richtersveld. Stated in the terms used in the Acts, members of the Community were, as at 1847, in bona fide and beneficial occupation of the land without title deed. Accordingly, under the Acts the Richtersveld was not to be considered or treated as Crown land until the claim thereto had been decided by the Governor. The Crown Lands Acts regulated the alienation of land. Section 12 of the 1887 Act in effect provided that occupied land such as the Richtersveld would be regarded as Crown land for the purpose of alienation only after any claim to that land had been decided upon by the Governor. Although the Richtersveld Community consistently claimed the land occupied by it as its own,[77] we do not know whether it had made a formal

[76] Above n 72.

[77] The SCA, at para 68 of the judgment above n 4, said in relation to these claims:

> "The Richtersveld people's claim to exclusive use and occupation of the whole of the Richtersveld was persisted in from annexation until their dispossession well into the 20th

claim in terms of one of the Crown Lands Acts in respect of the land occupied by it. What is certain though is that the Governor made no decision on the fate of the Richtersveld land. The SCA found that "[t]hese Acts accordingly manifested an intention to respect existing land rights and not to extinguish them."[78] The conclusion that section 12 demonstrates that the Acts did not extinguish the Community's right of ownership is unassailable. In fact, the Acts created a mechanism for adjudication by the Governor of the Community's claim.

[75] Contrary to the finding of the SCA, Alexkor contended that the grant of land had to originate with the British Crown. Alexkor placed much reliance upon the views expressed by some colonial government officials. These views, it was submitted, supported the conclusion that the colonial government regarded all land in the Cape Colony as Crown land unless it was held under a grant made by the Crown. The reliance upon the views of the colonial government officials is misplaced.

[76] What matters is not the views of the colonial government officials but the law of the Cape Colony at the time of, and subsequent to, annexation. As we have held, the applicable law in the Cape Colony at the time of annexation respected and protected land rights of the indigenous people. No act of state or legislation extinguished the land rights of the Richtersveld Community subsequent to annexation but before 19 June 1913. The Crown Lands Acts relied upon by Alexkor did not have

century. They made their claims expressly in correspondence with the Colonial authorities and also by conduct by requiring strangers to obtain their permission before settling or grazing their animals in the Richtersveld."

[78] SCA judgment above n 4 at para 65.

that effect. The views of colonial government officials cannot therefore prevail over the law that was applicable in the Cape Colony and which respected and recognised the land rights of the Richtersveld Community.

[77] Apart from this, colonial government officials expressed conflicting views on the issue. Some officials recognised the land rights of the Richtersveld Community. In addition, the conduct of the Richtersveld Community was consistent with their ownership of the subject land. It granted grazing leases and mineral leases to outsiders. Indeed as late as 23 February 1910 Reverend Kling entered into a mineral lease on behalf of the Richtersveld Community whom he described as "the owner of certain ground situate in the District of Klein Namaqualand, in extent about seven hundred thousand morgen."[79]

[78] Moreover, the witnesses on behalf of the Richtersveld Community testified that it had been in occupation of the subject land at the time of annexation and continued to be until its eviction after the discovery of diamonds in the 1920s. This testimony is supported by the documentary evidence that showed, amongst other things, that the Richtersveld Community continued to occupy, claim and exercise rights of ownership over the whole of the Richtersveld.

[79] Finally, Alexkor relied on the fact that, according to his report dated 30 June 1890, Mr Melvill, an Assistant Surveyor-General,

[79] Lease agreement between Kling and Wrensch, dated 23 February 1910.

> ". . . proceeded to point out certain boundaries to which I requested [the Richtersveld people] to confine themselves, informing them at the same time that these were only provisional, and subject to the approval of the Government."[80]

It was suggested that the Richtersveld Community lost its rights to the subject land, because it was excluded from the land demarcated by Melvill, on one of two bases. The first contention was that the members of the Community confined themselves within the limited area pointed out by Melvill and accordingly forfeited any right to the land.

[80] The other basis was this: the Community was, at a later date, prepared to accept an arrangement in terms of which the tract of land identified by Melvill was officially and formally allocated to the Richtersveld Community by the government. However, the LCC found that the land demarcated in compliance with Melvill's suggestion was never formally or officially allocated to the Richtersveld Community.[81] The SCA also found that the Richtersveld Community maintained its rights to the subject land.[82] These arguments accordingly do not advance the case for the appellants.

[81] The inevitable conclusion is that the indigenous law ownership of the Richtersveld Community remained intact as at 19 June 1913. No steps were taken to extinguish the rights of ownership prior thereto. No ticket or certificate of occupation

[80] Melvill's report dated 30 June 1890 at para 58.

[81] LCC judgment above n 2 at para 27.

[82] SCA judgment above n 4 at paras 8 and 80.

or certificate of grant had been issued which had the effect of limiting the indigenous law ownership of the Community in any way. No law was passed to render unlawful the exercise of any right by the Richtersveld Community in respect of the land in terms of its own indigenous law. Many opinions were expressed, there was much debate about what was to be done, considerable effort was expended in investigating the position of the Richtersveld, many letters were written, many claims were made on both sides and not an inconsiderable number of reports were compiled. But the Richtersveld Community in fact continued to occupy the whole of the Richtersveld including the subject land, to use it, to let it, to grant mineral rights in respect of it and to exercise all other rights to which it was entitled in accordance with its indigenous law ownership of the land.

[82] In the result, we conclude that the annexation of Richtersveld did not extinguish the right of ownership which the Richtersveld Community possessed in the subject land and that such right was not extinguished prior to 19 June 1913.

(f) The steps taken by the state in respect of the subject land after 19 June 1913

[83] The position of the Richtersveld Community began to change from 1926 onwards with the discovery of diamonds on the subject land. It was common cause that, if the Richtersveld Community's rights survived beyond 1913, it was ultimately dispossessed of the land by the end of 1993. The Community has consistently contended

> ". . . that the Richtersveld community was dispossessed by a series of legislative and executive steps whereby, after the discovery of diamonds in the mid 1920's, State alluvial diggings were established on the subject land, the public, including the Richtersveld people, were excluded from the subject land, mineral rights in the subject land were granted to Alexkor and full ownership of the subject land was ultimately transferred to Alexkor."[83]

[84] On 28 May 1926 and 1 June 1926, Parliament adopted a resolution establishing the Richtersveld Reserve "for the use of the Hottentots and Bastards who are residing therein and of such other coloured people as the Government may decide."[84] The Reserve was established on land which excluded the subject land but which was part of the Richtersveld and was about half the size of the whole of the area that had been owned by the Richtersveld Community and occupied by it. This resolution was clearly connected with the discovery of diamonds on the subject land. In the debate on the resolution the Minister of Lands said that there had been difficulty and

> ". . . that discoveries are being made in that part of the world, and speculators have instigated these people [the Richtersveld Community] to claim sovereign rights – to claim minerals and everything."[85]

However it is not clear whether the resolutions of Parliament were directly binding on the Richtersveld Community or whether they were part of the process required for the issue of the certificate of reservation that was issued four years later. We will assume for the purposes of this judgment that the resolutions themselves had no binding effect and that the rights of the Richtersveld Community were left undisturbed.

[83] SCA judgment above n 4 at para 91.

[84] *Hansard* (1926) 4322.

[85] *Hansard* (1926) 4329.

[85] The Precious Stones Act[86] (the Precious Stones Act) was passed in 1927, again as a direct consequence of the discovery of diamonds in the subject land. It made provision for a state alluvial digging to be established by Proclamation.[87] A state alluvial digging was indeed established on the subject land in 1928[88] and its area consistently extended by Proclamation until it covered the whole of the subject land in 1963.[89] All the Proclamations that relate to the subject land refer to it as "unalienated Crown land" or "unalienated state land". In other words, the Proclamations announce that the subject land is in fact state owned land. In this respect, these Proclamations are different in content and effect from the Crown Lands Acts discussed earlier. The Proclamations expressly state that land described in each Proclamation is in fact Crown land.

[86] There is another respect in which the Proclamations and the Crown Lands Acts differ. Read in the context of the Precious Stones Act, the Proclamations, unlike the Crown Lands Acts, make no provision for the determination of claims of bona fide occupiers without title. Each Proclamation read in the context of the Precious Stones Act expressly declares the state to be the owner of that part of the subject land to which it applies. In so doing, each Proclamation may well have extinguished the

[86] Act 44 of 1927.

[87] Section 26.

[88] Proclamation 58 of 1928.

[89] Proclamation 1 of 1929, Proclamation 250 of 1931, and Proclamation 158 of 1963.

indigenous law ownership of the Richtersveld Community to that part of the subject land and rendered the state the owner of the land.

[87] On 5 February 1930, before the state alluvial digging process in respect of the subject land had been completed, the land was reserved by a certificate of reservation issued in terms of the 1887 Crown Lands Act. According to this certificate, land three hundred and fifty thousand morgen in extent, which excluded the subject land, was reserved "for the use of the Hottentots and Bastards who are residing therein and of such other coloured people as the Governor-General may decide."[90] It is highly arguable that this certificate of grant, by necessary implication, deprived the Richtersveld Community of their indigenous law ownership of the whole of the Richtersveld and granted them limited rights of occupation in relation to that part of the Richtersveld described in it. It is unnecessary to follow that route.

[88] The concept of dispossession in section 25(7) of the Constitution and in section 2 of the Act is not concerned with the technical question of the transfer of ownership from one entity to another. It is a much broader concept than that, given the wide definition of "a right in land" in the Act. Whether there was dispossession in this case must be determined by adopting a substantive approach, having due regard to the provisions of the Precious Stones Act and the conduct of the government in giving effect to them.

[90] Certificate of Reservation, issued in terms of section 6 of Act 15 of 1887, 5 February 1930.

[89] The Precious Stones Act did not recognise the rights of those, like the Richtersveld Community, who were at the time the owners of land under indigenous law. This was because their rights had not been registered. All land in respect of which no person was registered as the owner in the deeds registry was treated by the Act as unalienated Crown land. The rights of the Richtersveld Community, the indigenous law owner of the land, were ignored as if it had no rights in the land whatsoever. What is more, the Community fell foul of section 103(5) and (6) of the Act. Subsection (5) makes it an offence for any person to occupy, trade on or use proclaimed land for any purpose without permission or authority while subsection (6) makes a criminal of any person who uses water from any place in an alluvial digging unless that is allowed by the Precious Stones Act. The effect of this Act was that all occupants of the land except those who were registered surface owners, or those who occupied at the instance of the surface owners, lost their right to occupy and exploit the land.

[90] This law in effect rendered the occupation of the subject land by the Richtersveld Community unlawful and dispossessed it of the rights it had as owner of the land. Everything that happened afterwards, except for the issue of the certificate of reservation, referred to in paragraph 87 above, was a mere consequence of the Richtersveld Community having been stripped of its rights of ownership by the Precious Stones Act and the Proclamations made pursuant to it.

[91] The evidence shows that the state subsequently treated the subject land as its own, required the Community to leave it, exploited it for its own account and later transferred it to Alexkor. All this happened after 1913 and effectively dispossessed the Community of all its rights in the subject land. These rights included the right to occupy and exploit the subject land, including its minerals.

(g) Whether the dispossession was the result of racially discriminatory laws or practices

[92] Section 25(7) of the Constitution requires "[a] person or community [to be] dispossessed . . . as a result of past racially discriminatory laws or practices" before that person is entitled to relief. As noted in paragraph 22, this is the constitutional provision repeated in the terms of the Act. The next question that arises is whether the dispossession that took place was a dispossession "as a result of past racially discriminatory laws or practices". We have seen that the Precious Stones Act and the Proclamations issued thereunder failed to recognise the indigenous law ownership of the Richtersveld Community and rendered its occupation of the land unlawful. They excluded the Community from the subject land and from the right to exploit its mineral wealth.

[93] The state implemented the Precious Stones Act, would not allow the members of the Richtersveld Community onto the land and ultimately fenced off the subject land. The certificate of reservation in effect meant that the members of the

Richtersveld Community were restricted to the land reserve, and thus it constituted part of the process of their exclusion from the subject land.

[94] Owners of land whose ownership was registered in the deeds office and on which state alluvial diggings were established were treated differently from those who held their land according to indigenous law, where no system of registration was required. Registered owners were allowed to have access to the land, to keep their homesteads and to share in the mineral wealth of the land. More specifically, they were entitled, amongst other things, to select between 50 and 400 claims free of charge depending on their location,[91] half the licence money[92] and the protection of their homesteads and water rights.[93]

[95] Accordingly, the Precious Stones Act and its Proclamations failed to recognise indigenous law ownership and treated the subject land as state land. On the other hand, registered ownership was recognised, respected and protected. For the most part, whites held their land under the system of registered ownership, though there were some black people and black communities who did acquire title of this sort.[94]

[91] Section 19(1)(a).

[92] Section 22.

[93] Section 23.

[94] For a comprehensive discussion of the question see L Platzky and C Walker *The Surplus People Forced Removals in South Africa* (Ravan Press, Johannesburg, 1985) especially at 74-9 and at 85. The Beaumont Commission's figures suggest that 1 002 039 morgen of land were held in freehold by African farmers in 1916 which included some land owned by coloured persons outside of the scheduled reserves (Report of the Natives Land Commission, UG 19-16, Vol 1 at 4).

[96] However, given that indigenous law ownership is the way in which black communities have held land in South Africa since time immemorial, the inevitable impact of the Precious Stones Act's failure to recognise indigenous law ownership was racially discriminatory against black people who were indigenous law owners. The laws and practices by which the Richtersveld Community was dispossessed of the subject land accordingly discriminated against the Community and its members on the ground of race.

[97] In this regard we, therefore, disagree with the conclusion of the LCC that neither the Proclamations nor the Precious Stones Act were racially discriminatory laws.[95] In dismissing the claim of the Richtersveld Community, the LCC relied on its previous decision in *Slamdien*[96] which determined that racially discriminatory laws or practices, for the purposes of section 25(7) of the Constitution and section 2 of the Act, must be "those that sought specifically to achieve the (then) ideal of spatial apartheid, with each racial and ethnic group being confined to its particular racial zone."[97] The SCA held that this test was unduly restrictive.[98] We agree.

[98] In our view, although it is clear that a primary purpose of the Act was to undo some of the damage wreaked by decades of spatial apartheid, and that this constitutes an important purpose relevant to the interpretation of the Act, the Act has a broader

[95] LCC judgment above n 2 at para 97.

[96] *Minister of Land Affairs and Another v Slamdien and Others* 1999 (4) BCLR 413 (LCC).

[97] Id at para 26.

[98] SCA judgment above n 4 at para 97.

scope. In particular, its purpose is to provide redress to those individuals and communities who were dispossessed of their land rights by the government because of the government's racially discriminatory policies in respect of those very land rights.

[99] In this case, the racial discrimination lay in the failure to recognise and accord protection to indigenous law ownership while, on the other hand, according protection to registered title. The inevitable impact of this differential treatment was racial discrimination against the Richtersveld Community which caused it to be dispossessed of its land rights. Although it is correct that the Precious Stones Act did not form part of the panoply of legislation giving effect to "spatial apartheid", its inevitable impact was to deprive the Richtersveld Community of its indigenous law rights in land while recognising, to a significant extent, the rights of registered owners. In our view, this is racially discriminatory and falls squarely within the scope of the Act. It follows that the test applied in *Slamdien* is too narrow in this regard.[99]

[100] In effect what the state did was to treat the subject land as its own and to pass laws that excluded the Community from all benefits in it and ultimately to vest ownership of the subject land in Alexkor. Whether or not that was unlawful under the laws then prevailing is irrelevant; the question whether the Community after all these years could claim back the land under the common law is similarly irrelevant. The Community does not have to rely on the common law. It has rights under the Act and is asserting those rights.

[99] If our approach had been followed in *Slamdien,* the result would not necessarily have been different.

[101] It follows that it is not necessary in this case to fix the precise date or dates of dispossession. It suffices to find, as we do, that after 19 June 1913 the actions of the state, to which we have referred, resulted in the loss by the Richtersveld Community of its rights in the subject land and that this dispossession was complete by 1993.

The order

[102] In the order of the SCA[100] reference is made to the rights of the Richtersveld Community in the subject land being "akin to that held under common-law ownership." We have found that the Richtersveld Community held ownership of the subject land under indigenous law, which included the rights to minerals and precious stones. To this extent only we will amend the order of the SCA.

[103] The following order is made:

1. The order of the Supreme Court of Appeal is amended to read as follows:

In result the appeal succeeds with costs including the costs of two counsel. The orders of the LCC are set aside and replaced with an order in the following terms:

(a) It is declared that, subject to the issues that stand over for later determination, the first plaintiff [the Richtersveld Community] is entitled in terms of section 2(1) of the Restitution of Land Rights Act 22 of 1994 to

[100] SCA judgment above n 4 at para 111.

restitution of the right to ownership of the subject land (including its minerals and precious stones) and to the exclusive beneficial use and occupation thereof.

(b) The defendants are ordered jointly and severally to pay the plaintiffs' costs including the costs of three counsel.

2. The second appellant (the Government of the Republic of South Africa) is ordered to pay the costs of the condonation application in this Court, including the costs of two counsel, on the scale as between attorney and client.

3. Save as aforesaid, the appeal is dismissed with costs, including the costs of two counsel.

Chaskalson CJ, Langa DCJ, Ackermann J, Goldstone J, Madala J, Mokgoro J, Ngcobo J, O'Regan J, Sachs J, Yacoob J

For the First Appellant: M Madlanga SC, SA Nthai, A Schippers, instructed by E Moosa Wagley & Peterson, Cape Town.

For the Second Appellant: RC Hiemstra SC, N Bawa, MV Combrink, instructed by the State Attorney, Cape Town.

For the Respondent: W Trengove SC, P Hathorn, instructed by Legal Resources Centre, Cape Town.