CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 69/06

DEPARTMENT OF LAND AFFAIRS	First applicant
POPELA COMMUNITY	Second applicant
MAMORIBULA MAAKE	Third applicant
JOHANNES THOLO MAAKE	Fourth applicant
RAMOTHABA PHINEAS MAAKE	Fifth applicant
MABULE ISAAC MAAKE	Sixth applicant
MOLATOLO MAMOYAHABO MAAKE NO	Seventh applicant
SEAKWANE WILSON MALEMELA	Eighth applicant
ABRAM MAAKE	Ninth applicant
MASELAELO MOSIBUDI MAAKE	Tenth applicant
MOHLAGO MAMOTLATSO MAAKE NO	Eleventh applicant

versus

GOEDGELEGEN TROPICAL FRUITS (PTY) LTD	Respondent

Heard on : 8 March 2007

Decided on : 6 June 2007

JUDGMENT

MOSENEKE DCJ:

Introduction

[1] This case raises complex legal issues related to restitution of land rights to people who were labour tenants in a painful period of our history. The social injustice of the termination of their rights as labour tenants is not in question. What the case turns on is whether the termination of labour tenancies by private farmers entitles labour tenants to redress under the Restitution of Land Rights Act[1] (the Restitution Act).

[2] The Popela Community (second applicant), alternatively the third to the eleventh applicants (individual applicants), claim restitution of rights in land under the Restitution Act. The Popela Community is a community or group of people acting in concert in claiming restitution of land rights. To this end, they have organised themselves into a voluntary association known as the Communal Property Association (CPA). The third to the eleventh applicants are men and women who claim restitution of land rights as individuals. They share much in common. They have the same ethnic lineage and all bear the Maake surname barring one claimant. They originate from the same rural neighbourhood and they are all former labour tenants on the farm Boomplaats. As members of the CPA, they seek to enforce their claims with its assistance.

[3] A party in its own class is the first applicant, the Department of Land Affairs (the Department). It bears certain statutory obligations to facilitate the achievement of

[1] Act 22 of 1994.

the constitutional aims of land restitution and land reform.[2] It seeks to appeal to this Court in its own name but clearly acts in the interests of the applicants.[3] It asks for no material relief other than to have the decision of the Supreme Court of Appeal substituted with the order sought by the applicants. It must be added that the Department seeks to have the costs order of the Supreme Court of Appeal reversed. The order requires it to pay the costs of the appeal jointly and severally with the other applicants.

[4] The land in issue forms part of the erstwhile farm Boomplaats 408 LT in the Mooketsi area of the Limpopo province. The farm Boomplaats is now consolidated into the farm Goedgelegen 566 LT and its registered owner is Goedgelegen Tropical Fruits (Pty) Ltd (respondent). The respondent opposes the claims.

[5] The Land Claims Court dismissed the claims of the community and of the individual claimants. An appeal to the Supreme Court of Appeal faltered. It was dismissed with costs. Aggrieved by the decision of the Supreme Court of Appeal, the applicants ask for leave of this Court to contest the decision.

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[2] Section 25(5) of the Constitution states:

> "The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis."

[3] Section 38 of the Constitution states:

> "Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are—
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> . . .
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> (c) anyone acting as a member of, or in the interest of, a group or class of persons;
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> (d) anyone acting in the public interest . . . ."

History of dispossession

[6] At the very outset, certain mainly uncontested background facts loom large and cast a wide shadow over this tale of dispossession of rights to land. The narrative has all the hallmarks of forcible dispossession of indigenous ownership of land, which in time, has degenerated into dispossession of mere labour tenancy.

[7] On all accounts, the ancestors of the individual applicants originally settled on the farm Boomplaats in the 1800s. The individual applicants, most of whom bear the family name Maake, trace their uninterrupted family settlement on the Boomplaats land back to the mid-19th century. According to the individual applicants, their forebears enjoyed undisturbed indigenous rights to the land and exercised all the rights that came with it. These rights included living on the land as families; bringing up their children on it; tending the elderly; paying spiritual tribute to their ancestors; and burying the dead. They were entitled to cultivate the land and to use it for livestock.

[8] They did in fact exercise these rights. They lived on the land; they built families and inevitably a community; they buried their dead on it; and the graves are still there. On the same land, they paid homage to their ancestors. They tilled the land and reared livestock on it. The land provided subsistence necessary for the families without them being beholden to anyone. The applicants say these land rights were capable of being passed on to direct descendants and that their ancestors did transmit them to successive generations. However, this seemingly idyllic and rustic mode of living was not to last forever.

[9] Initially, the Land Claims Court judgment records the colonial shift of land ownership patterns in terse terms:

> "According to a research report submitted by the Regional Commissioner, the ancestors of the claimants were already living on the farms during the middle of the 19th century. When the whites came to settle on the farms, they found them there. The white settlers required them to render services for a certain period every year in return for being allowed to stay on and use the farms."[4]

[10] Later, in the course of deciding whether the dispossession of indigenous title of the claimants to land occurred prior to 1913, the judgment had the following to say:

> "It might be that the claimants are part of an indigenous community which occupied Boomplaats before the Zuid Afrikaanse Republiek granted the land to white owners during 1889, thereby depriving the community of their communal ownership and forcing their members into labour tenancy. . . . The white owners took possession of the land, and compelled the inhabitants to become labour tenants."[5] (Footnote omitted.)

[11] This conclusion of the Land Claims Court on the forcible dispossession of indigenous ownership of land is well warranted by the facts. The research report of the Regional Commissioners[6] reveals that the farm Boomplaats was registered in the

[4] *Popela Community v Department of Land Affairs and Another* LCC 52/00, 3 June 2005, unreported at para 4.

[5] Id at para 61. However, in footnote 68 of the judgment, the Land Claims Court held that it was "not established that the claimants are part of, or members of, such a community."

[6] Section 4(3) of the Restitution Act provides for the appointment of Regional Land Claims Commissioners who serve in designated regions under the Chief Land Claims Commissioner. Their powers and duties are set out in section 6 of the Restitution Act. These include receiving claims for the restitution of rights in land; assisting claimants in preparing and submitting claims; investigating the merits of the claims; mediating and settling disputes arising from such claims; drawing reports on unsettled claims for submission as evidence to the Court; and presenting any other relevant evidence to the Court.

deeds registry for the first time in 1889 in the name of Mr PDA Hattingh.[7] On 22 February 1887, the land was transferred by title deed to Mr J de Villiers de Vaal and was further transferred to Mr JB de Vaal on 10 December 1897.

[12] The next successive owner of the land was Mr HB Gassel who took transfer in 1914. After his death, his widow, Mrs MC Gassel, took transfer of the land. The two were uncle and aunt to Mr HMJ Altenroxel who, in 1963, became the registered owner of the farm Boomplaats.[8] He conducted farming on it together with his sons, Mr August Altenroxel and Mr Bernard Altenroxel. Later, and significantly during the period between 1969 and 1971, the two sons farmed the land as lessees. Ultimately, in 1987, the farm was registered in their names[9] and six years later, they transferred it to the respondent.[10]

[13] It is beyond question that, throughout the tenure of successive registered landowners, the applicants, as their ancestors did, continued to live on the land but as no more than labour tenants. They had to work for the registered owner or his appointee in order to live there. The inexorable result was that, by 1969, the title of the applicants, the very descendants of the Maake people, had been whittled down to a vulnerable labour tenancy in relation to their ancestral land. Then, as I intimated earlier, Mr August Altenroxel together with his brother, Mr Bernard Altenroxel,

[7] By deed of transfer T3343/1889.

[8] By deed of transfer T27963/1963.

[9] By deed of transfer T10655/1987.

[10] At some point in time, the farm Boomplaats was subdivided and the remaining extent has been consolidated into the farm Goedgelegen 566 LT.

leased the farm from their father on Boomplaats and farmed there in partnership. As we already know, they became registered owners of the farm, but only several years later.

[14] In the trial before the Land Claims Court, Mr August Altenroxel was the first and main witness for the respondent. It fell on him to relate how the applicants were deprived of their land rights to the Boomplaats land. He was born in 1934 and worked on the farm from the age of seventeen years. He still lives on it. He is now retired. He has no interest in the corporation that now owns the farm. He narrates that when he and his brother started farming there, the Maake people, including the individual applicants and their families, lived there. The brothers as well as their father had found the Maake people there as labour tenants on Boomplaats.

[15] He testified that the labour tenants were allowed to build homes for themselves and their families and were entitled to plant crops and to graze their livestock. In his words, the white farmer showed them the fields that they were permitted to plough. The labour tenants were not allowed more than ten head of cattle per family and a specified number of goats and sheep. In return, the labour tenants and their respective family members had to work for the Altenroxels for two days a week.

[16] During 1969, Mr August Altenroxel and his brother decided to terminate the labour tenancy of the individual applicants, which they did. It is common cause that

the applicants did not receive any compensation for the loss of their rights to land in Boomplaats.

[17] Mr Altenroxel explained what the dispossession of the cropping and grazing rights meant to the erstwhile labour tenants. They were stopped from ploughing. Within two years, they had to dispose of all of their livestock. Thereafter, they were not allowed to keep livestock. They all became full time wage earners on the farm. They were paid what the surrounding farmers were paying their farm labourers. Those who did not accept the new employment regime left Boomplaats for the nearby "homeland" reserved for black people. However, he says, the erstwhile labour tenants were not compelled to leave the farm. In fact, nine applicants became permanent farm workers and continued residing on the Boomplaats farm. By 2001, there were six applicants living on the farm. Three applicant families still live on the farm although they are not wage earners. The remaining applicants will not be compelled to leave the farm. The owner of the farm, the respondent, has given an informal assurance to that effect during the hearing before the Supreme Court of Appeal.

[18] Mr Altenroxel says that they terminated the labour tenancy because it did not work well for them. In their commercial farming environment, they needed a regular, adaptable and well-controlled workforce. The labour tenancy system did not fulfil that business need. He elaborated that, at times, the services of labour tenants were simply not available or adequate when needed. He insisted that the labour tenancy of

the applicants was terminated for business purposes and not at the behest of any government official or pursuant to any law or regulation.

[19] Mr Altenroxel conceded under cross-examination that he was aware that other farmers in their area were terminating the labour tenancy relationships as between their black labour tenants and that the trend on other farms spurred them on to do the same. He rejected the suggestion that he must have been aware of legislation by government aimed at abolishing the labour tenancy system for black people. In his time, he says, "we never saw or heard about, about that legislation . . . ." He knew of the apartheid government's policy to establish homelands for blacks. He read about it in the Star newspaper and in the Farmers Weekly. But he had never heard of the 1913 Natives Land Act,[11] the Native Trust and Land Act of 1936,[12] the Bantu Laws Amendment Act of 1964[13] or of the Government Notice 2761 of 1970[14] proclaiming the government's intention to eradicate labour tenancy completely. He nonetheless admitted that he was a regular reader of the journal Farmers Weekly and that, during 1960 to 1968, he occasionally attended meetings of the local farmers association, during which the subject of the termination of labour tenancy had never been discussed.

The claims

[11] Act 27 of 1913.

[12] Act 18 of 1936.

[13] Act 42 of 1964.

[14] Government Gazette 2761 GN R1224, 31 July 1970.

[20] Given the background that I have sketched, it is vital, at the outset, to characterise the claims for restitution of land rights accurately. In this Court, particularly in relation to remedy, applicants vacillated over the nature of their claims. On occasion, they tended to invoke the loss of their indigenous land rights rather than dispossession of labour tenancy rights. It is indeed plain that the forebears of the applicants were deprived of their indigenous rights to the Boomplaats land during the second half of the 1800s. For better, for worse and perhaps for reasons better left unexplored, our Constitution has chosen not to provide for restitution of or equitable redress for property dispossessed prior to 19 June 1913. Since the dispossession of the indigenous title occurred before 1913, it seems self-evident that it is outside the restitutionary beneficence of section 25(7)[15] of the Constitution.

[21] This, of course, means that ordinarily, even if the applicants were to establish dispossession of indigenous communal ownership that occurred before the constitutional cut-off date of 19 June 1913, they would not be entitled to exact restitution or redress.[16] In the words of this Court in *Alexkor Ltd and Another v Richtersveld Community and Others*, dispossessions that took effect before 19 June 1913 are not actionable.[17]

[15] The full text of section 25(7) appears in para 48 below.

[16] This is distinguishable from the case of *Alexkor Ltd and Another v Richtersveld Community and Others* 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) at para 81 in which this Court found that the indigenous law ownership possessed by the Richtersveld Community in the subject land had not been effectively extinguished prior to 19 June 1913, with the result that it survived beyond the constitutional cut-off date.

[17] Id at para 40.

[22] By this I do not mean to convey that registered ownership of land always enjoys primacy over indigenous title. To do that would be to elevate ownership notions of the common law to the detriment of indigenous law ownership for purposes of restitution of land rights. Rights acquired under indigenous law must be determined with reference to that law subject only to the Constitution.[18] In appropriate cases, under the jurisdiction crafted by the Restitution Act, registered ownership in land will not be held to have extinguished rights in land recognised under indigenous law. One such case is *Prinsloo and Another v Ndebele-Ndzundza Community and Others*[19] where Cameron JA correctly observes that:

> "The Act recognises complexities of this kind and attempts to create practical solutions for them in its pursuit of equitable redress. The statute also recognises the significance of registered title. But it does not afford it unblemished primacy. I consider that, in this case, the farm's residents established rights in the land that registered ownership neither extinguished nor precluded from arising."[20]

[23] The facts in the present matter are different. The applicants themselves, so too the Regional Land Claims Commissioner, locate in time their dispossession of indigenous title to Boomplaats before 1913. Documentary and other evidence warrant this stance. Further, in their claim forms and in pleadings in the Land Claims Court, the claimants restrict their claims for restitution or equitable redress to dispossession of labour tenancy rights in 1969. Here the applicants have chosen not to seek, as the

[18] Id at paras 50-51.

[19] 2005 (6) SA 144 (SCA); [2005] 3 All SA 528 (SCA).

[20] Id at para 38. Reference to the "Act" and "statute" in the quotation is made in relation to the Restitution Act.

claimants did in *In Re Kranspoort Community*,[21] an order restoring their rights in the original farm along with an order in terms of section 35(4)[22] of the Restitution Act, adjusting those rights to full ownership. The individual claimants have even curtailed the extent of the land sought to be restored to accord with their labour tenancy claims:

> "The land claimed is the land formerly known as the remaining extent of the farm Boomplaats No. 408 LT. Vide diagram S.G. NO. A 1639/08 and Deed Grant No. 3343/1889. (DB357/23), which has now been consolidated into the farm Goedgelegen 566LT.
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> . . . .
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> The land claimed excludes the land, which was used by the landowner as marked in the map, attached herewith marked 'LC2' and the map attached to the notice of amendment dated 6 May 2002.
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> *The individual claimants are each claiming the land where their homesteads are or used to be and the land immediately around it comprising approximately 800m^2 and the whole land which they used jointly for ploughing and for grazing*."[23] (Emphasis added.)

[24] However, this does not mean as the respondent will have us accept, that the history of dispossession of property preceding the retroactive cut-off point of 19 June 1913 is of mere passing interest. The correct approach towards the historical context before the cut-off date is set out by this Court in *Richtersveld*:

> "This did 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

[21] 2000 (2) SA 124 (LCC) at para 83.

[22] Section 35(4) of the Restitution Act provides:

> "The Court's power to order the restitution of a right in land or to grant a right in alternative state-owned land shall include the power to adjust the nature of the right previously held by the claimant, and to determine the form of title under which the right may be held in future."

[23] Amended description of the land claimed filed by the claimants with the Land Claims Court on 31 March 2003 ahead of the trial proceedings.

> 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."[24]

I revert to this matter later in the contextual analysis related to whether the dispossession of rights in land, if any, suffered by the applicants is as a result of racially discriminatory laws or practices.

[25] For now, it should suffice to characterise the claims of the applicants accurately. The claims are in two parts. First, the applicants seek, individually or as a community, an order that they have been dispossessed of their labour tenant rights in 1969 as a result of racially discriminatory laws or practices and that they are therefore entitled to restitution or equitable redress under the Restitution Act. Second, as restitution or equitable redress, the individual applicants are each claiming the restitution of the land where their homesteads are or used to be and the land immediately around it, comprising approximately 800m^2, and the whole land that had been used jointly for ploughing and for grazing.

Litigation

[24] Above n 16 at para 40.

[26] As required by the provisions of section 14(1)(b) and (d)[25] of the Restitution Act, the regional land claims commissioner referred the contested claims for restitution to the Land Claims Court. At the trial, the Court heard evidence and, in the end, dismissed the collective claim of the Popela Community and the claims of the eleven individual claimants. The Court took the view that there is no clear evidence whether the individual claimants in this case voluntarily accepted the new system or whether they were forced into it. For that reason, it preferred to assume without deciding that during 1969, the Altenroxels dispossessed the individual claimants of cropping and grazing rights. However, the dispossession, it held, was not from a community of labour tenants but from individual labour tenants. The Court concluded that, whatever the case may be, the dispossession was not the result of a past racially discriminatory law or practice. It accordingly found no merit in any of the claims.

[27] With leave of the Land Claims Court, the Supreme Court of Appeal heard the appeal of the claimants and dismissed it with costs. It found that the claimants, whether as individuals or as a community, had not shown that their dispossession of labour tenants rights in 1969 was the result of a past racially discriminatory law or practice. The Court reasoned that, even if the Altenroxels knew of the projected

[25] Section 14 of the Restitution Act states:

> "(1) If upon completion of an investigation by the Commission in respect of specific claim—
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> . . .
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> (b) the regional land claims commissioner certifies that it is not feasible to resolve any dispute arising from such claim by mediation and negotiation; or
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> . . .
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> (d) the regional land claims commissioner is of the opinion that the claim is ready for hearing by the Court,
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> the regional land claims commissioner having jurisdiction shall certify accordingly and refer the matter to the Court."

phasing out of labour tenant agreements at the instance of the government of the day, knowledge by itself is not sufficient to establish the necessary causal connection between the racially motivated law or practice and the dispossession. In the event, the Court found it unnecessary to resolve the issue whether the dispossession implicated claimants as individuals or as a community of labour tenants.

Issues

[28] A claim for restitution of a right in land under section 2 of the Restitution Act may succeed only if: (a) the claimant is a person or community or part of a community; (b) that had a right in land; (c) which was dispossessed; (d) after 19 June 1913; (e) as a result of past racially discriminatory laws or practices; (f) where the claim for restitution was lodged not later than 31 December 1998; and (g) no just and equitable compensation was received for the dispossession.[26]

[29] In this Court, besides one jurisdictional issue and remedy, if any, only two elements of the claim remain in contention. This means that the issues that fall to be decided are: (a) whether leave to appeal should be granted; (b) whether the Popela Community is a "community" dispossessed of a right in land for purposes of section 2(1)(d)[27] of the Restitution Act; (c) whether the individual claimants were

[26] For a similar tabulation of the legislative requirements of section 2 of the Restitution Act see *Richtersveld* above n 16 at para 19; *In re Kranspoort Community* above n 21 at para 21.

[27] Section 2 of the Restitution Act states:

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

dispossessed of their right in land as a result of past discriminatory laws or practices as required by section 2(1)(a) of the Restitution Act; and (d) what the appropriate remedy should be, should the appeal succeed. I examine each issue in turn.

Leave to appeal

[30] There is no gainsaying that the substantive issues for determination are constitutional matters. The claims are made under section 2(1) of the Restitution Act. This legislation provides for the restitution of rights in land to persons or communities dispossessed of such rights after 19 June 1913 as a result of past discriminatory laws or practices. Although, at first, the Act was passed under the interim Constitution,[28] section 2(1) has been amended several times[29] in order to give effect to the provisions of section 25(7) of the Constitution.

[31] This case requires us to construe the provisions of section 2(1) of the Restitution Act. It is so that where a statute has been enacted to give content to a

[28] Section 121(2) of the interim Constitution, 1993, provided that:

> "A person or a community shall be entitled to claim restitution of a right in land from the state if—
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> > (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."

[29] Section 2 of the Restitution Act was amended by section 2(1) of Act 78 of 1996, substituted by section 3(1) of Act 63 of 1997 and by section 2 of Act 18 of 1999.

constitutional right or to the constitutional obligation of the legislature, the proper construction of that statute is itself a constitutional matter.[30]

[32] I have no doubt that it is in the interests of justice to hear this appeal and decide the issues that arise. As I have just said, restitution of land rights and land reform are constitutional issues. They sit in the heartland of the protective, restitutionary and land reform design of section 25 of the Constitution. The issues that arise are neither frivolous nor without merit. If anything, they are indeed important not only to the applicants who seek land restitution but also to the registered owner of the property concerned. The Land Claims Court makes the additional point that similar claims by labour tenants in respect of other farms are pending. Given our country's historical chasm on the issues of land dispossession and land restitution, the public has a legitimate interest in the equitable resolution of claims like these. I would grant the applicants leave to appeal.

Is the Popela Community a "community" dispossessed of a right in land?

[33] Section 25(7) of the Constitution and section 2(1)(d) of the Restitution Act entitle a community dispossessed of a right in land after 19 June 1913 to claim restitution or other equitable redress. A community, unless the context otherwise indicates, is any group of persons whose rights in land are derived from shared rules determining access to land held in common by such group.[31]

[30] *National Education Health and Allied Workers Union v University of Cape Town and Others* 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC) at paras 14-15. See also *Richtersveld* above n 16 at para 23.

[31] Section 1 of the Restitution Act defines a community as:

[34] The Land Claims Court concluded that in 1969 individual labour tenants and not the community were dispossessed of their labour tenants' rights. Each of the individual labour tenants had a discrete legal relationship with the white farmers. The Supreme Court of Appeal found it unnecessary to decide this issue because, in the view that it took of the matter, it had not been shown that the dispossession was causally linked to a law or practice that advanced racial discrimination. Given the conclusion I arrive at, I have to confront the issue.

[35] At the heart of this enquiry is whether the occupational rights in the land were derived from shared rules determining access to land held in common. At its core, the question is whether the labour tenants, through shared rules, held the land rights jointly. The community and individual applicants contend that they did. They support this contention by pointing to the history of their use and occupation of the land and to the attendant social arrangements. Their forebears lived on the farm since the mid-1800s, before the first registered owner Mr Hattingh in 1889, and the claimants continue to do so despite successive registered ownership of the land. One of their original leaders is Mr Popela Maake, after whom the community is named. Mr August Altenroxel testified that he knew Mr Popela Maake and that he died in 1940 when Mr August Altenroxel was six years old. The unchallenged evidence of the expert witness, Mr Joubert, shows with reference to aerial photos that from 1938 to 1968, members of the Popela Community, including the individual claimants in this

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". . . any group of persons whose rights in land are derived from shared rules determining access to land held in common by such group, and includes part of any such group."

case, were in possession of and were entitled to plough a total area of 45 hectares and that there were about 32 individual huts on Boomplaats.

[36] After Mr Popela Maake's demise, the community chose Mr Petrus Maake to lead them. Members of the community reported issues of conflict and disputes to him for resolution. He, as induna,[32] pointed out the area where a person could build or take over a homestead and allocated ploughing fields in an area over which the community had factual possession, to the exclusion of the farm owner. The community shared a common grazing area, they gathered fire-wood and drew water collectively and had a communal graveyard. The Altenroxels deny that, during their ownership of the farm, Mr Maake exercised any such power over the land.

[37] However, what is clear on all the evidence is that the indigenous ownership of land in the original Boomplaats farm was lost before 1913. Once they had lost ownership, they were compelled to work for the owner. Their relationship with the owner was coercive. The Land Claims Court found, correctly in my view, that "the white owners took possession of the land, and compelled the inhabitants to become labour tenants."[33]

[38] Although they had lost indigenous ownership, they continued to exercise the right to occupy the land, to raise crops and to graze their livestock. Successive registered owners did not terminate these rights. By 1969, the collective indigenous

[32] Induna is the head of a section of a community and is vested with authority to decide traditional disputes.

[33] Above n 4 at para 61.

title to land of the Popela Community had succumbed to settler dispossession and subsequent land laws on ownership and occupation of land by black people. Members of the community had been successfully coerced into being farm labourers whose occupational interest in the land had become subject to the overriding sway of the registered owner. They had to work the lands of the owner without wages in order to live there. Mr Altenroxel makes the point that, whilst there was a supervisor who was also regarded by the workers as kgoshi,[34] as well as a community, they derived their right to live there, plant crops and keep livestock from him, the white registered owner, at whose whim and fancy they lived.

[39] In the case of *In Re Kranspoort Community*, Dodson J correctly construes section 2(1)(d) of the Restitution Act to require that there must be a community or part of a community that exists at the time the claim is lodged and that the community must have existed some time after 19 June 1913 and must have been victim to racial dispossession of rights in land. I agree with Dodson J that in deciding whether a community exists at the time of the claim there must be: (a) "a sufficiently cohesive group of persons" to show that there is a community or a part of a community, regard being had to the nature and likely impact of the original dispossession on the group; and (b) some element of commonality between the claiming community and the community as it was at the point of dispossession.[35]

[34] Kgoshi is an overall leader or head of a community to whom izinduna report.

[35] Above n 21 at para 34.

[40] There is no justification for seeking to limit the meaning of the word "community" in section 2(1)(d) by inferring a requirement that the group concerned must show an accepted tribal identity and hierarchy. Where it is appropriate, as was the case in *Ndebele-Ndzundza*, the "bonds of custom, culture and hierarchical loyalty"[36] may be helpful to establish that the group's shared rules related to access and use of the land. The "bonds" may also demonstrate the cohesiveness of the group and its commonality with the group at the point of dispossession.

[41] However, what must be kept in mind is that the legislation has set a low threshold as to what constitutes a "community" or any "part of a community". It does not set any pre-ordained qualities of the group of persons or any part of the group in order to qualify as a community. This generous notion of what constitutes a community fits well with the wide scope of the "rights in land" that are capable of restoration. These rights, as defined,[37] go well beyond the orthodox common law notions of rights in land. They include any right in land, whether registered or not; the interests of labour tenants and sharecroppers; customary law interests; interests of a beneficiary under a trust; and a beneficial occupation for a continuous period of not less than ten years before the dispossession. The legislative scheme points to a purpose to make good the ample hurt, indignity and injustice of racial dispossession of rights or interests in land that continued to take place after 19 June 1913.

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[36] Above n 19 at para 30.

[37] Section 1 of the Restitution Act defines a right in land as:

> ". . . 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".

[42] The threshold set by section 2(1)(d) is well met if the right or interest in land of the group is derived from shared rules determining access to land that is held in common. This generous understanding of what constitutes a community is consistent with the retroactive reach of the restitution process back to 19 June 1913. With the passage of time, the composition and cohesion of communities who were victims of dispossession would be compromised in that communities would be displaced and alienated from their original homes at huge human and social expense.[38] Also, that interpretation advances the declared purpose of the operative legislation, which is to provide restitution and equitable redress to as many victims of racial dispossession of land rights after 1913 as possible.

[43] In my view, the Land Claims Court was wrong to hold that the applicants were not a community because they did not prove an accepted tribal identity, or that they did not live under the authority of a chief designated by tribal hierarchy or that they did not occupy the land in accordance with ancient customs and traditions. None of these attributes are requirements in themselves or collectively.

[44] In my view, it is clear from the evidence that the Maake people were a community at the time they were dispossessed of their indigenous ownership of the Boomplaats land in 1889 and eighty years later, in 1969, when they lost the remnants

[38] In relation to the consequences of forced removals on communities, see Bundy "Land, Law and Power: Forced Removals in Historical Context" in Murray and O'Regan (eds) *No Place To Rest: Forced Removals and the Law in South Africa* (Oxford University Press, Cape Town 1990) at 3.

of their original rights in land in the form of labour tenancy. Even when they submitted the current claim for restitution, they were a community with sufficient communality with their Maake forebears. They have retained much of their identity and cohesion as part of the erstwhile Maake or Popela clan.

[45] This however is not the end of the enquiry. The acid test remains whether the members of the Popela Community derived their possession and use of the land from common rules in 1969. The answer must be in the negative. By then, each of the families within the community had been compelled to have its own separate relationship with the Altenroxels. They pointed out the land for use by each family. They ordered them to dispense with their livestock. They required them singularly, and often also their children as young as ten years, to toil on the farm if they were to live there. The registered owner made it clear that he did not heed any rules of the community on land occupation. They made the rules and the labour tenant had to obey. The 1969 unilateral and summary termination of the land interests of the labour tenants makes the point loudly. Some erstwhile labour tenants stayed and accepted the prevailing labour wage while others went into the "diaspora" at Ga-Sekgopo in the nearby so-called black homeland.[39]

[46] In any event, at its very core, labour tenancy under the common law arises from a so-called innominate contract between the landowner and the labour tenant, requiring the tenant to render services to the owner in return for the right to occupy a

[39] This term is used evocatively by Dodson J in *In Re Kranspoort Community* above n 21 at paras 44 and 48, when referring to forced removals that resulted in harrowing displacement and homelessness.

piece of land, graze cattle and raise crops.[40] In name, it is an individualised transaction that requires specific performance from the contracting parties. This means that labour tenancy does not sit well with commonly held occupancy rights.[41] It is a transaction between two individuals rather than one between the landlord and a community of labour tenants. It must however be recognised that despite the fiction of the common law in regard to the consensual nature of labour tenancy, on all accounts, the labour tenancy relationships in apartheid South Africa were coercive and amounted to a thinly veiled artifice to garner free labour.[42]

[47] I conclude that by 1969, no rights in land remained vested in the labour tenants as a community. It has not been shown that, at the point of dispossession in 1969, the community of tenants on Boomplaats held the land in common under shared rules that they could enforce effectively in the face of an individualised system of labour tenancy. I need not assume. On the contrary, the evidence shows clearly that the individual applicants, who were labour tenants on the farm Boomplaats in 1969, were

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[40] *De Jager v Sisana* 1930 AD 71 at 81 and 83. See also Hathorn and Hutchison "Labour Tenants and the Law" in Murray and O'Regan (eds) above n 38 at 198-201.

[41] Section 1 of The Land Reform (Labour Tenants) Act 3 of 1996 defines a labour tenant as a person:

> "(a) who is residing or has the right to reside on a farm;
>
> (b) who has or has had the right to use cropping or grazing land on the farm, referred to in paragraph *(a)*, or another farm of the owner, and in consideration of such right provides or has provided labour to the owner or lessee; and
>
> (c) whose parent or grandparent resided or resides on a farm and had the use of cropping or grazing land on such farm or another farm of the owner, and in consideration of such right provided or provides labour to the owner or lessee of such or such other farm,
>
> including a person who has been appointed a successor to a labour tenant in accordance with the provisions of section 3(4) and (5), but excluding a farmworker . . . ."

[42] See Hathorn and Hutchison above n 40 at 201 for a discussion on the obligations of labour tenants in labour tenancy relationships.

dispossessed of occupation,[43] ploughing and grazing rights in that land as envisaged in the Restitution Act.

The phrase "as a result of"

[48] The entitlement to claim equitable redress or restitution of dispossessed property derives from the Constitution itself. 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." (Emphasis added.)

Section 2 of the Restitution Act echoes this injunction from the Bill of Rights by providing that a person shall be entitled to restitution of a right in land if he or she has been dispossessed of a right in land *as a result of* a past racially discriminatory law or practice.

[49] I draw attention to the phrase "as a result of" because much in this case turns on the meaning that we accord to it. The pivotal question relates to the meaning of the phrase in the context of the constitutional and legislative provisions within which it occurs. Important to that interpretive task are two definitions in section 1 of the Restitution Act. Racially discriminatory laws include "laws made by any sphere of government and subordinate legislation". Racially discriminatory practices are:

[43] See the definition of a "right in land" above n 37. It is not contested and, if anything, it is clear from the evidence that the individual claimants lived on the farm Boomplaats for an uninterrupted period of at least ten years before the dispossession of land rights in 1969.

". . . 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".

[50] The Supreme Court of Appeal endorsed the approach of the Land Claims Court that the words "as a result of" connote a causal connection[44] but that, in this case, there was no discernible causal connection. For this conclusion, both courts relied on the "but for" test which asks whether, but for the act or omission labelled as the possible cause, the result would have occurred. In applying this test, these courts have asked whether, but for the discriminatory laws and practices, the Altenroxels would have terminated the claimants' labour tenancies. They concluded that, regardless of the legal and social context, the farm owners would have dispossessed the applicants of their rights in the land. Thus, past discriminatory laws and practices did not cause the dispossession.[45] They held that the dispossession was as a result of a private decision of the farmers concerned.

The proper approach to statutory interpretation

[44] For this finding, the Land Claims Court relied on *Minister of Land Affairs and Another v Slamdien and Others* 1999 (4) BCLR 413 (LCC); [1999] 1 All SA 608 (LCC) at paras 37-38; *Boltman v Kotze Community Trust* [1999] JOL 5230 (LCC); *In Re Former Highlands Residents: Naidoo v Department of Land Affairs* 2000 (2) SA 365 (LCC) at 368G-369C.

[45] The causation enquiry has two parts to it: "factual causation" and "legal causation". The first stage, or "factual causation" enquiry, applies the *conditio sine qua non* or "but for" test. The test asks whether, but for the act or omission labelled as the possible cause, the result would have occurred. If the test does not identify the act or omission as a necessary condition for the result to occur, the enquiry ends. However, if the act or omission is a necessary condition, the second enquiry into legal causation must be conducted. The second enquiry seeks to ascertain whether the cause identified is a legally recognised cause or whether there is a sufficiently close relationship between the two events so that the former constitutes the legal cause of the latter. At this stage, one adopts a flexible approach that draws on reasonableness, common sense, other relevant policy considerations and the facts of the case. See *Slamdien* above n 44 at para 38.

[51] This Court has reiterated that the Constitution must be interpreted purposively.[46] Many pronouncements in this Court and other courts endeavour to encapsulate this purposive approach. Perhaps the most lucid dictum on purposive interpretation, which has been approved several times by this Court, is to be found in *R v Big M Drug Mart Ltd*,[47] per Dickson J, writing about the Canadian Charter of Rights and Freedoms.[48]

[52] In *Bato Star Fishing*,[49] Ngcobo J explains the proper approach to statutory interpretation:

> "The emerging trend in statutory construction is to have regard to the context in which the words occur, even where the words to be construed are clear and unambiguous. Recently, in *Thoroughbred Breeders' Association v Price Waterhouse*,[50] the SCA has reminded us that:
>
> > 'The days are long past when blinkered peering at an isolated provision in a statute was thought to be the only legitimate technique in interpreting it if it seemed on the face of it to have a readily

[46] *S v Zuma and Others* 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC) at para 17; *S v Makwanyane and Another* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at paras 9 and 301-302; *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as* Amici Curiae*)* 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC) at para 232.

[47] (1985) 18 DLR (4th) 321.

[48] Id at 359-360, where the Court held the following:

> "The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the *purpose* of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect. In my view, this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be . . . a generous rather than a legalistic one, aimed at fulfilling the purpose of a guarantee and securing for individuals the full benefit of the Charter's protection."

[49] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC).

[50] 2001 (4) SA 551 (SCA).

> discernible meaning. As was said in *University of Cape Town v Cape Bar Council and Another* 1986 (4) SA 903 (A) at 914D-E:
>
> > 'I am of the opinion that the words of s 3(2)(d) of the Act, clear and unambiguous as they may appear to be on the face thereof, should be read in the light of the subject-matter with which they are concerned, and that it is only when that is done that one can arrive at the true intention of the Legislature.'"[51]

[53] It is by now trite that not only the empowering provision of the Constitution but also of the Restitution Act must be understood purposively because it is remedial legislation umbilically linked to the Constitution. Therefore, in construing "as a result of past racially discriminatory laws or practices" in its setting of section 2(1) of the Restitution Act, we are obliged to scrutinise its purpose. As we do so, we must seek to promote the spirit, purport and objects of the Bill of Rights. We must prefer a generous construction over a merely textual or legalistic one in order to afford claimants the fullest possible protection of their constitutional guarantees. In searching for the purpose, it is legitimate to seek to identify the mischief sought to be remedied. In part, that is why it is helpful, where appropriate, to pay due attention to the social and historical background of the legislation. We must understand the provision within the context of the grid, if any, of related provisions and of the statute as a whole including its underlying values. Although the text is often the starting point of any statutory construction, the meaning it bears must pay due regard to

[51] Above n 49 at para 90.

context. This is so even when the ordinary meaning of the provision to be construed is clear and unambiguous.[52]

[54] Clearly the next task is to describe briefly the purpose of the statute. In *Richtersveld* this Court described the purpose of the legislation in these terms:

> ". . . 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 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."[53]

Commenting on the requirement of dispossession, the Court observed that:

> "The concept of dispossession in s 25(7) of the Constitution and in s 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."[54]

[55] It is indeed so that the Restitution Act is an enactment intended to express the values of the Constitution and to remedy the failure to respect such values in the past, in particular, the values of dignity and equal worth. To achieve this remedial purpose,

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[52] Id.

[53] Above n 16 at para 98.

[54] Id at para 88.

as it is shown later in this judgment, the history and context within which land rights were dispossessed and in particular the manner in which labour tenancy operated and was terminated must be considered. The causal enquiry required by section 2(1) of the Restitution Act must be understood in the light of this purpose and the full context of the dispossession of land rights in issue. It is to the legal and social context of the dispossession in this case that I now turn.

The grid of discriminatory laws and practices

[56] In order to understand whether a dispossession of a right in land is as a result of past discriminatory laws and practices, it will be helpful to set out the framework of the legislation that has relevance to the dispossession. The Supreme Court of Appeal found that the only relevant legislation that could have amounted to a discriminatory law in this context was section 27*bis*(1) of the Bantu Laws Amendment Act[55] (the BLA Act). In my view, this finding falls short of recognising the full range of the racist legislative scheme, policies and practices on land from 1913 to 1970 and their disastrous impact on the rights in land of black people.

[57] A brief survey of legislative and state policy framework on labour tenancy is instructive. The best available evidence is to be found in research and investigation

[55] Above n 13. Section 22 of the Bantu Laws Amendment Act provided for the insertion of section 27*bis* in the Native Trust and Land Act which read as follows:

> "(1) Whenever the Minister considers it in the public interest to do so, he may by notice in the *Gazette* declare that as from a date fixed in such notice—
>
> > (a) no further labour tenants' contracts shall be entered into and no further labour tenants shall be registered in respect of land in the area referred to in such notice; or
> >
> > (b) no labour tenant shall be employed on land in the area referred to in such notice."

reports of the Department of Land Affairs Report 190 of 1996[56] and the Nel Commission investigation into labour tenancy of 1961.[57] These reports contain historical facts on state policy, practices and laws and are premised on archival materials that were never put in dispute and, in my view, are cogent. In the light of the provisions of section 30(2)[58] of the Restitution Act, such materials are properly admissible.[59]

[58] Before 1910, there was no general restriction upon the acquisition of land by blacks, although virtually none of the best agricultural land was held other than by whites. The Natives Land Act of 1913 precluded blacks from owning land outside scheduled areas, which consisted of no more than thirteen percent of the total land mass of the country.[60] Independent rent tenancy and sharecropping in white-owned

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[56] This report focussed on the historical and legislative aspects which had an impact on the lives of labour tenants. The following conclusions, *inter alia*, were arrived at:

> "It can be concluded that government policy, throughout the years, were focussed on the needs of white farmers. The abidence of the labour tenancy system can be clearly understood, as it offered a degree of freedom to black people, who were increasingly restricted by legislation at the stage, as well as a way to secure a place for living, while earning an extra income in cities, mines or towns. The government lodged an increasing attack to abolish the labour tenancy system after the 1970's, although planning with regard to alternative refuge were not always in place. The farmers on their side, were also reluctant to register labour tenants, as many farmers found *labour farms* quite profitable. As a result of this, there [was] a constant flux of people evicted to these farms, as well as Trust farms, only to be evicted again at a later stage."

[57] The commission was prompted by calls for intervention by farmers, appealing to the government to terminate the labour tenancy system through legislation.

[58] Section 30(2) of the Restitution Act states:

> "Without derogating from the generality of the aforegoing subsection, it shall be competent for any party before the Court to adduce—
>
> (a) hearsay evidence regarding the circumstances surrounding the dispossession of the land right or rights in question and the rules governing the allocation and occupation of land within the claimant community concerned at the time of such dispossession; and
>
> (b) expert evidence regarding the historical and anthropological facts relevant to any particular claim."

[59] See *Richtersveld* above n 16 at para 41 on the admission of historical and archival material by a court.

[60] Bundy above n 38 at 5.

areas were eliminated. After the exclusion of blacks from land ownership in white areas, the racist government adopted measures to control blacks on farms through legislation, which rendered those who remained on farms either labour tenants or squatters. This occurred between 1913 and 1936.

[59] The Native Trust and Land Act of 1936 effected far reaching changes to the land tenure system of blacks. It limited the number of workers on a farm and subjected them to master and servant laws. It also created an elaborate system for registering and controlling the distribution of labour tenants.[61] This legislation provided the basis for the eviction of tenants from farms for the next 40 years. After 1948, with the advent of the new government, Chapter IV of the Act was enforced vigorously in a systematic plan to eliminate squatting and change labour tenancy into wage labour.

[60] The Prevention of Illegal Squatting Act of 1951[62] enabled farmers and local authorities to evict labourers with relative impunity. The BLA Act of 1964 implemented the recommendations of the 1961 Nel Commission. This 1964 legislation was the main drive behind the forced removals of squatters and labour

[61] Section 12 of the Native Trust and Land Act stated:

> "(1) Except with the approval of the Governor-General—
>
> > (a) no person other than the Trust or a native shall acquire land in a released area from a native if such land be wholly surrounded by land held by natives or by the Trust, whether the last-mentioned land is held individually or in communal tenure; and
> >
> > (b) notwithstanding anything in section *eleven* or in any other law, no native shall acquire land outside a scheduled native area from a person other than a native if such land be wholly surrounded by land held by persons other than natives."

[62] Act 52 of 1951.

tenants during the 1960s and 1970s. It is fair to say that, in effect, the trilogy of the BLA Act of 1964, read together with the Natives Land Act of 1913[63] and the Native Trust and Land Act of 1936, rendered vulnerable the interests in land of black occupiers in general and of labour tenants, in particular.

[61] The primary purpose of the proclamation in the 1967 Gazette was gradually to phase out the labour tenancy system by allowing a farmer fewer labour tenants per year. Subsequently, in a circular notice from the Department of Bantu Administration and Development entitled "*Arbeidsvoorligtingsbrief No 20*" dated 25 August 1969, farmers were directed to decrease the labour tenants in their service in an attempt to abolish the labour tenancy system in its totality by the end of 1970. Finally, on 31 July 1970, labour tenant contracts, in areas which included Boomplaats, were prohibited.

[62] In summary, from the 1920s and 1930s with greater momentum towards the 1950s and 1960s, the minority apartheid government with the support of the South African Agricultural Union, chose to control, limit and eventually eliminate labour tenancy on South African farms.

[63] Hathorn and Hutchison above n 40 at 195 describe the effect of the Natives Land Act of 1913 in the following terms:

> "The Natives Land Act 27 of 1913, which prohibited blacks from entering into 'any agreement or transaction for the purchase, hire or other acquisition from a person other than a native' of land outside the 'scheduled native areas', did not immediately affect the position of labour tenants for it treated them as farm labourers who were expressly permitted to reside on white farms. Indeed, the Act swelled the numbers of labour tenants for it forced many cash tenants and sharecroppers, whose way of life it destroyed, into labour tenancy."

[63] These laws on labour tenancy cannot be viewed in isolation. They must be considered in the context of other laws which ensured that blacks could not acquire title to land; could not insist on the recognition of their existing rights in land; could not seek to protect those existing rights in land against further erosion; and were precluded from asserting rights to occupy or move onto land in so-called non-scheduled areas[64] other than as squatters or labour tenants whose rights continued to be diminished. These laws must be understood, particularly from the 1930s onwards, in light of labour laws which prevented blacks from unionising; from withholding labour or otherwise effectively bargaining; and from lobbying or otherwise having an effective voice in central government because of a lack of proper representation.

What does "as a result of" mean?

[64] It is beyond cavilling that the legislation and practices of the past government on land rights and in particular on labour tenancy in relation to black people were unmistakably discriminatory on grounds of race. The narrow but crucial enquiry is whether the termination of a land right by a private farmer may serve as a causal link required by the operative legislation. I have intimated earlier that restoration of land rights is a constitutional innovation that is not only unique but also steeped in a troubled past that must be remedied. Therefore, the approach to causation we adopt must be one that best serves the manifest purpose of the Restitution Act.

[64] The 1913 and 1936 Acts did not permit ownership of land by black people outside scheduled areas. Non-scheduled areas, which comprised approximately 87% of the total surface area of the country, were for exclusive occupation by white people.

[65] In *Kranspoort Community*[65] Dodson J was confronted with the argument that a statute, the Group Areas Act,[66] did not escape the application of the *sine qua non* or "but for" test because the claimants for restoration of rights in land would, in the absence of the statute, have been evicted by way of civil action in terms of the common law. Consistent with a purposive understanding of the causal connection required by the Restitution Act, the Court correctly held that:

> ". . . before entering into the traditional two-stage enquiry, one must first see whether the solution to the causal enquiry cannot be arrived at on a simple application of the terms of the statute. What this means is that, if, having regard to all the circumstances, the dispossession is patently one in respect of which the statute intended to provide a remedy, the enquiry need go no further. If regard is had to the circumstances of the 1955/6 removals, they bear all the hallmarks of the type of dispossession which the Restitution Act seeks to remedy."[67]

[66] I have given an account of the historical context of dispossession of land rights in general and of the specific instances we are confronted with in this case. It is clear that they are a consequence of social and governance trends of spatial and other forms of apartheid, which cover a period of nearly 85 years. These trends took the form of race-based state practices, policies and laws related to rights in land. In their very natures, racist practices and policies cannot mean a single decisive cause but a concurrence of events conducted over time. In enacting the Restitution Act, the

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[65] Above n 21 at para 71.

[66] Act 36 of 1966. Robertson "Dividing the Land: An Introduction to Apartheid Land Law" in Murray and O'Regan (eds) above n 38 at 125 explains the effect of the group areas legislation as follows:

> "Group areas land is doubly restrictive against Africans in so far as ownership and occupation is concerned. This is because the Act's implementation has excluded all Africans and because the 1913 Land Act forbids Africans from holding any rights to land outside those set for them." (Footnotes omitted.)

[67] Above n 21 at para 72.

legislature must have been aware that apartheid laws on land were labyrinthine and mutually supportive and in turn spawned racist practices. And vice versa. Therefore, often the cause of historical dispossession of land rights will not lie in an isolated moment in time or a single act. The requisite causal connection must be gathered from all the facts as long as the connection commends itself to common sense and is reasonable rather than remote or far-fetched.

[67] Moreover, it is well recognised that different branches of the law may require different causation requirements.[68] For instance, the focus of the test for causation in branches of the law such as delict or criminal law is to impute or to limit liability. Neither liability nor culpability in the conventional sense is a feature of the restoration scheme envisaged by section 25(7) of the Constitution and the Restitution Act. Entitlement to redress under the Restitution Act does not hinge on any form of blameworthy conduct such as intention or negligence or a duty of care. Equally important is that the operative legislation does not hold liable any party for historical dispossession, whatever the motive of the dispossessor. It merely sets conditions that entitle a claimant to restitution. What section 2 of the Restitution Act does is to set its own limitations. In this context, it requires that only conduct or omissions that are

[68] *S v Mokgethi en Andere* 1990 (1) SA 32 (A) at 40G-H. For instance, in the context of the law of delict, Professor Boberg in *The Law of Delict* Vol 1 (Juta, Cape Town 1984) at 380, writing about causation and remoteness of damage, highlights the crucial relationship between causation and liability:

> "In the morass of controversy that surrounds this element of liability, the only two propositions on which there is complete unanimity shine like beacons in the darkness. These are: (a) the defendant is not liable *unless* his conduct *in fact* caused the plaintiff's harm; and (b) the defendant is not liable *merely because* his conduct in fact caused the plaintiff's harm — such liability would be too wide, and some means of limiting it must be found. Thus factual causation is a necessary but not a sufficient condition of liability. It is the test of factual causation and the method of limiting liability that are controversial."

causally connected to discriminatory laws or practices of the state or of a public functionary will entitle a dispossessed claimant to restitution.

[68] The claim is against the state. It has a reparative and restitutionary character. It is neither punitive in the criminal law sense nor compensatory in the civil law sense. Rather, it advances a major public purpose and uses public resources in a manifestly equitable way to deal with egregious and identifiable forms of historic hurt.

[69] I conclude that the term "as a result of" in the context of the Restitution Act is intended to be less restrictive and should be interpreted to mean no more than "as a consequence of" and not "solely as a consequence of". It is fair to add that, on this construction, the consequence should not be remote, which means that there should be a reasonable connection between the discriminatory laws and practices of the state, on the one hand, and the dispossession, on the other. For that determination, a context-sensitive appraisal of all relevant factors should be embarked upon. It is to that appraisal that I now briefly focus.

Was the dispossession as a result of past discriminatory laws and practices?

[70] I think that the applicants are correct in submitting that all these features constituted a grid of integrated repressive laws that were aimed at furthering the government's policy of racial discrimination. It created both spatial apartheid and a cheap labour force that was perceived to be malleable and was based upon an inequality between those classified as blacks and those classified as whites.

[71] The racially discriminatory laws in force and the racially discriminatory practices that prevailed materially affected and favoured the ability of the Altenroxels to dispossess the applicants of their labour tenancy rights. In a normal society based on dignity and equality, a truly representative government would have had a duty to protect and respect existing rights. It would have cared about the effect that any unilateral change in those rights would have had on the labour tenants and their families. The Altenroxels would have been compelled by law or practice not to take away the vested rights in land of others as at 1913, particularly because the original rights of the people concerned preceded the first land registration and went back generations. Simply put, without the effect of the apartheid laws, policies and practices on land rights of black people, the Altenroxels would have never had the power to do what they did.

[72] In my view, there is much to be said for the evidence of Dr Schirmer that white bywoners[69] were actively assisted by the state in procuring land title whilst black labour tenants were stripped of their rights in land and denied the ability to acquire land in non-scheduled areas. As may be gathered from this judgment, I agree with Dr Schirmer that the dispossession of land rights of the claimants by the Altenroxels did not occur in a social and legislative vacuum. The dispossession was indeed "tainted" by the context that allowed and actively encouraged it to occur.

[69] "Bywoners" were regarded as white labour tenants.

[73] It is so that the Altenroxels purported to act as free agents to advance their agro-economic interests. It may be that they wanted to arrange their affairs to earn more money. But to accept that they were free agents is to fail to grasp that their dubious freedom to deprive others of their rights in land was owed to racially discriminatory laws and state policies and practices that were intended to facilitate and did expunge land rights of black labour tenants. The dispossession initiated by the Altenroxels was a progeny or direct consequence of unjust laws and state sponsored practices toward land rights of black people.

[74] It must be borne in mind that labour tenancy, by its nature, presupposes a legally recognised relationship of a private nature. Accordingly, ending labour tenancy could not be accomplished by state-forced removals, with notices from the state to get out by a date, followed by state bulldozers and trucks with a police presence. It would be the farmers themselves who would have to take the steps to extinguish the rights on a farm-by-farm basis. The racist state policy and practice was clear: the farmers were encouraged to get on with the job as rapidly as possible, and the proclamation was introduced as an ultimate form of coercion to deal with recalcitrant farmers who were slow or reluctant to move. In this sense, the farmers were expected to be the direct agency for the achievement of racist state objectives. Looked at as a whole, the destruction of the limited rights of the labour tenants by the Altenroxels was consequent upon and facilitated by state laws and practices and furthered avowedly racist state objectives.

[75] It must be added that the government policy of abolishing labour tenancy was not simply driven by callous economic motives to create more cheap black labour. Nor was it merely a push to replace feudal forms of productive relationships with market-based ones. It was part of the grand apartheid design. Its notorious objective was to eliminate any vestiges of black land rights in what was designated as white South Africa. The goal was to cut any residual legal ties that identifiable black families and communities had to identifiable pieces of land. The Restitution Act acknowledges this by expressly including recognition of labour tenancy rights as a basis for restitution.

[76] In my view, the causal connection under section 2 of the Restitution Act should not be understood to require that the state or a public functionary should itself perform the dispossession of rights in land. It is sufficient if the termination of rights in land is permitted, aided and supported by racially discriminatory laws or practices of the state or other functionaries exercising public power. The question is not whether the dispossession is effected by the state or a public functionary, but rather whether the dispossession was as a consequence of laws or practices put in place by the state or other public functionary.

[77] Another consideration is that, if we were to understand section 2(1) of the Restitution Act to require that every termination of labour tenancy should be done by a state functionary only, labour tenants would always be excluded from the right to claim restitution. This is so because notionally labour tenancy is a private law

contract which may be terminated only by a party to it. Clearly, the exclusion would be at odds with the manifest purpose of the legislation to grant restitution or equitable redress to dispossessed labour tenants.

[78] It matters not whether the Altenroxels had knowledge of discriminatory laws. The Altenroxels are not being held culpable for their conduct or their professed ignorance of spatial apartheid. Inasmuch as we are dealing with indirect discrimination, what is important is the impact of the legislation and practices of the state on the rights of the applicants. The motive to discriminate is irrelevant.[70] The potentially divergent motives of those who dispossess rights of others cannot form the basis for entitlement to restitution. If it were so, untenable outcomes would arise. Claims for restitution of victims of dispossession who face the same adverse impact would yield different outcomes depending on the mental disposition of the dispossessor. The scheme of the Act is to restore rights in land and the dignity it brings to those who were affected by the racial discrimination that resulted in their dispossession.

[79] These laws, and in particular the BLA Act of 1964 facilitated and permitted farmers in the position of the Altenroxels to remove the vestiges of the labour tenancy system without demur. Those in occupation had no leg to stand on. The substratum of their occupation had been denied both by the Native Land Act of 1913, the Natives

[70] *Pretoria City Council v Walker* 1998 (2) SA 363 (CC); 1998 (3) BCLR 257 (CC) at para 43. See also *Richtersveld Community and Others v Alexkor Ltd and Another* 2003 (6) SA 104 (SCA); 2003 (6) BCLR 583 (SCA) at paras 103-105.

Trust Land Act of 1936 and the BLA Act of 1964, which ensured that even existing labour tenancy rights were vulnerable.

[80] In addition, the institutionalised and systemic practice of exploiting black people as a cheap source of labour for the financial benefit of white farmers enabled the Altenroxels to consider that there was nothing wrong in unilaterally altering the status of the claimants and their families without concerning themselves with the consequences of their actions. On this footing, there was no need for the Minister to proclaim by Gazette under the BLA Act that labour tenancy was being abolished in particular districts. Indeed, it would have been totally unnecessary. It is common cause that farmers in the area were actively ending labour tenancy on their farms. The evidence of the veteran farmer in the Mooketsi area, Mr Van Zyl, makes the point that the farmers were actively terminating labour tenancies of black farm dwellers. The state policy, legislation and practice to terminate labour tenancy on white farms were taking their full course. The individual and subjective motives of each farmer who terminated labour tenancies are irrelevant. What matters is the impact of the laws, policies and practices of government on the land interests of labour tenants. The wording used in section 2(1)(a) of the Restitution Act and section 25(7) of the Constitution refers in the passive to a person dispossessed, emphasising that dispossession is an event or occurrence, rather than the conduct of any agent.

[81] I conclude that the individual applicants were dispossessed of rights in land after 19 June 1913 as a result of past racially discriminatory laws or practices as contemplated in section 2 of the Restitution Act.

Remedy

[82] In this Court, the applicants did not press for a remedy beyond a declarator that the individual claimants are entitled to restitution of or equitable redress for being dispossessed of a right in the Boomplaats land after 1913. More significantly, the Department, which is charged with the duty to implement the Restitution Act, did not seek relief beyond a declarator. As I understood counsel for the Department, with a declarator of this Court in hand, the Department will facilitate the final resolution of the nature and extent of restitution or equitable redress envisaged by the operative legislation.

[83] However, it is appropriate to record that in the claims to the Regional Land Claims Commissioner, the claimants sought more. They asked that land formerly known as the remaining extent of the farm Boomplaats 408 LT, which has now been consolidated into the farm Goedgelegen 566 LT, be restored to them. They each claim the land where their homesteads are or used to be and the land immediately around it, comprising approximately 800 square metres, and the whole land which they used jointly for ploughing and for grazing. However, the difficulty is that, from the record of proceedings, the cadastral dimensions of the portion of the farm

Goedgelegen 566 LT, which the third to the eleventh applicants claim are by no means clear.

[84] Section 35 of the Restitution Act confers vast remedial powers on the Land Claims Court. They range from restoration of land claimed or any other right in land to paying the claimant compensation or granting any alternative relief. It would not be appropriate to venture into formulating a remedy beyond a declaratory order and costs. We have heard no evidence on the possible variants of remedies to be preferred. In any event, it would not be desirable to be a court of first and last instance on a matter best left to the Department or a specialist court, which the Land Claims Court is.[71] It is clear from section 35(2)(fA)[72] of the Restitution Act that it is still open to the parties to reach an agreement regarding finalisation of the claim, which I assume includes the form and extent of restitution or other relief.

[85] The sensible course available to this Court is to make a declarator only. At the hearing, the claimants urged us not to remit the matter to the Land Claims Court and assured us that the Department would decide, in conjunction with the claimants, on the finalisation of this claim. The respondent did not object to the attitude of the applicants that the matter should not be remitted. We do not remit this matter to the Land Claims Court on the clear understanding that, should no agreement be reached

[71] *National Education Health and Allied Workers Union* above n 30 at paras 30, 34 and 35.

[72] Section 35 of the Restitution Act states:

> "(2) The Court may in addition to the orders contemplates in subsection (1)—
>
> > (fA) make appropriate orders to give effect to any agreement between the parties regarding the finalisation of the claim."

on the terms of the restitution or other equitable redress, any affected party may approach the Land Claims Court for an appropriate order on remedy as envisaged in section 35 of the Restitution Act.

[86] Finally, it is appropriate to observe that the rights of the individual applicants were not merely economic rights to graze and cultivate in a particular area. They were rights of family connection with certain pieces of land, where the aged were buried and children were born and where modest homesteads passed from generation to generation. And they were not simply there by grace and favour. The paternalistic and feudal-type relationship involved contributions by the family, who worked the lands of the farmer. However unfair the relationship was, as a relic of past conquests of land dispossession, it formalised a minimal degree of respect by the farm owners for the connection of the indigenous families to the land. It had a cultural and spiritual dimension that rendered the destruction of the rights more than just economic loss. These are factors that might require appropriate consideration by the Department or the Land Claims Court when an appropriate remedy is fashioned.

[87] Before I turn to costs, I must mention that the second to the eleventh applicants filed their application for leave to appeal one day late. They seek an order condoning their late filing of the application. The relief they ask for is not opposed and, in any event, it is justified. Secondly, Mr Abram Maake, the ninth applicant, and Mr Maselaelo Mosibudi Maake, the tenth applicant, have since passed away. The respective executors of their deceased estates ask for leave to be substituted for the

deceased applicants. This application is not challenged and it is well grounded. An order to this effect will be made. Should any of the individual applicants pass away before the finalisation of this claim, his or her lawful heir or executor may be substituted for the deceased.

Costs

[88] The Land Claims Court did not make any order as to costs at the end of the trial but directed that costs of the subsequent application for leave to appeal shall be costs in the appeal. However, the Supreme Court of Appeal ordered the claimants and the Department to pay costs jointly and severally including costs attendant upon the use of two counsel. The applicants have raised an important matter of land restitution and have succeeded in this Court. I can find no reason why this Court should not set aside the costs order of the Supreme Court of Appeal.

[89] What remains is to consider which costs order to make in this Court. In this judgment, I have emphasised that a claim for restoration of rights in land under the Restitution Act is a claim against the state. The owner of the land, which is the object of the claim, is entitled to resist the claim but that does not alter the core character of the statutorily devised claim as one against the state. The claim is not retributive but restorative in purpose. Nothing in the manner in which the respondent has conducted its case justifies an order of costs against it.

[90] On the other hand, I keep in mind that the individual applicants have incurred substantial costs in the Supreme Court of Appeal and in this Court. However, it seems that their cause was made possible by the worthy and selfless support of the Nkuzi Land Rights Legal Unit, a public interest law firm. On the other hand, the individual claimants enjoyed the support of the Department which has made common cause with them in the Supreme Court of Appeal and in this Court. I consider it just and equitable that this Court makes no order as to costs.

Order

[91] The following order is made:

1. The application for the condonation of the late filing of the application for leave to appeal is granted.
2. The executor in the deceased estate of the late Abram Maake, who was the eighth appellant in the Supreme Court of Appeal, is substituted in these proceedings as the ninth applicant.
3. The executor in the deceased estate of the late Maselaelo Mosibudi Maake, who was the ninth appellant in the Supreme Court of Appeal, is substituted in these proceedings as the tenth applicant.
4. The application for leave to appeal is granted.
5. The appeal of the second applicant, the Popela Community, is dismissed but the costs order of the Supreme Court of Appeal against the second applicant is set aside.

6. The appeals of the first applicant and of the third to the eleventh applicants against the decision of the Supreme Court of Appeal are upheld.
7. The orders of the Land Claims Court and of the Supreme Court of Appeal relating to the first applicant and to the third to the eleventh applicants are set aside in their entirety.
8. It is declared that the third to the eleventh applicants were each dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws and practices and that they are accordingly entitled to restitution under section 2 and the other relevant provisions of the Restitution of Land Rights Act 22 of 1994.
9. No order as to costs is made.

Madala J, Mokgoro J, Navsa AJ, Ngcobo J, Nkabinde J, O'Regan J, Sachs J, Skweyiya J and Van der Westhuizen J concur in the judgment of Moseneke DCJ.

For the Applicants:	Advocate BS Splig SC instructed by the Nkuzi Development Association, Land Rights Legal Unit and G Shakoane instructed by the State Attorney, Johannesburg.
For the Respondent:	Advocate GL Grobler SC instructed by Steytler Nel and Partners.