CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 52/12
[2013] ZACC 6

In the matter between:

KWALINDILE COMMUNITY	Applicant
and	
KING SABATA DALINDYEBO MUNICIPALITY	First Respondent
CAPE GANNET PROPERTIES 118 (PTY) LTD	Second Respondent
WHIRLPROPS 46 (PTY) LTD	Third Respondent
ZIMBANE COMMUNITY	Fourth Respondent
BATHEMBU COMMUNITY	Fifth Respondent
MINISTER FOR AGRICULTURE AND LAND AFFAIRS	Sixth Respondent
REGIONAL LAND CLAIMS COMMISSIONER: EASTERN CAPE	Seventh Respondent
LANDMARK MTHATHA (PTY) LTD	Eighth Respondent
PROUD HERITAGE PROPERTIES 119 (PTY) LTD	Ninth Respondent
UWP CONSULTING (PTY) LTD	Tenth Respondent

Case CCT 55/12

And in the matter between

ZIMBANE COMMUNITY	Applicant
and	
KING SABATA DALINDYEBO MUNICIPALITY	First Respondent
CAPE GANNET PROPERTIES 118 (PTY) LTD	Second Respondent
WHIRLPROPS 46 (PTY) LTD	Third Respondent
KWALINDILE COMMUNITY	Fourth Respondent
BATHEMBU COMMUNITY	Fifth Respondent
MINISTER FOR AGRICULTURE AND LAND AFFAIRS	Sixth Respondent
REGIONAL LAND CLAIMS COMMISSIONER: EASTERN CAPE	Seventh Respondent
LANDMARK MTHATHA (PTY) LTD	Eighth Respondent
PROUD HERITAGE PROPERTIES 119 (PTY) LTD	Ninth Respondent
UWP CONSULTING (PTY) LTD	Tenth Respondent

Heard on : 13 November 2012

Decided on : 28 March 2013

JUDGMENT

MOSENEKE DCJ (Mogoeng CJ, Cameron J, Froneman J, Jafta J, Nkabinde J, Skweyiya J, Van der Westhuizen J and Zondo J concurring):

Introduction

[1] This case concerns claims of two traditional communities for the restitution of their rights in land situated within the environs of the City of Mthatha. More pointedly, it raises the circumstances under which a court may, before the validity of a land claim is finally determined, make an order that immunises the claimed land from being restored to the claimants.

[2] The Restitution of Land Rights Act[1] (Restitution Act), under which the two communities seek restitution of their rights in land, authorises a court, on application by a government body and provided set requirements are met, to direct that when a land claim is finally determined, the rights in the land or in part of the land shall not be restored to a claimant. If an order for non-restoration were made, a successful claimant would be entitled only to monetary or other equitable redress but not to the actual restoration of the land.

[3] The operative provision of the Restitution Act is section 34. It is expedient that we cite relevant parts of its text this early:

> "(1) Any national, provincial or local government body may, in respect of land which is owned by it or falls within its area of jurisdiction, make application to the Court for an order that the land in question or any rights in it shall not be restored to any claimant or prospective claimant.

[1] 22 of 1994.

> . . .
>
> (5) After hearing an application contemplated in subsection (1), the Court may ─
>
> (a) dismiss the application; (or)
>
> (b) order that when any claim in respect of the land in question is finally determined, the rights in the land in question, or in part of the land, or certain rights in the land, shall not be restored to any claimant; (or)
>
> (c) make any other order it deems fit.
>
> (6) The Court shall not make an order in terms of subsection (5)(b) unless it is satisfied that ─
>
> (a) it is in the public interest that the rights in question should not be restored to any claimant; and
>
> (b) the public or any substantial part thereof will suffer substantial prejudice unless an order is made in terms of subsection (5)(b) before the final determination of any claim."

[4] The Land Claims Court and, on appeal, the Supreme Court of Appeal, in a somewhat curtailed form, made an order under section 34(5)(b). The two communities are aggrieved and seek leave to appeal the decision. King Sabata Dalindyebo Municipality (Municipality or first respondent), in whose favour the disputed order was made and within whose jurisdiction the claimed land lies, opposes the appeal. Two other respondents are resisting the appeal in order to protect their financial interests in the land which is the object of the claim. The one is Cape Gannet Properties 118 (Pty) Ltd (second respondent), a company that has concluded a long-term lease and development agreement with the Municipality over 25 proposed subdivisions of the Remainder of Erf 912. The other is Whirlprops 46 (Pty) Ltd (third respondent). It holds long term lease rights over land that falls within the Remainder of Erf 912. As will be seen later,

the Remainder of Erf 912 became municipal land with certain conditions attached for its use.

[5] Thus, the core contest between the two communities and the Municipality is whether it is in the public interest that the land the communities claim not be restored to them, or whether the public will suffer substantial prejudice should a court refuse to make a non-restoration order ahead of the final determination of the claims.[2]

Background

[6] Mthatha was established as a municipality on 27 October 1882 after the Cape Colonial Government purchased it from Chief Ngangelizwe, for the sum of 1 200 pounds. The town has now become known as the City of Mthatha. The boundaries of the Municipality of Mthatha were set out in a proclamation of 1882.[3] Since then the boundaries of the Municipality have been re-defined several times. However, a significant milestone occurred in 1923 when a deed of grant was passed in favour of that Municipality over Erf 912 Mthatha, formerly known as Mthatha Town Commonage West and East.[4]

[2] Hoexter *Administrative Law in South Africa* (Juta & Co, Cape Town, 2012) at 564: "[T]he order does not decide rights of ownership; it merely restores the *status quo ante*, the position before the illicit action was taken. This means that the court will not concern itself with the merits of the matter". (Footnotes omitted.)

[3] Proclamation No. 192 published in the Cape of Good Hope Government Gazette on 27 October 1882.

[4] Government Gazette No. 1325 of the Province of the Cape of Good Hope published on 15 May 1931.

[7] Shortly before Transkei was granted "independence" by the apartheid South African Government, ownership of Erf 912 became vested in the Transkei Government with the Mthatha Municipality retaining usufructuary rights.

[8] With the advent of the new constitutional dispensation in 1994 all land owned by the former Transkei Government, including Erf 912, which was by then known as the Remainder of Erf 912 Mthatha, vested in the Government of the Republic of South Africa by virtue of the provisions of section 239 of the interim Constitution.[5]

[9] On 1 April 1997 the Minister for Land Affairs (Minister), properly authorised by statute,[6] in writing delegated his powers to dispose of state property to the Member of the Executive Council for Housing and Local Government in the Eastern Cape (MEC).[7] Paragraph 3 of the delegation required that if delegated state land is to be developed, the

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[5] Act 200 of 1993. Section 239 in relevant part states:

> "Transitional arrangements: Assets and liabilities
>
> (1) All assets, including funds and administrative records, which immediately before the commencement of this Constitution vested in an authority referred to in section 235(1)(a), (b) or (c), or in a government, administration or force under the control of such an authority, shall be allocated as follows—
>
> (a) Where any asset is applied or intended to be applied for or in connection with a matter which—
>
> (i) does not fall within a functional area specified in Schedule 6; or
>
> (ii) does fall within such a functional area but is a matter referred to in paragraphs (a) to (e) of section 126(3) (which shall be deemed to include a police asset),
>
> such asset shall vest in the national government."

[6] See section 2(1)(a)(i) of the Land Administration Act 2 of 1995 read with the State Land Disposal Act 48 of 1961.

[7] As per the Delegation of Ministerial Powers of 1 April 1997 (Delegation).

MEC or any other competent authority must first satisfy themselves beforehand that the development will not result—

> "in the dispossession of people's rights (formal or informal) granted on or over such commonage land and in the event people's rights are affected, it is a pre-requisite that other arrangements satisfactory to those people have been made, in consultation with the Department of Land Affairs and in accordance with the provisions and/or conditions stated in the Policy and Procedures on Municipal Commonage document by the said Department".[8]

[10] The sequel of the ministerial delegation was that on 19 August 1997 the MEC donated specified state owned pieces of land (erven) within the Mthatha Township as well as the Remainder of Erf 912 to the Mthatha Municipality. The transfer of ownership of the Remainder of Erf 912 to the Municipality of Mthatha was made by a deed of transfer passed on 29 January 1999.

[11] During the course of 1998, the Kwalindile traditional community and the Zimbane traditional community (applicant communities) lodged separate claims with the Regional Land Claims Commissioner[9] (Commissioner) for the restitution of their rights in land.

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[8] Id at para 3.

[9] The Commissioner is appointed in terms of section 4(3) of the Restitution Act, which in relevant part states:

> "The Commission shall consist of a Chief Land Claims Commissioner appointed by the Minister, after inviting nominations from the general public, a Deputy Land Claims Commissioner similarly appointed and as many regional land claims commissioners as may be appointed by the Minister."

Pursuant to section 6 of the Restitution Act:

> "The Commissioner shall receive and acknowledge all claims for the restitution of land rights, assist claimants in the preparation and submissions of claims, advise claimants of the progress of their claims, report settled claims to the Court, and assist in any further disputes between claimants and other interested parties."

The exact geographic extent of each land claim is uncertain but in both instances the claims included the restoration of parts of immovable property described as the Remainder of Erf 912 within the area of jurisdiction of the Municipality.

[12] In particular, on 3 September 1998, the Kwalindile Community lodged at least two claims for restoration of land rights relating to disparate pieces of land. Its one claim sought restitution of community land rights to the Matiwane Mountain Range. The other claim related to the Kwalindile Trust Farms. Much history is narrated in the papers on how this traditional community was removed by the apartheid state from its ancestral lands and in return given compensatory land in the form of the trust farms known as Kwalindile Trust Farms, bordering Mthatha. There, the people re-established themselves, built homes, tilled the soil and grazed their animals. The community now claims the undeveloped rural land. However, an annexure to the claim form they lodged with the Commissioner widened the reach of the claim.

[13] The essence of the Kwalindile Community's claim is that before the advent of democracy in 1994, over a period of nearly 20 years, the Transkei Government systematically "carved out" and "chopped off" their communal land for private development and governmental purposes. According to the applicant communities, that land included and is now part of the Remainder of Erf 912 where several prominent buildings and landmarks of the City of Mthatha are located.

[14] The Municipality has strenuously resisted the claim of the Kwalindile Community and has asserted that the claim has no merit in relation to the Remainder of Erf 912. It contends that the landmarks listed in the annexure to the land claim form of the community are located on the Remainder of Erf 912, and that this land never formed part of the Kwalindile Trust Farms but has always been part of Mthatha since its establishment in 1882. This dispute of history and fact will engage the trial court that must finally determine the land claim in the light of all the evidence before it. For present purposes, we need not resolve the dispute.

[15] Again, during December 1998, the Zimbane Community lodged with the Commissioner a land claim for the restoration of significant parts of the Remainder of Erf 912. The community said they had lived on the fringes of the southern edge of the Mthatha commonage for generations and that their ancestral land included the Remainder of Erf 912.

[16] The Municipality has disputed the validity of the Zimbane Community land claim too. In its founding papers before the Land Claims Court, it has given a lengthy account of the history of Mthatha with the view to show that the land claims are spurious. The Zimbane Community, the Municipality contends, has never lived on the land they are now claiming. However, the Municipality readily concedes that the ancestral area of residence and jurisdiction of the Zimbane Community shares a common boundary with the City of Mthatha. The Municipality explains that the common boundary existed since

1882 when Mthatha was founded and that it was properly surveyed and published in 1906 well before 13 June 1913, the commencement date for valid claims under the Restitution Act. The Municipality insists that the Zimbane Community area had never formed part of the town of Mthatha. Again, we need not reach or resolve the validity of the claims at this stage.

[17] The land claims of both communities were investigated by the Commissioner. She caused a research report to be prepared on each claim and wrote an extensive report on the claims. She accepted the claims and referred them to the Land Claims Court for adjudication. The Commissioner also gave the Municipality, as owner of the land, formal notice of the land claim of the Kwalindile Community.[10] On 19 November 2007 the Commissioner published, for general notice, the claims in terms of section 11(1) of the Restitution Act.[11]

[18] It is noteworthy that the land claims of the two communities enjoy the support of the Commissioner and the Minister. It will be remembered that they facilitated the donation of the land including the Remainder of Erf 912 to the Municipality, subject to

[10] General Notice in terms of Restitution of Land Rights Act (Act No. 22 of 1994) published on 19 November 2007.

[11] Section 11 of the Restitution Act, relating to the procedure after lodgment of claim, provides:

> "(1) If the regional land claims commissioner having jurisdiction is satisfied that—
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> (a) the claim has been lodged in the prescribed manner;
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> (b) the claim is not precluded by the provisions of section 2; and
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> (c) the claim is not frivolous or vexatious;
>
> he or she shall cause notice of the claim to be published in the *Gazette* and shall take steps to make it known in the district in which the land in question is situated."

all development on the donated municipal commonage not resulting in "the dispossession of people's rights (formal or informal) granted on or over such commonage land".[12]

[19] During or about 2005 and 2006, even before the determination of the validity of the land claims, the Municipality concluded long registrable leases with the second and third respondents and other commercial property developers over divided portions of the Remainder of Erf 912. The applicant communities, Kwalindile Community in particular, were most displeased by what they perceived as the Municipality's pre-emptive strike against the possible restoration of the claimed land.

[20] By way of background, the Land Claims Court explained[13] that previously the Kwalindile Community successfully approached it for an interim interdict against the Municipality and certain commercial property developers. The interdict restrained them from developing portions of the land known as Remainder of Erf 912. In response, the Municipality sought, in an abortive counter-claim, to set aside the decision of the Commissioner to publish a formal notice of the land claim of the Kwalindile Community. Prolonged negotiations between the parties yielded no agreement on whether the property developments may proceed.

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[12] Above n 7.

[13] *King Sabata Dalindyebo Municipality v Kwalindile Community and Others* [2010] ZALCC 33 at para 11.

In the Land Claims Court

[21] During September 2008, the Municipality resorted to an application in terms of section 34 of the Restitution Act in the Land Claims Court. The objective of the application was to secure a court order that excluded the restoration of the claimed land as one of the possible restitution remedies available to the applicant communities when the merits of their claims are finally determined. The Municipality's papers were somewhat cluttered by alternative prayers to review, set aside or to have withdrawn the Commissioner's decision to accept and publish in the public media and Government Gazette details of the applicants' restitution claims.

[22] On 14 December 2010, the Land Claims Court granted the order sought in terms of section 34(5)(c) of the Restitution Act subject to certain qualifications which the Supreme Court of Appeal later set aside. Its order read:

> "(i) The Remainder of Erf 912 Mthatha shall not be restored to any claimant or prospective claimant.
>
> (ii) All the prayers seeking the withdrawal, review and the setting aside of publication of notices in the Daily Dispatch and the Government Gazette by the 5th respondent are dismissed.
>
> (iii) The resumption and the initiation of all development projects upon any portion of the Remainder of Erf 912 Mthatha by the applicant shall only proceed with the full transparent and exhaustive consultation with the 4th, 5th and present and prospective claimant respondents.
>
> (iv) Developers and prospective developers must ensure that whatever agreements reached with the applicant in respect of Remainder Erf 912 Mthatha are in compliance with paragraph (iii) of this order and should revise and re-structure such agreements accordingly. They must also ensure compliance with the spirit

and letter of the Delegation, the Constitution and the Act on the part of the applicant and the 4th 5th Respondents.

(v) The applicant and the 4th and 5th Respondents are ordered and are expected to take their responsibilities to the public seriously and take the initiative and lead in reaching consensus. They should jointly research projects and lay down the criteria for the advertising and acceptance of tenders for developments on the Remainder of Erf 912 Mthatha.

(vi) There is no order as to costs."[14]

[23] In the light of the outcome I reach, it would be useful to provide a brief narration of the reasoning of the Land Claims Court. On the description of the land sought to be immunised from restoration, the learned Bam JP decried the fact that its description is no more than the "Remainder of Erf 912 Mthatha" and that "[i]t is not clear from the founding affidavit or from the papers which specific areas the Remainder of Erf 912 encompasses."[15]

[24] The Land Claims Court acknowledged the averments of the applicant communities that the area of the Municipality is urbanised; that its suburbs consist of privately owned and developed erven; that the property prices of the land in the affluent suburbs of Mthatha are in the millions; that it comprises of a thriving central business district and an industrial area which continues to develop on a daily basis; and that the city has schools, hostels, hotels, guest houses, medical clinics, taxi ranks, shopping centres, stores, railway lines, pump stations, a police station, offices, courts of law, banks and other public

[14] Id at 13.

[15] Id at para 7.

facilities, including a golf course and a recreational park. However, the court qualified what it called, the 'suburban bias', by remarking that the city "is surrounded on all sides by a very extensive rural hinterland."[16]

[25] The Land Claims Court turned to the submissions of the Municipality that it would be in the public interest for the Court to grant the order sought. The Court defined public interest as that which is in the interests and benefit of the community or communities served by the Municipality on the land in question.[17] It rejected outright the contention that the commercial developments undertaken by the second and third respondents and other developers with the concurrence of the Municipality measured up to what is in the public interest.[18] In this regard the Court said—

> "the developments, unilaterally agreed between the applicant and the 6th–10th respondents, do not measure up as being in the 'public interest' in their present formats. They were designed primarily to promote entrepreneurial pursuits of a few with minimal or peripheral outcomes to the communities served by the applicant particularly those with present and prospective claims to the land such as the First and Second Respondents."[19]

[26] The Land Claims Court nonetheless found, for the Municipality, that it was in the public interest to make an order preventing restoration. It cited the dicta of Meer J in

[16] Id at paras 7-8.

[17] Id at para 16.

[18] Id at para 17.

[19] Id.

Nkomazi Municipality v Ngomane of Lugedlane Community and Others[20] where the Court stated:

> "Then there is the reality that restoration of land within the towns could well require, as envisaged by the ninth respondent, towns people to be expropriated of their houses, the expropriation of schools, churches, parks and other facilities, as could occur also in respect of the numerous businesses, industries and other economic activities in the town. Major social disruption, the avoiding whereof is advocated at section 33(d) of the Restitution Act, would be inevitable."

[27] Adopting a similar reasoning, the Land Claims Court concluded that it was duty bound-

> ". . . to avert the chaos that would follow were established cities and settlements suddenly carved up piecemeal into as many separate and disparate pieces and portions as there were claims."[21]

[28] In the face of these submissions, the Land Claims Court held that even a partial restoration of portions of an established metropolitan area such as Mthatha would seriously disrupt and disintegrate the city's stability and development. Thus, it reasoned, the public interest would be served by granting the order for non-restoration. The Court made the additional finding that it would not be in the public interest "to restore . . . any

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[20] [2010] 3 All SA 563 (LCC) at para 29 (*Nkomazi*).

[21] Above n 13 at para 20.

portion of the city as that could lead to chaos and possible upheaval". There could be "inter-community tensions and strife" because of "overlapping claims".[22]

In the Supreme Court of Appeal

[29] With leave of the Land Claims Court, the Supreme Court of Appeal heard the appeals of the Municipality and of the second and third respondents together with the cross-appeals of the applicant communities and of the Commissioner and the Minister. The Municipality and other respondents welcomed the Land Claims Court's order that it would not be in the public interest to restore any portion of the city of Mthatha to any of the claimants. However, they impugned, on several grounds, the conditions the Land Claims Court had laid down on how the future developments on the Remainder of Erf 912 were to be conducted, purportedly in terms of section 34(5)(c) of the Restitution Act which authorises the court to make any other order it deems fit.[23]

[30] The applicants and other cross-appellants did not join issue with the respondents on the legal probity of the conditions for the development imposed by the Land Claims Court. We are informed that before the Supreme Court of Appeal, it was common cause

[22] Id at para 25.

[23] Section 34(5) in relevant part states:

> "After hearing an application contemplated in subsection (1), the Court may—
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> (a) dismiss the application;
>
> (b) order that when any claim in respect of the land in question is finally determined, the rights in the land in question, or in part of the land, or certain rights in the land, shall not be restored to any claimant;
>
> (c) make any other order it deems fit."

amongst the parties that the conditions were incompetently imposed. The principal contention of the applicants in their cross-appeals was that, in making the order of non-restoration under section 34(5)(b) the Court misdirected itself on several grounds. They contended that it did not properly exercise the power conferred on it by the operative statute judicially. Once the Court had found that the commercial development of the Remainder of Erf 912 was not in the public interest, it should have held that the public interest did not require it to make a non-restoration order over vacant and undeveloped land within the Remainder of Erf 912.

[31] The Supreme Court of Appeal upheld the appeals of the respondents with costs of three counsel.[24] It set aside the conditions laid down by the Land Claims Court. It dismissed the cross-appeals of the applicant communities with costs of three counsel and directed that the costs of the appeals and of the cross-appeals be paid by the Commissioner. The Supreme Court of Appeal also substituted the order of the Land Claims Court with the following order:

> "In terms of section 34(5)(b) of the Restitution of Land Rights Act 22 of 1994 it is ordered that when claims in terms of the Act in respect of any land situate in the town of Mthatha, including the Remainder of Erf 912 Mthatha (the land), are finally determined, the rights in the land or any portion thereof shall not be restored to any successful claimant."[25]

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[24] *King Sabata Dalindyebo Municipality and Others v KwaLindile Community and Others* [2012] 3 All SA 479 (SCA) at para 74 (Supreme Court of Appeal judgment).

[25] Id.

Leave to appeal

[32] In this Court, the applicant communities seek leave to appeal against the order of the Supreme Court of Appeal. The Municipality, as well as the second and third respondents, urge us to refuse leave to appeal on the grounds that the complaint raised by the applicant communities is purely factual and raises no constitutional issues. They say the only grievance of the applicants is that the Municipality failed to establish facts on which it was possible to exercise a value judgment on the issues raised in section 34(6) of the Restitution Act.

[33] The respondents have misconceived the case put up by the applicants in this Court. First, there can be no gainsaying that a claim for restoration of dispossessed rights in land is a pre-eminent constitutional issue. The right is a vital part of the constitutional quest to heal divisions and exclusions of the past. It is foreshadowed in section 25(7) of the Constitution[26] and given practical effect through the scheme of the Restitution Act. It must follow that a dispute over whether a court should make a non-restoration order in relation to a land claim is a constitutional question.

[34] Second, we are not called upon to adjudicate upon a factual dispute or to prefer our factual findings over those of the Land Claims Court. The question for our determination

[26] Section 25(7) 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."

is whether the Supreme Court of Appeal was correct when it held that the Land Claims Court had properly complied with the requirements of section 34(6) of the Restitution Act. Our concern is whether, on the facts before it, the Land Claims Court was properly satisfied that the threshold requirements of *public interest* and *substantial prejudice* were met before it issued the order of non-restoration.

[35] The respondents add that the application has no prospects of success because no court will order that the land leased by the second and third respondents may be restored to the applicants or to any other claimant. They add that the applicants have no particular emotional tie to the land claimed and that, in any event, its restoration is not feasible.

[36] Let it suffice to observe that the appeal does bear reasonable prospects of success. This Court may very well arrive at a decision other than that of the Supreme Court of Appeal. Even if the merits of the decision of the Supreme Court of Appeal were not to be faulted, the order it made may be impermissibly wide. In a proper case, that alone would be sufficient to warrant our interference.

[37] The land claims are a matter of great importance to all the parties to this dispute, to the broader Mthatha community and to the affected commercial developers. It is in the public interest and in the interests of justice for this Court to hear the appeal.

Issues

[38] The foremost issue is whether the Land Claims Court properly exercised the power conferred on it by statute. We must determine whether the Supreme Court of Appeal was right in declining to interfere with the non-restoration order granted by the Land Claims Court. To make that determination, we must probe whether the Land Claims Court has correctly determined the *public interest* and the *substantial prejudice* threshold requirements imposed by section 34(6)(a) and (b) in the light of the facts. Lastly, we must enquire whether, in any event, the order granted by the Supreme Court of Appeal is overbroad and whether its costs order against the Commissioner is justified.

Applicable law

[39] The Restitution Act is legislation that is meant to give effect to the compelling constitutional priority of land restitution and reform required by sections 25(5) to (7) of the Constitution.[27] These provisions were inserted in the Constitution in recognition of

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[27] Section 25 of the Constitution in relevant part provides that:

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

See also *Baphalane Ba Ramokoka Community v Mphela Family and Others; In re: Mphela Family and Others v Haakdoornbult Boerdery CC and Others* [2011] ZACC 15; 2011 (9) BCLR 891 (CC) (*Mphela*) and *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).

our regretful history of widespread dispossession of land from individuals and communities because of discriminatory laws and practices.

[40] Section 34(1) of the Restitution Act permits a national, provincial or local government body, in respect of land owned by it or which falls within its jurisdiction, to apply to the Land Claims Court for an order that the land in question, or any part of the land, or certain rights in the land, shall not be restored to a claimant for a claim made in terms of the Restitution Act.

[41] The primary object of section 34 is to pre-empt land restoration that threatens or prejudices public interest. The object accords with the statute's objective to achieve equitable redress whilst avoiding major social disruption which might substantially prejudice the public interest. To that end, the Restitution Act makes it plain that when a court decides a matter under this legislation, it must bring to account "the desirability of avoiding major social disruption".[28]

[42] Section 34(6) prevents a court from making a non-restoration order unless the twin threshold requirements of *public interest* and *substantial prejudic*e are satisfied. Having said that, it is hard to imagine how a restoration that seriously prejudices the public could

[28] Section 33(d) provides that in considering its decision in any particular matter the court shall have regard to the desirability of avoiding major social disruption.

be in the public interest. Conversely, if the restoration is not in the public interest, ordinarily it would be prejudicial to the public to restore the land in question.

[43] As we have noted, a court must be satisfied that a non-restoration order is justified by the applicable legal principles and facts. It must make a value judgment on what is in the public interest and what is substantially prejudicial. The outcome of the value judgment will depend on an assessment of all the facts. This means that a public body seeking a non-restoration order must adduce the facts necessary to enable a court to exercise a value judgment of where the public interest lies, in relation to the particular land sought to be restored. Whilst a claimant for restitution of land rights is not always entitled to restoration of rights in the land claimed,[29] restoration of the land claimed must enjoy primacy when feasible. That much is clear from the scheme of the Act and relevant jurisprudence.[30] A non-restoration order is invasive of restitution rights, and for that reason, the statute requires that it may be made only when the threshold requirements have been met.

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[29] *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 26 states:

> "Section 25(7) confers a right to restitution or equitable redress but leaves the form and manner of redress to legislation. We have described the wide discretion the legislative scheme confers on the Minister and claimants subject to the equitable jurisdiction of the courts. Neither a claimant nor a community may insist as of right on original land dispossessed. . . . What is appropriate property restitution or equitable redress in response to historical dispossession is bound to vary and be subject to the specific context. For that very reason, the submission that the framework agreement discriminates unfairly against claimants who insist on return of their original land is unsustainable and must be dismissed."

See also *Khosis Community, Lohatla and Others v Minister of Defence and Others* 2004 (5) SA 494 (SCA) at para 4 (*Khosis*); *In re Kranspoort Community* 2000 (2) SA 124 (LCC) at para 82; and *Blaauwberg Municipality v Bekker and Others* 1998 (1) All SA 88 (LCC) at para 34.

[30] See *Mphela* above n 27.

[44] In *Nkomazi* the Land Claims Court, citing *Khosis*, observed that:

> "In reaching a decision in respect of the threshold requirements, the Court has to take into account the factors listed in Section 33 of the Restitution Act. Not all of them are necessarily applicable in any given case. Factors such as the feasibility of restoration (Section 33(c)A), social upheaval (Section 33(d)) and the current use of the land are closely related to the public interest considerations in Section 34(6)(a). What is involved in determining the question of public interest, is a weighing or balancing of private interests on the one hand and public interests on the other."[31] (Footnotes omitted.)

[45] In arriving at where the public interest lies, a court must carefully weigh all the relevant factors on how public interest will be prejudiced. The court must also keep in mind that the truncation of the claimant's right may be limited to non-restoration only since a claimant would still be entitled to other forms of equitable redress provided the curtailment passes the *public interest* and *substantial prejudice* tests.

Did the Land Claims Court properly exercise its statutory powers in terms of section 34(5) pursuant to the requirements of 34(6)?

[46] Section 34(5) confers this power only on the Land Claims Court. It is that Court that may hear, dismiss, or grant the application or make any other order it deems fit. An appeal court may interfere only if the statutory power has not been properly exercised. This would be so if, for instance, the court has exercised its statutory power capriciously or was moved by a wrong principle of law or an incorrect appreciation of the facts or has

[31] Above n 20 at para 9.3.

not brought its unbiased judgment to bear on the issue or has not acted for substantial reason.[32]

[47] As we have seen, section 34(5) lists a range of options from which a court may choose in exercising its statutory power. They range from a dismissal of an application, granting an order insulating the land in question from a restoration order to any other order deemed necessary. The choice of the order granted will always depend on the facts established. If those facts justify an order excluding restoration, the court may not grant a dismissal, simply because it is one of the options listed. It must grant only the order justified by the facts.

[48] Understandably, the applicants' appeal is directed against the decision of the Supreme Court of Appeal which in effect upheld the non-restoration order. Thus, as we determine whether the Land Claims Court had properly exercised its statutory power, we are in effect asked to determine whether the Supreme Court of Appeal's decision should be upheld on appeal.

[49] The Land Claims Court, so too the Supreme Court of Appeal, correctly found that it is not clear from the Municipality's founding papers what the municipal boundaries and

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[32] *Giddey NO v J C Barnard and Partners* [2006] ZACC 13; 2007 (5) SA 525 (CC); 2007 (2) BCLR 125 (CC) and *Mabaso v Law Society of the Northern Provinces and Another* [2004] ZACC 8; 2005 (2) SA 117 (CC); 2005 (2) BCLR 129 (CC). See also *General Council of the Bar of South Africa v Geach and Others* [2012] ZASCA 175 and *Kekana v Society of Advocates of South Africa* 1998 (4) SA 649 (SCA).

features of the City of Mthatha are. It was also not clear what the location, demarcations and physical features of the land to be immunised from restoration were. The Land Claims Court decried this paucity of detail in the founding papers in the following graphic terms:

> "It is not clear from the founding affidavit or from the papers which specific areas the Remainder of Erf 912 Mthatha encompasses. There is no map in the papers depicting its boundaries and physical features. Nor is there anything that portrays or illustrates the arrangements, components of any structures, open fields, streets, thoroughfares, aqueducts and dams. An aerial photograph demarcating the area sought for non-restoration would have been immensely helpful".[33]

[50] It is indeed plain from the record before us that the Municipality has not lodged any surveyed municipal limits and physical features of Mthatha. Nothing informs us which parts of the area of the Municipality are developed and built up and which are not. Nor have we seen a surveyed map or an Integrated Development Plan of the area of jurisdiction of the Municipality. The Local Government: Municipal Systems Act[34] obliges every municipality to develop, implement, publicise and inform the public of the adoption of an Integrated Development Plan.[35] From the Integrated Development Plan it would have been possible to discern the nature and extent of urbanisation, infrastructure

[33] Above n 13 at para 7. See also Supreme Court of Appeal judgment above n 24 at para 42.

[34] 32 of 2000.

[35] Id.

and superstructures of the Remainder of Erf 912. It would also help identify vacant land along the urban fringe earmarked for future development of Mthatha.

[51] Section 34(5)(b) of the Restitution Act requires that a non-restoration order must be made in respect of "the land in question or part of the land." It is indeed the duty of the government body seeking the order to identify with reasonable certainty the land in question. If this did not happen, the Land Claims Court would be unable to fashion an order that precisely targets the land in question. Although the Land Claims Court and the Supreme Court of Appeal decried the paucity of the description of the land in question, they proceeded to make an order that immunised the restoration of any and all land within the area of jurisdiction of the Municipality. A non-restoration order is invasive of the constitutional right of a claimant to possible restoration. Therefore, the order must be made with sufficient particularity to ensure that the possible redress that would result in a successful claim is not unduly curtailed. That, in my view, is a material irregularity that vitiates the non-restoration order of the two courts.

[52] Allied to the preceding irregularity is the finding of the Land Claims Court and of the Supreme Court of Appeal that if a non-restoration order is not made chaos and social disruption would occur in the city of Mthatha. The Land Claims Court, found itself duty bound to make the order. In the words of the Court—

> "to avert the chaos that would follow were established cities and settlements suddenly carved up piecemeal into as many separate and disparate pieces and portions as these were claims."[36]

[53] In arriving at this conclusion the Land Claims Court was well aware of the positions of the two applicant communities and noted that they sought restoration of only undeveloped portions of the Remainder of Erf 912. The Court specifically recognised that the Zimbane Community had made its position quite clear that "it is not seeking restoration to itself of the city of Mthatha and properties in private hands." They directed their claim at the "vast tracks of undeveloped and un-serviced land that is part of Erf 912." If their claims were to be successful, they said, they would rather have the undeveloped land restored to them so that they may embark on its development themselves. In this Court too, both applicant communities reiterated the limits of their claim to restoration of the undeveloped and vacant land within the Remainder of Erf 912.

[54] The Supreme Court of Appeal also premised its decision on the assumption that all land in Mthatha is urbanised and developed or has been properly earmarked for future development. Its judgment is animated by the possible destruction of the 'urban fabric' of the Mthatha community that is "completely urbanised" and "continually engaged in the development of the city in various directions."[37]

[36] Above n 21.

[37] Above n 24 at para 28.

[55] The evidence points in a different direction. It is undisputed that there are large tracts of land within the Remainder of Erf 912 which are not developed. The Land Claims Court finds and states that:

> "It should be added that the N2 still cuts through the centre of . . . Umthatha and that the city is surrounded on all side[s] by a very extensive rural hinterland. It is common cause that during 1998 the Remainder of Erf 912 Umthatha was transferred to the applicant measuring 1740,400 hectors in extent".[38]

[56] This finding of the Land Claims Court is indeed supported by the evidence of the Commissioner and the Minister. They dispute the assertion of the Municipality that there is no land within the municipal area that can be restored to the applicant communities. Both assert that restoration is feasible in relation to parts of the vast undeveloped tracts of land within the municipal commonage. The Municipality has not disputed this evidence nor has it laid bare plans for the development of the vacant land within the Remainder of Erf 912.

[57] The Land Claims Court misdirected itself on the value judgment it had to make. It misconceived the nature and extent of the claims made by the applicant communities. The applicant communities have always made it clear that they do not seek restoration of the urbanised and developed parts of Remainder of Erf 912 or any other part of Mthatha for that matter.

[38] Above n 13 at para 8.

[58] The Supreme Court of Appeal too, in my view, was not correct in upholding the order made by the Land Claims Court under section 34(6) of the Restitution Act. Nothing on the facts justifies the conclusion that it is in the public interest for rights on vacant and undeveloped land not to be restored. Similarly, there is no evidence that restoration will cause social upheaval and disruption, or that the public will suffer substantial prejudice simply because vacant and undeveloped land on the fringes of the town may be restored to the applicants when their claim over the Remainder of Erf 912 is finally determined.

[59] One of the considerations which influenced the Supreme Court of Appeal appears in its finding that the applicant communities had no sentimental or ancestral attachment to the land claimed.[39] This finding is inconsistent with the undisputed fact that the Zimbane Community has lived for nearly two centuries on the land, something borne out by the ancestral graves located in the vicinity of the land claimed, which ancestral graveyard the Municipality had, at its ordinary council meeting in 2002, resolved to respect and fence off.

[60] A further consideration is that the order of the Land Claims Court and the subsequent order of the Supreme Court of Appeal are overbroad. The latter order relates to "any land situate in the town of Mthatha, including the Remainder of Erf 912

[39] Id above n 24 at para 68.

Mthatha".[40] Clearly, the order covers what the evidence calls the vast tracts of undeveloped land and un-serviced land that forms part of the Remainder of Erf 912. It is clear from section 34(5) of the Restitution Act that a court may make an order "in part of the land, or certain rights in the land". The Supreme Court of Appeal could have tailored its order to exclude undeveloped land within the Remainder of Erf 912. For instance, it could have immunised the actual restoration of the land on which the commercial development of the third respondent stands. The facts show that there is a fully built shopping complex on the land which cost R165 million to build, and has a present value of R240 million subject to a bank mortgage of R146 million. The complex is in full public use.

[61] The Minister and the Commissioner also argued, before the Land Claims Court and the Supreme Court of Appeal, that when the land that makes up Mthatha commonage, including the Remainder of Erf 912, was donated by the Minister to the Eastern Cape Province and later by the Province to the Municipality, it was subject to written conditions of delegation set by the Minister. The core condition was that the Municipality was obliged to consult communities with "formal and informal rights" in the land before it was developed or alienated.[41] In this regard, the Land Claims Court found that the Delegation had been breached:

[40] Above n 24.

[41] The Delegation above n 7 required the MEC, to dispose of state properties subject to the following conditions:

(i) establish a proper land administration which has the legal, financial, administrative and manpower capacity to deal with the properties in question;

> "However, given the poor track record of the applicant in complying with the spirit and the letter of the Delegations, the Constitution and the Act in the unilateral awarding of tenders to the 6th-10th Respondents, the application will be granted subject to conditions to be set out presently."[42]

[62] The Supreme Court of Appeal rejected the contention that the Municipality had breached the Delegations and held that the rights contemplated in the Delegations were not binding on the Municipality because they were not registered against its title of the municipal property. The Supreme Court of Appeal also stated that in any event, "formal and informal rights" do not include mere claims in land, which according to the Court, are not rights.[43]

[63] Given the conclusion we have reached, it is unnecessary to decide the exact ambit of "formal and informal rights" as envisaged in the Delegations. I must however dispel the suggestion that a right to claim restoration of rights in land under the Restitution Act is not an existing right. The Municipality was clearly wrong in taking the position that it may ignore the reservation in the Delegation that development should "not result in

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(ii) ensure that the properties designated as Municipal Commonages be utilised for housing development;

(iii) ensure that any development of the Commonages will not result in the dispossession of the people's rights;

(iv) local authorities may not alienate, dispose or sell the Remainder of Municipal Commonage properties, but must retain and utilise the said Remainder for public use to ensure that such land is released to the needy local residents for agricultural purposes;

(v) local authorities shall lease the properties at a market related rental.

[42] Above n 13 at para 27.

[43] Above n 24 at para 63.

dispossession of people's existing rights, (formal or informal)."[44] One such right would certainly be the right warranted by the Constitution to lodge a claim for restoration of the land in question.

[64] For the reasons preceding, I would uphold the appeal and set aside the orders of both the Supreme Court of Appeal and the Land Claims Court. That however is not the end of the matter. I turn now to consider the position of the second and third respondents.

Second and third respondents

[65] The second and third respondents have only a limited interest in this application. They have submitted, rightly so in my view, that they have no legal interest in whether a blanket order in terms of section 34(5)(b) is made in respect of the whole of the Remainder of Erf 912. However, their interest in the order relates only to the rights they have acquired in the land in question. Therefore, their interest is not whether the entire order of the Land Claims Court should be set aside, but rather whether it should be set aside insofar as it relates to their interest in the respective properties.

[66] What then is their interest in the Remainder of Erf 912? The second respondent is a lessee in terms of a lease concluded with the Municipality for a period of 60 years in respect of a property described as "proposed subdivisions of Erf 912 Mthatha". The lease

[44] Above n 8.

provides that the second respondent shall have a pre-emptive right to purchase the property. When the lease was concluded the parties agreed that the property would be developed by the second respondent as a shopping centre with motor showrooms and an office park.

[67] Later, with the consent of the Municipality, the second respondent planned to erect a casino, hotel and conference centre on the property. We are now told, that because of the delays occasioned by the land claims proceedings, the second respondent's original plans have fallen away and it has reverted to the intention of constructing a shopping centre on the property. No construction has thus far ensued from these plans.

[68] The third respondent has taken cession of the lessee's rights in a long term lease concluded with the Municipality in respect of a property described as "Erf 18647 Mthatha" (Erf 18647). The lease is for a period of 30 years with an option to renew for another 30 years. The third respondent has caused an enormous shopping complex to be erected on its leased property.

[69] Before this Court, the second and third respondents drew our attention to the terms of section 35(9) of the Restitution Act, which provides that any state land which is held under lease shall be deemed to be in the possession of the state for the purposes of section 35(1) of the Restitution Act. Accordingly, it was contended that the Land Claims Court may make an order for the restoration of the land to claimants, irrespective of the

lease. The order would be subject to a just and equitable compensation being paid to the lessee. The second and third respondents contended further that, in the absence of an order in terms of section 34(5)(b) of the Restitution Act, it is certainly possible that the land under the lease may be restored to the applicants or any other claimant.

[70] The legal contentions described in the previous paragraph cannot be faulted. There is indeed much to be said for the third respondent's contention that the restoration of its developed property to any other claimant is neither feasible nor in the public interest. The development is *a fait accompli*. This complex has a floor area of approximately 27 000 square metres. The building was completed before October 2007 at a cost of R165 million. The present value is estimated at R240 million and the third respondent's rights in and to the lease agreement have been mortgaged to Nedbank Ltd, securing a debt of R146 million. As we understand the papers, the complex is in daily use by members of the public. It provides communities access to facilities and amenities that were otherwise unavailable to them. There is no evidence on the record that the claimant communities would want to or have the skills to own or manage a complex of this magnitude. In any event, the stance of the communities has been that they do not seek restoration of developed and privately owned land.

[71] It was well within the authority of the Land Claims Court to make a tailored section 34(6) order only in respect of the land on which the third respondent holds a

registered long lease. It should have held, as we now do, that it would not be in the public interest and would be substantially prejudicial to the public to order restoration of that land of Erf 18647. The order should be limited to the cadastral description of Erf 18647 as described on the surveyed diagrams attached to the written lease.

[72] We have also applied our minds to the possibility of making an order customised to immunise the other developed and urbanised parts of Mthatha. However, it would be neither prudent nor possible to do so in this case because of the lack of geographical detail about the exact boundaries and features of the developed and undeveloped parts of the city. As we have noted, the tailored order we will make relating to the land under the registered long lease has been made possible by the surveyed and ascertainable boundaries of the land.

[73] We are unable to uphold the second respondent's opposition to the appeal on the ground that it is not feasible to restore to the applicant communities the land earmarked for a lease in their favour. This is so because the land has been neither surveyed and sub-divided nor developed. The existence of a lease that is yet to be put into operation may serve as a relevant factor when the Land Claims Court ultimately determines whether the land claims have any merit and, if so, whether to restore the land to the claimants or order another form of equitable redress.

Costs

[74] Section 34(9) of the Restitution Act provides:

> "Unless the Court orders otherwise, the applicant shall not be entitled to any order for costs against any other party."

The Land Claims Court made no order as to costs. Despite the provisions of section 34(9) the Supreme Court of Appeal ordered that the costs of the appeals be paid by the Commissioner and that the costs of the Municipality in the appeal be paid by the Commissioner. In each case costs include costs of three counsel.

[75] The Supreme Court of Appeal motivated the cost order along the following lines:

> "The regional commissioner, representing the state, was the prime mover in resisting the relief sought, initially in the LCC by the municipality, and on appeal by the municipality and Cape Gannet and Whirlprops. She launched the interdict proceedings referred to earlier. Her statutory report in terms of s 34(2) unequivocally took up the cudgels on behalf of the claimants insofar as undeveloped land in Mthatha was concerned and propounded the view that the claimants were entitled to the restoration of such land, notwithstanding the factor of 'feasibility'. She remained adamant in that stance in the answering affidavit to which she was the deponent. Reliance was placed on her stance by the other unsuccessful respondents. She was in short the driving force behind the litigation. Accordingly, Cape Gannet and Whirlprops, private litigants who achieved success in constitutional litigation against a government agency, the regional commissioner, are entitled to an order that she bear their costs on appeal."[45] (Footnote omitted.)

[45] Above n 24 at para 72.

[76] In an application under section 34, a Regional Commissioner has a well marked out role. A notice of the application must be given to the Commission. It must investigate and submit a report to court on whether the order should be granted.[46] Perforce, the report to court includes the Commission's assessment on the factors, listed in section 33 of the Restitution Act that may move a court in deciding the application. This means that a Regional Commissioner seized with the application must report on diverse factors including, as the Commissioner did in this case, whether restoration of the claimed land is feasible, whether major social disruption is likely to occur and importantly, whether restoration should be ordered.

[77] Added to these duties, the statute places several positive duties on a Regional Commissioner once a notice of the claim has been published.[47] These include duties related to the leasing and development of land under notice of a claim. The Commissioner's report and affidavits to the Land Claims Court were frank and firm and mainly in support of the claims of the applicant communities and in opposition to new developments undertaken without the consent of the applicant communities. None of her representations, in our view, justifies the censure against her as being a 'ring-leader' of the claimants. She did her job diligently and perhaps overzealously. That should be no

[46] Section 34(2) in relevant part provides that a notice of any such application shall be given to the Commission, which shall investigate and submit a report to the Court on the desirability of making an order referred to in subsection (1).

[47] See section 11 of the Restitution Act.

cause to lumber her office with an onerous cost bill. We are, therefore, entitled to interfere with the costs order of the Supreme Court of Appeal.

[78] It is the Municipality which brought everyone to court and it has not been successful. There is no reason why the costs should not follow the event, particularly in relation to private parties. We would order the Municipality to pay the costs of the applicant communities and the third respondent in the Land Claims Court, in the Supreme Court of Appeal and in this Court. It follows that we would set aside the adverse costs order made by the Supreme Court of Appeal against the Commissioner.

Order

[79] The following order is made:

1. Leave to appeal is granted.
2. The appeals of the Kwalindile Community (applicant in case number CCT 52/12) and the Zimbane Community (applicant in case number CCT 55/12) are upheld.
3. The order of the Supreme Court of Appeal is set aside.
4. The order of the Land Claims Court is set aside and in its place the following order is made:

   "1. The application for an order in terms of section 34(5)(c) of the Restitution of Land Rights Act, 22 of 1994 is dismissed.

2. The land on which Whirlprops 46 (Pty) Ltd (third respondent) holds a registered long lease, limited to Erf 18647 Mthatha, King Sabata Dalindyebo Municipality, District of Mthatha, in the Province of the Eastern Cape, measuring 2,7360 (two comma seven three six zero) hectares, shall not be restored to any claimant or prospective claimant."

5. King Sabata Dalindyebo Municipality (first respondent) is ordered to pay the costs of (a) Kwalindile Community (applicant in case number CCT 52/12), (b) Zimbane Community (applicant in case number CCT 55/12) and (c) Whirlprops 46 (Pty) Ltd (third respondent) in the Land Claims Court, the Supreme Court of Appeal and in this Court, including the costs of two counsel, where applicable.

For the Applicant in CCT 52/12:	Advocate A A Gabriel SC instructed by Magigaba Incorporated Attorneys.
For the Applicant in CCT 55/12:	Advocate J Krige and Advocate P G Beningfield instructed by Chris Bodlani Attorneys.
For the First Respondent:	Advocate S M Mbenenge SC, Advocate H S Havenga SC and Advocate A M da Silva instructed by Dayimani Sakhela Inc. Attorneys.
For the Second and Third Respondents:	Advocate C J Pamenter SC instructed by Cox Yeats Attorneys.