CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 42/07

[2008] ZACC 5

In the matter between:

M M MPHELA AND 217 OTHERS 1st to 218th Applicants

versus

HAAKDOORNBULT BOERDERY CC AND 6 OTHERS 1st to 7th Respondents

Heard on : 8 NOVEMBER 2007

Decided on : 8 MAY 2008

JUDGMENT

MPATI AJ

Introduction

[1] This matter concerns the restitution of land lost due to past discriminatory laws and practices. The applicants are members of the Mphela family and descendants of the late Mr Klaas Phali Mphela. They lodged a claim under the Restitution of Land

Rights Act (the Act)[1] for restitution of a farm previously known as the Remaining Extent of the farm Haakdoornbult 542, Registration Division KQ, Thabazimbi, Limpopo.[2] (I shall refer to the land claimed as "the farm" or "Haakdoornbult"). The farm was a single tract of land at the time the applicants' predecessors were entitled to it. It now consists of four subdivisions. The Land Claims Court (Land Court) (per Moloto J, sitting with Mr G Hugo as assessor) upheld the claim and ordered that all four subdivisions of the land be restored to the applicants.[3] On appeal to it, the Supreme Court of Appeal (per Harms ADP, Cameron and Mlambo JJA, Snyders and Musi AJJA concurring) set aside that order and, in turn, ordered that 86% of the land (three of the four subdivided portions) be restored to the applicants.[4] The full order of the Supreme Court of Appeal reads:

> "1. The appeal is upheld.
>
> 2. The cross-appeal is struck from the roll.
>
> 3. The order of the Court below is set aside and the following order substituted in its stead:
>
> 'The Minister of Land Affairs and Agriculture is ordered to acquire and restore to a communal association to be formed by the claimants the following properties (including all mineral rights that are transferable but subject to existing servitudes and free of mortgage bonds):
>
> (a) Portion 7 of the farm Haakdoornbult 542, measuring 101,1038 ha;
>
> (b) The former Portion 3 of Haakdoornbult 542, measuring 172,5105 ha and now forming part of the farm Drie Jongelings Geluk 562; and
>
> (c) Portion 6 (a portion of Portion 2) of Haakdoornbult 542, measuring 271,6941 ha.'

[1] 22 of 1994.

[2] The farm, 636,1188 ha in extent, went through subdivisions and now consists of four pieces of land, each separately owned.

[3] Judgment reported as *Mphela and Others v Engelbrecht and Others* [2005] 2 All SA 135 (LCC).

[4] Judgment reported as *Haakdoornbult Boerdery CC and Others v Mphela and Others* 2007 (5) SA 596 (SCA).

4. The matter is remitted to the Land Claim Court to consider and determine:
   (a) whether, to what extent and in what form and on what conditions the communal association is to contribute to the acquisition by the State of the properties mentioned in para 3(b) and (c) above;
   (b) the conditions on which the communal association to be formed shall hold the land on behalf of the community; and
   (c) whether any rights of way or other servitudes should be granted over the restored properties."

[2] The applicants now seek leave to appeal against paragraphs 1 and 3 of the order of the Supreme Court of Appeal. The main issue in this matter, then, relates to the extent of restitution to which the applicants are entitled.

[3] The first to sixth respondents oppose the application for leave to appeal. However, only the second to sixth respondents have lodged a cross-appeal, conditional upon leave being granted to the applicants, against that part of the order of the Supreme Court of Appeal that restores their portions of Haakdoornbult to the association formed by the applicants. The Bez Bezuidenhout Family Trust (Bezuidenhout Trust), represented in these proceedings by the second to fourth respondents as trustees thereof, owns what is known as the "Former Portion 3 of the farm Haakdoornbult 542, measuring 172,5105 hectares",[5] which now forms part of an adjoining farm. "Portion 6 (a portion of Portion 2) of the farm Haakdoornbult 542, measuring 271,6941 hectares",[6] is owned by the F & S Furstenburg Family Trust (Furstenburg Trust). The fifth and sixth respondents are trustees of the Furstenburg Trust and have been cited as such.

[5] Above n 4 at para 16.

[6] Id at para 17.

[4] A third piece of the claimed land, namely "Portion 7 of the farm Haakdoornbult, measuring 101,1038 hectares"[7] is owned jointly by Mr Graham Engelbrecht and Mrs Hendrina Engelbrecht. This portion is not the subject of any appeal. The fourth piece, described as the "Former Remaining Extent of the farm Haakdoornbult 542, measuring 90,8104 hectares"[8] (the Remaining Extent) is owned by the first respondent. It forms part of Portion 5 of the farm Haakdoornbult 542.[9]

Background

[5] Since the decisions of the Supreme Court of Appeal[10] and the Land Court[11] have been reported, it is not necessary to set out the facts in detail. A very brief summary will suffice. As pointed out earlier, the applicants are members of the Mphela family and descendants of the late Mr Klaas Phali Mphela. Mr Mphela was a farmer who, until his demise in February 1932, was the registered owner of Haakdoornbult, a sizeable farm situated on the banks of the Crocodile River near Thabazimbi in present day Limpopo Province. In March 1932 the farm was registered in the name of Mr Daniel Rakgokong Mphela, eldest son of Mr Mphela. He, in turn, entered into an agreement with his siblings and the families of those of his siblings who were no longer alive, in terms of which he granted them "the undisturbed right to live and reside" on the farm and "to use and cultivate [it] and to exercise all the rights

[7] Id at para 19.

[8] Id at para 18.

[9] Portion 5 is not at issue in this matter. A map of the claimed land is reproduced above n 4 at 619.

[10] Above n 4.

[11] Above n 3.

over [it]".[12]

[6] During 1951 the farm was sold to the owners of a neighbouring farm, the Botha brothers, who paid approximately 50% more than the market value of the farm at the time.[13] The sale was not voluntary. The government of the day had insisted that the Mphela family relocate to a nearby farm, Pylkop, since Haakdoornbult was considered as a "black spot" in an area earmarked for members of the white community only. The neighbouring farmers also put pressure on the Mphela family to vacate the farm. The family resisted the removal, but were eventually forcibly removed to Pylkop in 1962. They had purchased Pylkop from the government with the proceeds received from the sale of Haakdoornbult.[14] The forced removal is crisply described thus by Harms ADP:

> "The removal was nevertheless traumatic and was only consented to after a night raid, arrest of the adults for trespassing and the bulldozing of their houses and kraals and kgotla tree."[15]

The Mphela family was not compensated for the structures they had put up on Haakdoornbult.[16]

[7] There were no houses on Pylkop for occupation by the Mphela family. The

[12] Id at para 5.

[13] Haakdoornbult was valued at 5 040 pounds while the purchasers offered and paid 7 558 pounds, the latter amount was the value of Pylkop, the other farm at issue in this case.

[14] Pylkop was situated in an area that was to be incorporated into Bophuthatswana, a so-called black self-governing State.

[15] Above n 4 at para 3.

[16] These primarily consisted of residential dwellings.

government provided them with tents as temporary accommodation.

The proceedings in the Land Court

[8] Initially all the owners of the four portions of the subdivided farm opposed the applicants' claim. However, the Engelbrecht family, the owners of Portion 7, withdrew their opposition during the course of the proceedings.

[9] Three issues remained for resolution by the Land Court after the parties had filed a statement of agreed facts and facts in dispute. These were: (a) whether the applicants had lodged their claim with the Commission on Restitution of Land Rights in the prescribed manner in terms of the Act; (b) whether the claim, if properly lodged, was excluded by the provisions of section 2(2) of the Act;[17] and (c) in the event that (a) and (b) were decided in favour of the applicants, what form of restitution should be granted.

[10] The Land Court decided questions (a) and (b) in favour of the applicants.[18] In dealing with question (c), that is what form of restitution should be granted in terms of section 35, the Court, as it was enjoined to do, considered the provisions of section 33

[17] Section 2(2) reads:

> "No person shall be entitled to restitution of a right in land if –
>
> (a) just and equitable compensation as contemplated in section 25(3) of the Constitution; or
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> (b) any other consideration which is just and equitable, calculated at the time of any dispossession of such right, was received in respect of such dispossession."

[18] Although the Supreme Court of Appeal differs with the Land Court on the bases upon which the latter found that the claim was not excluded by the provisions of section 2(2) of the Act, the Supreme Court of Appeal also held that the Mphela family did not receive just and equitable compensation. No argument to the contrary was advanced in this Court. It is accordingly not necessary to set out the basis of the Land Court's findings.

of the Act[19] and found that all the factors listed in that section, relevant to the claim, pointed in favour of an award of restitution.[20] It held that the applicants had made out a compelling case for restoration and ordered that the whole of the land claimed be restored to the applicants.[21]

[11] It was argued on behalf of the applicants before the Land Court that no order should be made regarding the return of Pylkop in the event that Haakdoornbult was restored to the applicants.[22] One of the reasons for this argument was that the seventh respondent, the Minister responsible for the administration of the Act, had indicated at the commencement of the hearing before the Land Court, that she would not seek the return of Pylkop in the event of the farm being restored to the applicants. The contention on behalf of the owners, on the other hand, was that failure to make an order for the return of Pylkop would amount to "double" compensation. The Court was of the view, however, that land cannot be given away on the mere "I do not claim the compensatory land" of the seventh respondent. It therefore called for full

[19] The relevant subsections of section 33 read:

> "In considering its decision in any particular matter the Court shall have regard to the following factors:
>
> (a) The desirability of providing for restitution of rights in land to any person or community dispossessed as a result of past racially discriminatory laws or practices;
>
> (b) the desirability of remedying past violations of human rights;
>
> (c) the requirements of equity and justice;
>
> . . . .
>
> (eA) the amount of compensation or any other consideration received in respect of the dispossession, and the circumstances prevailing at the time of the dispossession;
>
> (eB) the history of the dispossession, the hardship caused, the current use of the land and the history of the acquisition and use of the land".

[20] Above n 3 at 188A-B.

[21] Id at 188G.

[22] Pylkop was referred to as "compensatory land".

argument on the question of whether the seventh respondent "can legally abandon the compensatory land in the face of the peremptory provisions of section 33(eA)" of the Act.[23]

[12] In a separate judgment[24] the Land Court held that it had a discretion to order the return of compensatory land even in the absence of a plea by the State.[25] It held further that, having considered certain factors and conditions prevailing at Pylkop, "it [would be] just and equitable not to order the return of the compensatory land".[26]

The proceedings in the Supreme Court of Appeal

[13] The owners of three of the subdivisions of Haakdoornbult appealed the decision of the Land Court with leave of that Court. The main issue before the Supreme Court of Appeal was whether the claimants had made out a case for the restoration of all four subdivisions of the farm. Although the Supreme Court of Appeal considered that the purchase price paid for the farm was not below its market value,[27] it nevertheless found that the Mphela family were not fully and fairly

[23] Above n 3 at 190A-B. See also above n 19.

[24] *Mphela and Others v Engelbrecht and Others* LCC 66/01 in the Land Claims Court, 18 July 2005, unreported.

[25] Id at para 8.

[26] Id at para 9.

[27] The market value of the property in issue at the time of dispossession is one of the factors a court is enjoined by section 25(3) of the Constitution of the Republic of South Africa, 1996, to take into account when considering whether just and equitable compensation had been paid. Section 25(3) reads:

> "The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including -
>
> (a) the current use of the property;
>
> (b) the history of the acquisition and use of the property;

compensated. In this regard the Court made the following important and enormously relevant observations:

> "The family, consisting of many households, had to relocate; they had to rebuild houses; they had to build a school; and they had to rebuild their lives on vacant land. Their houses and cattle kraals had no commercial value for a purchaser and would have been discounted by any purchaser. In short, the family lost more than the market value of the farm."[28]

And further:

> "Fair compensation is not always the same as the market value of the property taken; it is but one of the items which must be taken into account when determining what would be fair compensation. Because of important structural and politico-cultural reasons indigenous people suffer disproportionately when displaced and Western concepts of expropriation and compensation are not always suitable when dealing with community held tribal land. A wider range of socially relevant factors should consequently be taken into account, such as resettlement costs and, in appropriate circumstances, solace for emotional distress."[29]

[14] Understandably so, the Supreme Court of Appeal was in no position to quantify the losses and trauma suffered by the Mphela family, for which no compensation had been paid. But in considering whether a case had been made out for the return of the whole farm, the Court reasoned that, even if it were to be accepted that the market

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(c) the market value of the property;

(d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and

(e) the purpose of the expropriation."

[28] Above n 4 at para 47.

[29] Id at para 48.

value of the farm as at 1962 was more than the purchase price actually paid for it,[30] as the Land Court had found, and even if Pylkop were to be regarded as compensatory land to which could be added the unquantifiable losses and trauma suffered, the family would be substantially over-compensated were restoration of the whole farm to be ordered.

[15] In deciding whether or not to order restoration of land, said the Supreme Court of Appeal, a court is obliged, in terms of section 33(eA) of the Act,[31] to take into account the amount of compensation or any other consideration received in respect of the dispossession. This aspect, the Court found, was overlooked by the Land Court despite it having been brought to that Court's attention. This meant that the discretion exercised by the Land Court was fatally flawed and the Supreme Court of Appeal was consequently entitled to exercise its own discretion.[32]

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[30] This was the year in which the Mphela family were eventually forcibly removed from Haakdoornbult.

[31] Above n 19.

[32] Section 35(1) of the Act grants a discretion to the Land Court to order restitution of land. It reads:

"The Court may order—

(a) the restoration of land, a portion of land or any right in land in respect of which the claim or any other claim is made to the claimant or award any land, a portion of or a right in land to the claimant in full or in partial settlement of the claim and, where necessary, the prior acquisition or expropriation of the land, portion of land or right in land: Provided that the claimant shall not be awarded land, a portion of land or a right in land dispossessed from another claimant or the latter's ascendant, unless—

(i) such other claimant is or has been granted restitution of a right in land or has waived his or her right to restoration of the right in land concerned; or

(ii) the Court is satisfied that satisfactory arrangements have been or will be made to grant such other claimant restitution of a right in land;

(b) the State to grant the claimant an appropriate right in alternative state-owned land and, where necessary, order the State to designate it;

(c) the State to pay the claimant compensation;

(d) the State to include the claimant as a beneficiary of a State support

[16] The Supreme Court of Appeal then proceeded to deal with the individual portions of the farm and held that restoration of Portion 7 (owned by the Engelbrecht family) would not amount to over-compensation. Having considered the factors listed in section 33 of the Act,[33] "the most pertinent being the question of feasibility,"[34] the Court found that no compelling reasons were furnished why Portion 3 (owned by the Bezuidenhout Trust) and Portion 6 (owned by the Furstenburg Trust) could not be restored. In light of the restoration of the Engelbrecht property however, the issue arose of the adequacy of the compensation that the Mphela family had received. The Supreme Court of Appeal answered this question by ordering the restoration of Portions 3 and 6 "subject to a possible contribution" by the applicants.[35]

[17] With regard to the Remaining Extent (owned by the first respondent) the Supreme Court of Appeal observed that this piece of land has no water allocation although part of it abuts the Crocodile River. The current owner irrigates part of it by way of an irrigation system using a water allocation that belongs to another farm. The Supreme Court of Appeal considered that if the Remaining Extent were to be restored, it would become dry land which could be used for grazing of a small number of cattle. Also, because of its peculiar shape,[36] its restoration would mean that part of portion

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programme for housing or the allocation and development of rural land;

(e) the grant to the claimant of any alternative relief."

[33] Above n 19.

[34] Above n 4 at para 68.

[35] Id at para 74.

[36] See above n 4 at para 71, where the Supreme Court of Appeal described the Remaining Extent as having the "appearance of an appendix, a finger protruding from the rest of Haakdoornbult", and as an "isthmus surrounded

5[37] would be surrounded on three sides by the family farm and would become isolated as the fourth side borders on the river. And, because that part of the irrigation system used on the land concerned cannot be used elsewhere and would thus be "sterilised",[38] part of a huge investment (in the irrigation system) would become valueless. The applicants would derive no benefit from it while the State would have to compensate the first respondent.

[18] For these reasons, relating to the question of feasibility[39] and the current use of the land,[40] the Supreme Court of Appeal held that the return of the Remaining Extent would be counter-productive. It accordingly made the order referred to in paragraph 1 above.

The applicants' submissions

[19] Counsel for the applicants formulated the main issue for determination in the form of a question: whether the receipt of compensatory land operates to limit the area of Haakdoornbult which may be restored. Counsel submitted that the approach adopted by the Supreme Court of Appeal in this regard renders the restitution process a mere top-up scheme for compensatory land received under apartheid and tends to entrench the apartheid era allocation of land along racial lines. He argued that the Supreme Court of Appeal's approach misconceives the purpose of section 25(7) of the

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by other property belonging to [the first respondent]".

[37] The Supreme Court of Appeal erroneously refers to Portion 5 as Portion 1. It was known as Portion 1 before it was consolidated with the Remaining Extent.

[38] Above n 4 at para 72.

[39] Above n 19 at section 33(eA).

[40] Id at section 33(eB).

Constitution[41] as well as the provisions of the Act. A further contention, was that notwithstanding the wide discretion conferred on the Land Court for its decision on appropriate relief to be granted to claimants, the primary purpose of section 25(7) of the Constitution and the Act is to bring about the actual return of land taken from South African citizens and communities on the grounds of race.

[20] Concerns regarding possible over-compensation, so it was argued, must be addressed under the statutory mechanisms provided in section 35(2)(b) and (f) of the Act[42] and not by depriving claimants of the land from which they were forcibly removed. It was contended that, once the Supreme Court of Appeal accepted that the remedy for over-compensation lies in section 35(2)(b), there was no basis for the Court to interfere with the order of the Land Court for restoration of the whole farm.[43]

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[41] Section 25(7) reads:

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

[42] Section 35(2) reads:

> "The Court may in addition to the orders contemplated in subsection (1)—
>
> (a) determine conditions which must be fulfilled before a right in land can be restored or granted to a claimant;
>
> (b) if a claimant is required to make any payment before the right in question is restored or granted, determine the amount to be paid and the manner of payment, including the time for payment;
>
> (c) if the claimant is a community, determine the manner in which the rights are to be held or the compensation is to be paid or held;
>
> (d) . . . .
>
> (e) give any other directive as to how its orders are to be carried out, including the setting of time limits for the implementation of its orders;
>
> (f) make an order in respect of compensatory land granted at the time of the dispossession of the land in question".

[43] See above n 4 at para 67 where the Supreme Court of Appeal said:

> "The problem of overcompensation can be solved within the provisions of the Act because the Act contemplates that more than what was lost can be returned provided the claimant makes

Restoring the whole of the land claimed, said counsel, is not over-compensation but restoration. Where complete restoration of land claimed would amount to over-compensation, then compensatory land or other compensation (if no compensatory land was given) should be taken back. As to redistribution, counsel submitted that the Supreme Court of Appeal was correct in holding that courts cannot effect it. In the present matter, however, the State, in not claiming the return of Pylkop, has approved such redistribution, so the argument continued.

Respondents' submissions

[21] The main issue, according to counsel for the respondents, is justice and equity. Restitution entails the question: What has a claimant lost? If there is no difference between what was received as compensation and what was lost, no restitution is available.[44] The enquiry, said counsel, should be aimed at the extent of restitution to which a claimant is entitled. If there is a shortfall, then the claimant is entitled to such a shortfall. In its deliberations, a court must take into account the interests of all concerned, including those of the current owners of the land subject to a claim.

[22] As to the order restoring Portions 3 and 6 of the farm, it was argued that the Supreme Court of Appeal erred in finding that no compelling reasons were given as to why those portions should not be restored to the applicants. Counsel for the respondents contended that such compelling reasons were furnished.

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good the shortfall (section 35(2)(b))."

[44] See above n 17.

Condonation

[23] The applicants have applied for condonation for the late filing of their replying affidavit. The application was not opposed. I am satisfied that the explanation given for the late filing is adequate and that it is in the interests of justice that condonation be granted.

The application for leave to appeal

[24] In considering whether or not leave should be granted, the first question to be answered is whether the matter raises a constitutional issue. In my view, the answer is in the affirmative. The interpretation of legislation giving effect to a provision in the Constitution is a constitutional issue.[45] The Act gives effect to the provisions of section 25(7) of the Constitution.[46]

[25] The next question is whether it is in the interests of justice for leave to be granted.[47] An assessment of where the interests of justice lie will involve a careful weighing up of all factors relevant to the application for leave to appeal, including the important factor of the applicant's prospects of success on appeal.[48] In coming to its decision on whether or not to order the return of the whole of the land claimed the

[45] *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* [2007] ZACC 12; 2007 (6) SA 199 (CC); 2007 (10) BCLR 1027 (CC) at para 31; *Alexkor Ltd and Another v The Richtersveld Community and Others* [2003] ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) at para 23; *National Education Health and Allied Workers Union v University of Cape Town and Others* [2002] ZACC 27; 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC) at paras 14-5.

[46] See above n 41.

[47] *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another* [2006] ZACC 9; 2007 (1) SA 343 (CC); 2006 (11) BCLR 1255 (CC) at para 26, and the cases cited in fn 76 of that judgment.

[48] *Concerned Land Claimants' Organisation of Port Elizabeth v Port Elizabeth Land and Community Restoration Association and Others* [2006] ZACC 14; 2007 (2) SA 531 (CC); 2007 (2) BCLR 111 (CC) at para 21.

Supreme Court of Appeal exercised a discretion. The question whether leave should be granted will therefore require a consideration of the circumstances in which this Court will interfere with the exercise by the Supreme Court of Appeal of its discretion.

[26] The discretion exercised by the Supreme Court of Appeal in this matter is one in the strict sense, or, as was said in *S v Basson*,[49] a "strong" discretion or "true" discretion, in the sense that a range of options was available to it.[50] As such this Court, exercising appellate jurisdiction, will not set aside the decision of the Supreme Court of Appeal merely because it would itself, on the facts of the matter before the Supreme Court of Appeal, have come to a different conclusion. It will only interfere where it is shown that the Supreme Court of Appeal—

> "had not exercised its discretion judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles."[51]

[27] A number of criticisms have been levelled at the approach adopted by the Supreme Court of Appeal in arriving at its decision to award only part of the original farm claimed. Before I deal with those criticisms it may be convenient to make a few

[49] [2005] ZACC 10; 2007 (3) SA 582 (CC); 2005 (12) BCLR 1192 (CC).

[50] Id at para 110; *Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd ('Perskor')* 1992 (4) SA 791 (A) at 800D-E.

[51] *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at para 11; *S v Basson* above n 49 at para 110; *Mabaso v Law Society, Northern Provinces and Another* [2004] ZACC 8; 2005 (2) SA 117 (CC); 2005 (2) BCLR 129 (CC) at para 20.

preliminary comments about restoration of rights in land.

[28] The reality of the prolonged suffering endured by the majority of South Africans, Africans in particular, as a result of past discriminatory laws or practices, which allowed for their being deprived of rights in land through expropriation and mass removals without just and equitable compensation, need not be retold here. It is a well-known phenomenon which section 25 of the Constitution, specifically subsections (1) and (2) thereof, assures us shall never to occur again.[52]

[52] Section 25 provides as follows:

> "(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
>
> (2) Property may be expropriated only in terms of law of general application—
>
> (a) for a public purpose or in the public interest; and
>
> (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.
>
> (3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including—
>
> (a) the current use of the property;
>
> (b) the history of the acquisition and use of the property;
>
> (c) the market value of the property;
>
> (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
>
> (e) the purpose of the expropriation.
>
> (4) For the purposes of this section—
>
> (a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and
>
> (b) property is not limited to land.
>
> (5) 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.
>
> (6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.
>
> (7) 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

[29] In *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance*[53] this Court made the following observation about section 25 of the Constitution:

> "Subsections (4) to (9) all, in one way or another, underline the need for and aim at redressing one of the most enduring legacies of racial discrimination in the past, namely the grossly unequal distribution of land in South Africa."[54]

And on another occasion O'Regan J said:

> "[O]ur Constitution is a document committed to social transformation. It insists that the deep injustices of our past characterised by racial dispossession and exclusion be addressed and reversed. The Constitution's commitment to the protection of property rights must be interpreted in a manner consistent with that vision."[55]

[30] The manner or method of redressing and reversing the grossly unequal distribution of land and the injustices "characterised by racial dispossession and exclusion"[56] is envisaged in section 25 of the Constitution, more particularly

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Act of Parliament, either to restitution of that property or to equitable redress.

(8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).

(9) Parliament must enact the legislation referred to in subsection (6)."

[53] [2002] ZACC 5; 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC).

[54] Id at para 49.

[55] *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and Others (KwaZulu-Natal Law Society and Msunduzi Municipality as Amici Curiae)* [2004] ZACC 16; 2005 (1) SA 530 (CC); 2005 (2) BCLR 150 (CC) at para 81(*Mkontwana)*.

[56] Id.

subsections (5)[57] and (7).[58] Subsection (5) enjoins the State to make it possible for citizens to gain access to land, but to do so on an equitable basis by taking reasonable legislative and other measures. The subsection therefore places a positive duty on the State to give attention to the question of redistribution of land, so as to realise the nation's commitment to land reform.[59]

[31] Subsection (7) entitles those individuals and communities dispossessed of their property after 19 June 1913[60] to claim restitution of that property or equitable redress where the dispossession was as a result of past racially discriminatory laws or practices. If land is the subject of the dispossession, the subsection also ensures the realization of the nation's commitment to land reform.[61] One of the aims of the Constitution, as was said in *First National Bank*, is to redress the "grossly unequal distribution of land in South Africa".[62]

[32] It seems to me, therefore, that where land which was the subject of a dispossession as a result of past discriminatory laws is claimed, and the claim is not barred by section 2(2) of the Act, the starting point is that the whole of the land should be restored, save where restoration is not possible due to compelling public interest considerations. In *Khosis Community, Lohatla, and Others v Minister of Defence and*

[57] See above n 52.

[58] Id.

[59] Above n 52 at section 25(4).

[60] The now repealed Black Land Act (then entitled the Native Land Act), which prevented Africans from purchasing land within an area designated for white ownership, was promulgated on that date.

[61] Property may be possessions other than land. See *Mkontwana* above n 55 at para 82.

[62] Above n 53 at para 49.

Others (‘*Khosis Community*’)[63] the Supreme Court of Appeal said the following:

> “[I]n a case such as the present the general approach ought to be that the dispossessed community is entitled to restoration of the land unless restoration is trumped by public interest considerations.
>
> Undeniably, the umbilical cord that joins any particular community and its ancestral land is strong and it has a highly emotional element that has to be respected. That does not, however, mean that all other public interest considerations should be ignored.”[64]

I agree with counsel for the applicants that these comments by the Supreme Court of Appeal represent recognition of the primacy of restoration of land.

[33] But that said, the dispossessed individual or community is not entitled, under section 25(7) of the Constitution, to restoration of the original property claimed as of right, either in whole or part.[65] The claimant is entitled only “to the extent provided by an Act of Parliament” which, in this instance, is the Act.[66] A court may, for example, in the exercise of its discretion, order the State to pay compensation to the claimant in lieu of the land claimed.[67] The ultimate decision whether the whole or a portion only, or whether indeed none of the land, should be restored will depend upon a consideration of the factors enumerated in section 33 of the Act.[68] And as was

[63] 2004 (5) SA 494 (SCA).

[64] Id at paras 30-31.

[65] Above n 48 at para 26.

[66] Above n 41.

[67] Above n 32 at section 35(1)(c) of the Act.

[68] Above n 19.

pointed out in *Khosis Community*, not every factor will be applicable in every claim.[69]

[34] I make these observations in light of criticism, by counsel for the applicants, of the Supreme Court of Appeal's statement that section 25(7) of the Constitution "is not about land redistribution but about restitution",[70] and that where it is in the public interest to restore more than what a claimant is entitled to under the Act, it is for the State "to use its powers under other Acts to acquire the whole of the land".[71] Redistribution cannot be done, said the Supreme Court of Appeal, under the provisions of the Act, and, in particular, courts do not have the power to redistribute land.[72]

[35] The contention of counsel was that the return of land of which claimants were specifically dispossessed can hardly be described as redistribution. If claimants were forcibly removed from land and it is returned, that is restoration and not redistribution, so the argument continued.

[36] I think the criticism is due to a misreading of the Supreme Court of Appeal's judgment. The context in which the statements complained of were made is the following. The Supreme Court of Appeal reasoned that the return of the whole farm claimed in the present matter, when considered with the compensation received by the Mphela family at the time of dispossession, would amount to substantial over-

[69] Above n 63 at para 30.

[70] Above n 4 at para 7.

[71] Id at para 61.

[72] Id.

compensation. The Court was dealing with the omission by the Land Court to consider the question of the extent of restoration of the land and whether restoration of the whole would not amount to "double" compensation after it had held, for good reason, that Pylkop (which the Land Court considered as compensatory land) should not be returned.[73] Although it considered that a measure of over-compensation is not necessarily excluded by the Act, the Supreme Court of Appeal reasoned that courts do not have the power to redistribute land; that is to say courts cannot, without more, order the return of more land than a claimant is entitled to under the Act. I agree. This is more so in this case where the land that was originally taken has since been subdivided into four separately owned subdivisions.

[37] I do not understand the Supreme Court of Appeal to mean that lost land cannot be restored in whole even if the restoration would amount to over-compensation. In such a case a court is authorised, under section 35(2)(b), to order that the claimant make a payment "before the right in question is restored" and to determine the amount to be paid and the manner of payment.[74] The Supreme Court of Appeal recognised all this and ordered the remittal of the matter to the Land Court precisely for this purpose, it being of the view that the return of three of the four portions of the farm might amount to over-compensation.[75] This brings me to the approach adopted by the Supreme Court of Appeal in considering the remedy it ultimately awarded.

[73] Id at paras 56 and 58.

[74] Above n 42.

[75] Above n 4 at para 74. See also the order of the Supreme Court of Appeal, above [1].

The approach of the Supreme Court of Appeal

[38] Counsel for the applicants did not suggest that the Supreme Court of Appeal's reasoning that the return of the whole of the farm would amount to substantial over-compensation was wrong. His submission was that once the Supreme Court of Appeal had accepted that the remedy for over-compensation was to be found in section 35(2)(b) of the Act, there was no basis for it to interfere with the order of the Land Court for the restoration of the whole farm. A further contention was that the Supreme Court of Appeal ought to have confined its attention to the second judgment of the Land Court[76] and the reasons why it (the Land Court) declined to make orders in terms of section 35(2)(b) or (f). It was accordingly argued that to the extent that the Supreme Court of Appeal interfered with the Land Court's exercise of its discretion in terms of section 35(1) of the Act, and to the extent that it based its decision to decline restoration of the entire farm on a concern about over-compensation, it erred and proceeded in conflict with the constitutional and statutory regime for restitution.

[39] It is true that the Supreme Court of Appeal was concerned about over-compensation. That is precisely why, having decided that three of the four portions of the farm should be returned to the applicants, it ordered remittal of the matter to the Land Court to deal with possible over-compensation. It is also true that the Supreme Court of Appeal reasoned that the return of the whole farm would amount to over-compensation, but it did not decline to order the restoration of the Remaining Extent for that reason.

[76] See above at [12].

[40] It will be recalled that opposition against the applicants' claim for return of the Engelbrecht property (Portion 7 of the farm Haakdoornbult) was withdrawn. There was therefore no reason why this Portion could not be returned. As to Portions 3 and 6 (the Bezuidenhout Trust and Furstenburg Trust properties respectively) the Supreme Court of Appeal found that no compelling reasons had been furnished as to why these portions could not be restored to the applicants.

[41] When dealing with the Remaining Extent (referred to as RE) the Court said the following:

> "This portion never existed as a topo-cadastral entity. It has the appearance of an appendix, a finger protruding from the rest of Haakdoornbult. It can also be described as an isthmus surrounded by other property belonging to the CC. This other farm is Portion 1 of Haakdoornbult (a property that is not the subject of a land claim) and the strange appendix form was the result of a subdivision dating back to 1921. Having been consolidated with Portion 1, the RE now forms an integral part of Portion [5]."[77]

The Court went further to say:

> "If the RE were to be returned to the family it would mean that part of Portion [5] would be surrounded on three sides by the family's land and because its fourth side borders on the river, it would mean that this part of the CC's land would become isolated. Apart from this, as mentioned before, the irrigation system used by the CC, using a water allocation belonging to another farm (because the RE has no water allocation), irrigates part of the RE. If the RE were to be restored, the land will become dry land and bearing in mind that dry land farming is no longer viable in that part of the country it means that it will probably become grazing for some 13 head of

[77] Above n 4 at para 71.

> cattle since the carrying capacity of the farm is about 7 ha per large animal unit. (The water allocation belonging to the Engelbrecht land is much less than the irrigable land on that portion and it makes no sense to use that water on this piece.) Part of a huge investment in the irrigation system will become valueless because part of the system's capacity will be sterilised. By its very nature that part of the system cannot be used elsewhere. The State will have to compensate the CC for this loss and no one, especially not the family, will derive any tangible benefit from this payment. In addition the family has not produced any evidence as to any productive use to which it intends to put this part of the land. The family also has no special emotional ties to the RE. In fact, before the dispossession, the house on this part of the land had been leased to a Mr Furstenburg."[78]

[42] The Court accordingly concluded that "it would be counterproductive to order the return of the [Remaining Extent] taking into account especially the question of feasibility (section 33(cA)) and the current use of the land (section 33(eB))".[79]

[43] Section 33(cA) of the Act enjoins the Court, in considering its decision where restoration of land is claimed, to have regard to the feasibility of the restoration, and section 33(eB) requires, among others things, that regard be had to the current use of the land.[80] Clearly, then, the question of over-compensation did not come into consideration in the exercise by the Supreme Court of Appeal of its discretion under section 35(1) of the Act when it decided not to order the restoration of the Remaining Extent to the applicants.[81]

[44] Counsel for the applicants argued, however, that to the extent that the Supreme

[78] Id at para 72.

[79] Id at para 73.

[80] Id.

[81] Id at paras 71-3.

Court of Appeal found justification for its decision to deprive the applicants of the Remaining Extent in the criteria in sections 33(cA) and 33(eB), it erred.[82] It was contended that the cadastral shape of the land, without more, can hardly be considered a factor which goes to feasibility or current use; that the fact that the land never existed as a separate topo-cadastral entity is similarly hardly relevant in determining whether feasibility or current use preclude restoration; and that the unusual shape of Portion 5, part of which would be isolated from the rest were the Remaining Extent to be restored, cannot be considered relevant to the question at issue.

[45] It may very well be that these factors, by themselves, would not be enough to justify a refusal to restore the Remaining Extent. I say this because restoration of the Remaining Extent would not introduce a new phenomenon, or something that never was. But fundamental to the Supreme Court of Appeal's considerations was the effect that restoration would bring about: the rendering valueless of part of a huge investment in the irrigation system; the fact that the land in issue will become dry land due to it having no water allocation; and the other factors mentioned in the judgment.[83] It may well be that this Court, in considering these factors in the exercise of its own discretion, would have arrived at a different decision. But that is not the test for interference with the exercise of a discretion by a court whose order is on appeal.[84]

[82] Id at para 73.

[83] Above n 4 at para 72.

[84] See [26] above for the test for interference.

[46] Counsel contended further that the Supreme Court of Appeal completely ignored the test for feasibility as laid down by the Land Court in *In re Kranspoort Community*.[85] The relevant part of that judgment reads:

> "The test which emerges from this analysis is that the Court should ask: is the restoration of the rights in land in question to the claimant possible and practical, regard being had to
>
> (1) the nature of the land and the surrounding environment at the time of the dispossession;
> (2) the nature of the claimant's use at the time of the dispossession;
> (3) the changes which have taken place on the land itself and in the surrounding area since the dispossession;
> (4) any physical or inherent defects in the land;
> (5) official land use planning measures relating to the area;
> (6) the general nature of the claimant's intended use of the land concerned.
>
> However, this does not mean that an enquiry into the social and economic viability of the claimant's intended use is required. To require this would give rise to problems. Courts are not well-equipped to assess such social and economic viability. The effect of requiring such an enquiry may also be greatly to narrow the prospects of restoration awards being made generally and this would be contrary to the overall purpose of the legislation which has as one of its major focuses the actual restoration of rights in land."[86]

[47] Apart from the fact that the Supreme Court of Appeal is not bound by a judgment of the Land Court, it appears that the Supreme Court of Appeal indeed dealt with, at least, point (3) of the test enunciated in the judgment, namely the changes which have taken place on the land itself and in the surrounding area since

[85] 2000 (2) SA 124 (LCC).

[86] Id at para 92.

dispossession.[87] In any event, I do not believe that the Land Court ever intended the factors it listed for the test for feasibility to be a *numerus clausus*.

[48] It was also argued that the Supreme Court of Appeal was not correct in saying that on the basis of the evidence on record the Remaining Extent has no water allocation. Counsel submitted that the whole of the claimed land, including the Remaining Extent, enjoys a total allocation of 44,9 hectares. Thus, if the Remaining Extent were to be restored the applicants would be entitled to irrigate it. The question of the irrigation rights, or the absence thereof, in respect of the Remaining Extent should, therefore, not be used as a basis upon which to deny the applicants full restoration, so it was contended.

[49] It is true that the total water allocation of 44,9 hectares was for the whole farm. After various subdivisions, however, the owners of Portion 7 (Engelbrechts) used the entire water allocation and also sold the Remaining Extent to Mr Furstenburg. The Remaining Extent was subsequently consolidated with Portion 1 (which consisted of two pieces of land separated by the Remaining Extent) to form Portion 5. It is therefore correct, as matters are at present, that the Remaining Extent does not, on its own, have a water allocation. The Supreme Court of Appeal did not, therefore, misdirect itself on the facts. And, in any event, it did not arrive at its conclusion of not restoring the Remaining Extent to the applicants only on the basis of that portion of the claimed land having no water allocation. That factor was considered together

[87] Above n 4 at para 72.

with others as has been mentioned above.[88] Counsel's submission cannot therefore be sustained.

[50] In my view, the applicants have not made out a case for this Court to interfere with the Supreme Court of Appeal's exercise of its discretion. There are thus no prospects of success on appeal on the question of the Supreme Court of Appeal's decision not to restore the Remaining Extent to the applicants. It follows therefore that leave to appeal must be refused. This effectively disposes of the respondents' conditional application for leave to cross-appeal.

[51] But that is not the end of the matter. A further issue that requires attention is that part of the order of the Supreme Court of Appeal in terms of which the matter was remitted to the Land Court for consideration of whether, to what extent and in what form and conditions, a contribution should be made to the acquisition by the State of the properties in respect of which restoration has been authorised.[89]

The remittal order

[52] Having found that the applicants were entitled to restoration of Portion 7 (Engelbrecht's property) the Supreme Court of Appeal recognised the possibility that the restoration of the other parts of the farm might amount to over-compensation, or even under-compensation. The Court was, however, alive to the fact that over-compensation can be solved "within the provisions of the Act", which contemplate

[88] Id at paras 71-2.

[89] Id at para 77, at para 4(a) of the order at [1].

that a claimant make good the difference where more is returned than that which was lost.[90] The Supreme Court of Appeal could not, for lack of evidence, make a determination in this regard. It found, however, that the applicants were entitled to the return also of Portions 3 and 6 (the Bezuidenhout and Furstenburg properties) of the farm, but ”subject to a possible contribution” to cover over-compensation; hence paragraph 4(a) of its order.[91]

[53] Despite the fact that in their application for leave to appeal the applicants sought leave to appeal only against paragraphs 1 and 3 of the Supreme Court of Appeal’s order, counsel submitted strongly that paragraph 4(a) was inappropriate. In this regard it was contended that the remittal would lead to a cumbersome, costly and drawn out process between two parties who have no dispute with each other. For these reasons too, so it was argued, leave to appeal should be granted.

[54] In my view, the remittal for this purpose will unnecessarily prolong finalisation of this matter. The process will entail engaging in another enquiry relating to the present value of each of the individual Portions, which could take time to ascertain due to possible disagreement between valuers. Moreover, the State has clearly indicated that it does not seek any contribution from the applicants. Whilst that in itself is not decisive, it is not insignificant that the Supreme Court of Appeal did not find as a fact that the return of three of the four portions of land claimed amounts to over-compensation. It held that the return of the whole farm would amount to over-

[90] Above n 42 at section 35(2)(b).

[91] Above n 4 at para 4.

compensation.[92] I accordingly hold the view that these are relevant factors to which the Supreme Court of Appeal did not properly direct itself. This, to my mind, is sufficient for this Court to interfere with the Supreme Court of Appeal's discretion on this aspect of the case and to set aside that part of the remittal order.

[55] One further issue raised by counsel for the applicants needs brief mention. It relates to the question of when an order in terms of section 35(2)(b) or (f) of the Act is appropriate. Section 35(2)(f) authorises a court to make an order in respect of compensatory land granted at the time of the dispossession of the land claimed.[93] The issue arose first as a result of an order made by the Land Court referring for further argument the question of "whether the government can waive its rights under section 33(eA) of [the Act], and, if not, how this section should be applied in the circumstances of this case". That is the question that led to the second judgment of the Land Court.[94] It was argued, on behalf of the applicants in the Land Court and before this Court, that both forms of relief require a claimant to forfeit "something" and that for that reason "someone" must claim such relief, which the State has not done in the present matter.

[56] The issue does not arise here. I have already dealt with the question of a possible contribution by the applicants and have held that that issue should not be remitted to the Land Court for further consideration. As to an order in respect of

[92] Id at paras 69-70.

[93] Above n 42.

[94] Above n 24.

compensatory land, the State could in any event not claim it in respect of Pylkop. As was said by the Supreme Court of Appeal in another context, "Pylkop is . . . irrelevant because what a dispossessed person or community did with the compensation received is of little consequence in determining whether the compensation received 'in respect of' the property was adequate or not".[95] The Mphela family did not "receive" Pylkop as compensatory land. They purchased it with the purchase price received for Haakdoornbult. Pylkop, therefore, belongs to the family[96] and no "claim" can be made that it, or part of it, be returned to the State under the Act, nor could any court make an order in respect of it under section 35(2)(f) of the Act.

[57] I therefore refrain from expressing any opinion on the issue as raised by counsel for the applicants. It is not necessary to consider it for purposes of the outcome of this matter.

[58] Related to this issue is an application by the applicants for an amendment to their further particulars in response to a request for them by the respondent. The applicants sought to effect an amendment so as to make an offer for the return of part of Pylkop were this Court to consider the restoration of the Remaining Extent to amount to over-compensation.

[59] I have held that there is no basis upon which the discretion exercised by the

[95] Id at para 4.

[96] It is registered in the name of the Estate of the late Daniel Rakgokong Mphela and the family's rights are registered against the Title Deed.

Supreme Court of Appeal can be interfered with. The application is therefore moot.

The cross-appeal

[60] I have mentioned that the second to sixth respondents have lodged a cross-appeal conditional upon the granting of the applicants' leave to appeal. Had it not been for the fact that paragraph 4(a) of the order of the Supreme Court of Appeal is to be set aside, leave to appeal would not have been granted to the applicants. Leave is to be granted on a very limited basis which has nothing to do with the question whether or not restitution of the Remaining Extent should or should not have been awarded.

Conclusion

[61] It follows that the cross-appeal cannot be entertained and should be struck from the roll, while leave to appeal on the limited ground mentioned above should be granted to the applicants. The parties do not seek a costs order and none will be made.

Order

1. Condonation for the late filing of the applicants' replying affidavit is granted.
2. The applicants are granted leave to appeal.
3. The appeal succeeds to the extent only that paragraph 4(a) of the order of the Supreme Court of Appeal is set aside, with the result that paragraph 4(b) becomes 4(a) and paragraph 4(c) becomes 4(b).
4. The cross-appeal is struck from the roll.

MPATI AJ

Langa CJ, Moseneke DCJ, Madala J, Ngcobo J, Nkabinde J, Sachs J, Skweyiya J, Van der Westhuizen J and Yacoob J concur in the judgment of Mpati AJ.

For the Applicants:	Advocate G Dodson and Advocate A Friedman instructed by the Legal Resources Centre.
For the First to Sixth Respondents:	Advocate HS Havenga instructed by Grütter Grobbelaar Attorneys.
For the Seventh Respondent:	Advocate P Kennedy SC and Advocate T Seneke instructed by the State Attorney, Pretoria.