CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 127/13

In the matter between:

ISABEL JOYCE FLORENCE Applicant

and

GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA Respondent

Neutral citation:	*Florence v Government of the Republic of South Africa* [2014] ZACC 22
Coram:	Moseneke ACJ, Skweyiya ADCJ, Cameron J, Dambuza AJ, Froneman J, Jafta J, Khampepe J, Madlanga J, Majiedt AJ, Van der Westhuizen J and Zondo J
Heard on:	18 February 2014
Decided on:	26 August 2014
Summary:	Restitution of Land Rights Act 22 of 1994 — section 33 — purposes of equitable redress — method of escalating past loss to present-day value Restitution of Land Rights Act 22 of 1994 — section 35 — remedial powers — a court's power to award costs of erecting a memorial plaque

ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the Land Claims Court):

1. Leave to file the supplementary record is granted.
2. Condonation is granted.
3. Leave to appeal is granted.
4. Leave to cross-appeal is granted.
5. The appeal is dismissed.
6. The cross-appeal is upheld.
7. There is no order as to costs.

JUDGMENT

VAN DER WESTHUIZEN J (Cameron J, Froneman J and Majiedt AJ concurring, and Khampepe J concurring only on the cross-appeal):

Introduction

[1] "You can't repeat the past", the narrator says to Jay Gatsby in F Scott Fitzgerald's iconic novel.[1] Hopelessly romantic and ever optimistic, Gatsby responds: "Can't repeat the past? Why of course you can!" If only we could repeat, re-run or re-shape history to avoid the injustices of the apartheid era. But we cannot. Perhaps

[1] Fitzgerald *The Great Gatsby* (Charles Scribner's Sons, New York 1925) at 110.

the best that can be done is to try to redress past injustices by enacting and applying legislation under the Constitution of our young democracy to deal with some of the consequences of the apartheid regime's treatment of the majority of South Africans.

[2] The Promotion of National Unity and Reconciliation Act[2] is one example. The Restitution of Land Rights Act[3] (Restitution Act) is another. It represents an attempt to address evictions, forced removals and past dispossession of land. The Group Areas Act[4] – one of the cornerstones and most pernicious pieces of apartheid legislation – used race to determine the area in which people were allowed to live. Many were deprived of their homes and land because of the colour of their skin. The members of the Florence family are among them.

[3] One of the underlying questions is whether restitution should act as a means of reversing the injury itself, knitting the bones of history together as if no fracture had ever occurred, or instead as a salve for an ever-gaping wound. Section 25(7) of the Constitution[5] promises that persons or communities dispossessed of property as a result of racially discriminatory laws or practices are entitled to restitution of the property or to equitable redress. The Restitution Act provides for the fulfilment of this promise. Ms Florence, the applicant, asks this Court to decide what constitutes

[2] 34 of 1995. This Act set up the Truth and Reconciliation Commission. For examples of the Act's application, see *The Citizen 1978 (Pty) Ltd and Others v McBride* [2011] ZACC 11; 2011 (4) SA 191 (CC); 2011 (8) BCLR 816 (CC); *Du Toit v Minister of Safety and Security and Another* [2009] ZACC 22; 2009 (6) SA 128 (CC); 2009 (12) BCLR 1171 (CC); and *Azanian Peoples Organisation (AZAPO) and Others v President of the Republic of South Africa and Others* [1996] ZACC 16; 1996 (4) SA 671 (CC); 1996 (8) BCLR 1015 (CC).

[3] 22 of 1994.

[4] 77 of 1957.

[5] See below [42] for the wording of section 25(7).

equitable redress under the Restitution Act. Is it always appropriate for a court – when making an award in the form of financial compensation – to convert past property into present-day monetary terms using the Consumer Price Index (CPI)?[6] This is what the Land Claims Court did and the Supreme Court of Appeal confirmed. Ms Florence argues that this does not give sufficient effect to the right to restitution or equitable redress and applies for leave to appeal against the Supreme Court of Appeal's decision.

[4] The Government, the respondent, opposes the application. In addition, it applies for leave to cross-appeal and asks this Court to set aside the Supreme Court of Appeal's decision to order the state under the Restitution Act to bear the costs of a memorial plaque on the property, as a form of symbolic relief.

Issues

[5] The main appeal questions the concept of equitable redress under the Constitution and the Restitution Act. The cross-appeal requires us to decide whether interference with the Supreme Court of Appeal's discretion under the Restitution Act in directing the state to bear the costs of the erection of a memorial plaque is justified.

[6] Subsidiary questions are raised:

(a) Should condonation for the late filing of documents be granted?

[6] See below [54] for an explanation of the CPI.

(b) May this Court interfere with the exercise of discretion by the Land Claims Court and the Supreme Court of Appeal?

(c) Should leave to appeal be granted?

(d) What is the meaning of "equitable redress" in the Restitution Act? In light of this, what is the purpose of financial compensation?

(e) Is the CPI an appropriate means of converting past loss into present-day monetary terms?

(f) If not, are alternatives available?

(g) What is the significance of section 33 of the Restitution Act?

(h) Given the above, is interference with the Land Claims Court's exercise of discretion warranted?

(i) What order should follow if the decision by the Supreme Court of Appeal is set aside?

(j) Who should bear the costs of this application?

Factual background

[7] The Florence family lived in a house called Sunny Croft on Erf 44408 (the property) in present-day Rondebosch, Cape Town, from December 1952 until November 1970. On 9 January 1957 Mr Florence (the applicant's husband) and his two brothers entered into a written agreement to purchase the land from the owner, Dr Yeller. It was agreed that the purchase price was to be paid off in instalments every month for 13 years and 10 months. These instalments were met.

[8] The area in which the land was situated was classified a "White Group Area" in terms of the Group Areas Act which prevented the transfer of the property into Mr Florence's name, as he was not classified as "white". On 16 October 1970 Mr Florence, his brothers and Dr Yeller agreed to cancel the sale and the Florence family was refunded an amount of R1 350. Because of the area's classification and harassment by the authorities, the family was forced to leave in November 1970.

[9] On 14 December 1995 Mr Florence launched a restitution claim, in his own right and on behalf of his two brothers, in terms of the Restitution Act. The claim initially sought restoration of the entire plot of the property. Given subsequent development on the land, however, this was not feasible. The claim was therefore amended to seek equitable redress in the form of financial compensation, as well as the erection of a memorial plaque.

[10] In June 2009, after her husband died, Ms Florence was substituted in the claim as the applicant. In March 2010 she and the current owner of the property reached a private agreement in terms of which the current owner consented to the erection of a memorial plaque on the property and withdrew his opposition to the Florence family's claim. The Florence family approached the Land Claims Court for a determination of their claim, orders awarding them just and equitable compensation and the costs of erecting the memorial plaque.[7]

[7] Section 22 read with sections 38B and 35 of the Restitution Act.

Land Claims Court

[11] The case in the Land Claims Court turned on—

(a) the nature and extent of the 1970 loss (and the amount of compensation this warranted);

(b) the appropriate method for conversion for equitable redress;

(c) Ms Florence's claim for a *solatium*;[8]

(d) the costs of erecting the plaque; and

(e) the costs of litigation insofar as they had not been met by the Land Claims Commission.

Only (a) to (d) are relevant before this Court.

[12] The requirements for a claimant to qualify for restitution are listed in section 2 of the Restitution Act.[9] The Land Claims Court held that it was not in dispute that the

[8] *Hermanus v Department of Land Affairs: In re Erven 3535 and 3536, Goodwood* 2001 (1) SA 1030 (LCC) at para 16 explains that a *solatium* is "[a]n award for non-financial deprivation, irrespective of what form it takes". Outside the context of restitution, an award of a *solatium* is similarly defined as an award for sentimental damages that is "intended to neutralise the wounded feelings of the plaintiff of having to suffer a wrongful act." See Erasmus et al "Damages" in *LAWSA* 2 ed (2005) vol 7 at para 9.

[9] The relevant subsections read:

> "(1) A person shall be entitled to restitution of a right in land if—
>
> (a) he or she is a person dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices; or
>
> (b) it is a deceased estate dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices; or
>
> (c) he or she is the direct descendant of a person referred to in paragraph (a) who has died without lodging a claim and has no ascendant who—
>
> (i) is a direct descendant of a person referred to in paragraph (a); and
>
> (ii) has lodged a claim for the restitution of a right in land; or
>
> (d) it is a community or part of a community dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices; and
>
> (e) the claim for such restitution is lodged no later than 30 June 2019.
>
> (2) No person shall be entitled to restitution of a right in land if—

family had a right in land and that they were dispossessed of this right in terms of past racially discriminatory legislation. It further held that the family had effectively paid off the purchase price at the time of their dispossession and therefore should be compensated as the *de facto* owners of the property.

[13] The Land Claims Court then determined the extent of the loss.[10] Despite receiving R1 350 from Dr Yeller, the Land Claims Court found that the Florence family had been under-compensated for their dispossession by R30 513 as at October 1970. Thus the R1 350 could not be considered just and equitable compensation for the property so as to disqualify the Florence family from bringing a restitution claim under the Restitution Act.[11]

[14] Having regard to the purposes of the Restitution Act, the need to give its provisions a generous interpretation, as well as the factors listed in section 33,[12] the

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> (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."

[10] The actual amount due in financial compensation, according to the Land Claims Court, was the agreed market value at the time of the sale, plus the removal costs, minus the agreed compensation received from Dr Yeller at the time of cancellation. The Land Claims Court did not consider the amount refunded to the Florence family by Dr Yeller to be just and equitable compensation.

[11] Section 2(2)(a). See above n 9.

[12] Section 33 reads:

> "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;

Land Claims Court found that it would be just and equitable to convert the family's 1970 financial loss to its present-day value in order to accommodate "changes over time in the value of money", as captured in section 33(eC) of the Restitution Act.

[15] This raised the issue regarding the most appropriate method for conversion, which primarily involved the interpretation of section 33(eC). The Land Claims Court followed its own precedent in *Farjas LCC*[13] and found that using the CPI for conversion accords with the proper interpretation of the phrase "changes over time in the value of money",[14] which is "what a person can buy with the money".[15]

[16] The Court found that "changes over time in the value of money" entails concepts different from an investment. An investment relates to interest earned from

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(cA) If restoration of a right in land is claimed, the feasibility of such restoration;

(d) The desirability of avoiding major social disruption;

(e) Any provision which already exists, in respect of the land in question in any matter, for that land to be dealt with in a manner which is designed to protect and advance persons, or categories of persons, disadvantaged by unfair discrimination in order to promote the achievement of equality and redress the results of past racial discrimination;

(eA) The amount of compensation or any other consideration received in respect of the dispossession, and the circumstances prevailing at the time of the dispossession;

(eB) The history of the dispossession, the hardship caused, the current use of the land and the history of the acquisition and use of the land;

(eC) In the case of an order for equitable redress in the form of financial compensation, changes over time in the value of money;

(f) Any other factor which the Court may consider relevant and consistent with the spirit and objects of the Constitution and in particular the provisions of section 9 of the Constitution."

The Court found that the most relevant of these factors were section 33(b), (c), (eA), (eB) and (eC).

[13] *Farjas (Pty) Ltd v Minister of Agriculture and Land Affairs and Others*; *Rainy Day Farms (Pty) Ltd v Minister of Agriculture and Land Affairs and Others* [2011] ZALCC 22 (*Farjas LCC*) at para 27.

[14] Section 33(eC) of the Restitution Act.

[15] *Florence (Dodgen) v Government of the Republic of South Africa and Another* [2013] ZALCC 11 (Land Claims Court judgment) at para 32.

money. Interest accrues as the proceeds of money and is not its actual value; the value of money is not changed because interest is earned. Since interest is conceptually different from the value of money as stated in section 33(eC), an investment index is not a suitable method for conversion. The CPI measures the actual value of money and is therefore more appropriate. On the basis of this calculation, the Land Claims Court determined Ms Florence's under-compensation to be R1 488 890.

[17] In addition to this award, the Land Claims Court gave Ms Florence R10 000 as a *solatium*, in recognition of the emotional hardship and trauma of forced removal and in acknowledgement of the family's dignity and worth.[16] But it declined to find in her favour on the memorial plaque. First, the Court held that it lacked jurisdiction because the issue was subject to a private agreement between the current landowner (who was the first respondent in the case before the Land Claims Court) and Ms Florence. Second, the Court held that there was no need to decide the issue, since it had already awarded a *solatium* which served a similar purpose to an award for the costs of erecting a memorial plaque.

Supreme Court of Appeal

[18] Ms Florence appealed to the Supreme Court of Appeal on the—

(a) use of the CPI as a method of conversion;

(b) costs of erecting the memorial plaque; and

[16] In this regard the Court found it relevant that the Florence family were members of the Black River Community. The Black River Community was all but wiped out due to forced removals in terms of the Group Areas Act.

(c) costs of litigation insofar as they have not been met by the Land Claims Commission.

[19] The Supreme Court of Appeal regarded itself bound by its own decision in *Farjas*,[17] which confirmed the finding in *Farjas LCC* that the Land Claims Court is entitled to use the CPI to determine changes over time in the value of money. It held that the Land Claims Court did not misdirect itself in applying the CPI.

[20] However, the Supreme Court of Appeal did not agree with the Land Claims Court that it had no jurisdiction to order payment of the costs of the memorial plaque. It found that the agreement between Ms Florence and the current landowner did not entail a waiver of any right she had to claim the costs of erecting the plaque from the state.

[21] Instead, the Supreme Court of Appeal held that the Land Claims Court had jurisdiction to decide this issue because of its remedial powers under the Restitution Act, which include ordering the payment of "any alternative relief".[18] The Supreme Court of Appeal held that the order to pay for the memorial plaque qualifies as alternative relief because it is of symbolic significance and spiritual importance to the family and addresses the hurt and injustice they suffered.

[17] *Farjas (Pty) Ltd v Minister of Agriculture and Land Affairs and Others* [2012] ZASCA 173; 2013 (3) SA 263 (SCA) (*Farjas*) at para 16. The reasoning of the Supreme Court of Appeal in this case was that the evidence of the experts, who found that the CPI was inappropriate, was purely from an investment perspective. The Court held that in deciding compensation in terms of the Restitution Act, the question is not about investment but rather about what amount would be equitable redress having regard to the historic and social injustice of the past and the factors in section 33 of the Restitution Act.

[18] Section 35.

[22] Finally, since each party had been partially successful, the Supreme Court of Appeal concluded it was fair and just that each party pay its own costs. Ultimately, however, section 29(4) of the Restitution Act[19] meant that the Land Claims Commission was responsible for the costs of the litigation.

Condonation

[23] Ms Florence filed a supplementary volume of documents late, the day before the hearing. This Court's practice directions require that, if a party files additional documents which are not part of the record, it should be done at least ten days prior to the hearing. Ms Florence applied for condonation for this late filing. The application is not opposed, nor does the late filing cause prejudice or adversely affect the administration of justice. I would grant condonation.

Leave to appeal – main appeal

[24] Restitution of land rights and land reform "sit in the heartland of the protective, restitutionary and land reform design of section 25 of the Constitution."[20] This matter requires that the Restitution Act, which gives content to section 25(7) of the Constitution, be interpreted. It is also in the interests of justice to grant leave to

[19] Section 29(4) reads:

> "Where a party cannot afford to pay for legal representation itself, the Chief Land Claims Commissioner may take steps to arrange legal representation for such party, either through the state legal aid system or, if necessary, at the expense of the Commission."

[20] *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) (*Goedgelegen*) at para 32. And see *Mphela and Others v Haakdoornbult Boerdery CC and Others* [2008] ZACC 5; 2008 (4) SA 488 (CC); 2008 (7) BCLR 675 (CC) at para 24 where this Court held that the interpretation of the Restitution Act raises a constitutional issue as it gives effect to section 25(7) of the Constitution.

appeal. The Land Claims Court is a specialist court[21] exercising power in a forum "where the conflicting values as embodied in the constitutional property clauses take on concrete form."[22] This Court has held that it would be slow to hear appeals from specialist courts unless important issues of principle are raised.[23] The Land Claims Court's interpretation of section 33 of the Restitution Act, which was confirmed by the Supreme Court of Appeal, raises important issues.

[25] Although many were dispossessed of their property under apartheid, this Court still has to determine an appropriate approach for measuring compensation under the Restitution Act. Certainty on the contours and content of equitable redress under the Restitution Act would benefit the broader public, which has an interest in how such claims are resolved given South Africa's "historical chasm on the issues of land dispossession and land restitution."[24] This case raises important issues of principle with large practical effects. Even though this judgment may not formulate a precise test for determining financial compensation in all cases, greater direction should be given.[25] There are also reasonable prospects of success regarding whether the Land Claims Court and the Supreme Court of Appeal applied the CPI rigidly and formalistically. It is therefore in the interests of justice to grant leave to appeal.

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[21] *Goedgelegen* id at para 84.

[22] Mostert *The Relevance of Constitutional Protection and Regulation of Property for the Private Law of Ownership in South Africa and in Germany* (LLD dissertation, University of Stellenbosch 2000) at 311.

[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 30-1.

[24] *Goedgelegen* above n 20 at para 32.

[25] On the relevance of legal certainty for the interests-of-justice test see, for example, *Radio Pretoria v Chairperson, Independent Communications Authority of South Africa and Another* [2004] ZACC 24; 2005 (4) SA 319 (CC); 2005 (3) BCLR 231 (CC) at para 22.

Interference in the exercise of discretion

[26] It has to be determined whether this Court may interfere in the exercises of discretion of the Land Claims Court and the Supreme Court of Appeal. Generally, an appeal court may interfere with a lower court's exercise of discretionary power only if that power was not properly exercised.[26] In the context of restitution this principle has been emphasised by the courts.[27] Discretionary power is not exercised judicially if applied capriciously; if the court was moved by a wrong principle of law or an incorrect appreciation of the facts; if it did not bring its unbiased judgment to bear on the issues; or if it did not act for substantial reasons.[28] As to the main appeal, I return to this question after a more thorough analysis of the decisions and the relevant legal issues. But it is convenient first to examine whether the Supreme Court of Appeal's exercise of discretion in ordering the state to pay for the memorial plaque should be overturned. This is what the Government asks for in the application to cross-appeal.

Leave to appeal – cross-appeal

[27] The Government argues that neither the Land Claims Court nor the Supreme Court of Appeal has jurisdiction to order the state to pay the costs for the erection of a memorial plaque, because the settlement agreement between the landowner and Ms Florence was a private affair in which the state had no role. It further contends

[26] *Ferris and Another v FirstRand Bank and Another* [2013] ZACC 46; 2014 (3) SA 39 (CC); 2014 (3) BCLR 321 (CC) at para 28.

[27] *Mphela* above n 20 at para 26 and *Farjas* above n 17 at para 16.

[28] *Giddey NO v J C Barnard and Partners* [2006] ZACC 13; 2007 (5) SA 525 (CC); 2007 (2) BCLR 125 (CC) (*Giddey*) at para 19; *General Council of the Bar of South Africa v Geach and Others* [2012] ZASCA 175; 2013 (2) SA 52 (SCA) (*Geach*) at paras 58-61; *Kekana v Society of Advocates of South Africa* [1998] ZASCA 54; 1998 (4) SA 649 (SCA) at 654E-G; and *Ex Parte Neethling and Others* 1951 (4) SA 331 (A) at 335D-E.

that the Supreme Court of Appeal failed to consider that the forced removal of the community to which the Florence family belonged has already been recognised in the District Six Museum. Payments to the Florence family will be coming from the public purse. Given that other legislation like the National Heritage Resources Act[29] (NHRA) exists to preserve South African heritage, the Government maintains that the Supreme Court of Appeal's order overstepped the Court's authority.

[28] Ms Florence contends that the Supreme Court of Appeal's interpretation of section 35(1)[30] of the Restitution Act was within its discretion, given the vast remedial powers conferred by this section. Moreover, the Supreme Court of Appeal's substitution of its own decision for that of the Land Claims Court was the judicial exercise of discretion.[31] There are no grounds for this Court to substitute its preferences for those of the Supreme Court of Appeal.

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[29] 25 of 1999.

[30] Section 35(1) provides that the Land Claims 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 programme for housing or the allocation and development of rural land;
>
> (e) the grant to the claimant of any alternative relief."

[31] *Dikoko v Mokhatla* [2006] ZACC 10; 2006 (6) SA 235 (CC); 2007 (1) BCLR 1 (CC) at paras 59-60 and *S v Basson* [2005] ZACC 10; 2007 (3) SA 582 (CC); 2005 (12) BCLR 1192 (CC) at para 110.

[29] The Supreme Court of Appeal correctly decided that the Land Claims Court mistakenly held that it lacked jurisdiction. The mere fact that the landowner agreed to permit the erection of a memorial plaque does not preclude the Land Claims Court's remedial discretion. The contract simply established that the family is not prohibited from erecting the plaque. Nor does directing the state to pay for the plaque infringe privity of contract or force the state into the private relationship between Ms Florence and the landowner. It merely obliges the state to cover certain costs, up to a prescribed limit – and a fairly modest one at that. Both the Land Claims Court and the Supreme Court of Appeal therefore had jurisdiction to exercise their remedial discretion.

[30] The Government's argument that the NHRA deprives courts of jurisdiction also fails to persuade. Although the NHRA empowers heritage authorities to manage the national estate, nothing in the statute or its wording gives these authorities exclusive power or implies that they have sole jurisdiction to direct the establishment of memorials, so as to preclude a court from ordering the erection of a plaque. A close reading of the NHRA (particularly sections 3, 30 and 35) reveals that the authorities perform largely administrative and organisational functions. Moreover, there is no precedent that supports the interpretation that the authorities have sole jurisdiction to the exclusion of courts. Two statutory presumptions accord with this view. First, Acts should be read harmoniously – nothing in the NHRA contradicts this presumption. Therefore, a court's wide remedial powers under the Restitution Act

and the provisions of the NHRA should be read together.[32] Second, there is a presumption against ousting a court's jurisdiction. In *Metcash Trading Limited* the Court stated:

> "Although the [Value-Added Tax] Act vests jurisdiction to vary or set aside assessments . . . there is nothing in section 36 to suggest that the inherent jurisdiction of a High Court to grant appropriate other or ancillary relief is excluded. The section does not say so expressly nor is such an ouster necessarily implicit in its terms, while it is trite that there is a strong presumption against such an implication."[33]

[31] This Court will refrain from setting aside a decision on appeal if the only reason is that it would have come to a different conclusion on the facts.[34] Moreover, this Court has held that determining compensation in a particular case (especially for sentimental damages) involves the exercise of a discretion, in which the Court will be particularly reluctant to intervene. In *Dikoko* (dealing with the law of defamation) a majority of the Court declined to interfere with damages awarded by a lower court.

[32] Moseneke J wrote:

> "It must however be emphasised that the mere fact that the damages seem high is no reason to cut them down. In other words, the mere preference of a court with appellate power is not sufficient to upset a damages award. The standard at issue is

[32] See *Petz Products (Pty) Ltd v Commercial Electrical Contractors (Pty) Ltd* 1990 (4) SA 196 (C) at 204H-I (applied in *Arse v Minister of Home Affairs and Others* [2010] ZASCA 9; 2012 (4) SA 544 (SCA); 2010 (7) BCLR 640 (SCA) at 558) and *Kent NO v South African Railways and Another* 1946 AD 398 at 405.

[33] *Metcash Trading Limited v Commissioner, South African Revenue Service, and Another* [2000] ZACC 21; 2001 (1) SA 1109 (CC); 2001 (1) BCLR 1 (CC) at para 43 (discussing the Value-Added Tax Act 89 of 1991 in relation to a court's ability to grant ancillary relief).

[34] *Mphela* above n 20 at para 26 and *Farjas* above n 17 at para 27.

> not whether or not the trial court is correct but whether there is a glaring disproportionality between the amount awarded and the injury to be assuaged."[35]

He further stated that a court, when evaluating an appeal related to an award of damages, should consider the judgment as a whole to ascertain how the quantum had been determined.[36] The memorial plaque is a form of remedy, akin to damages, over which the Land Claims Court and the Supreme Court of Appeal have a wide discretion.

[33] Section 35(1) of the Restitution Act sets out the relief which the Court may order. There are several options but no indication whether they are conjunctive or disjunctive and therefore no indication whether a court can order several forms of relief in section 35(1) or just one form. "Alternative relief" in section 35(1)(e) is similarly ambiguous. It could mean relief that is different from and mutually exclusive to the relief in section 35(1)(a) to (d). However it could also mean relief that is different from – not the same as – but not mutually exclusive to the relief in section 35(1)(a) to (d). In other words, section 35(1)(e) does not necessarily have to exclude any of the relief mentioned in the earlier sections. If the first interpretation is preferred, a court could never award different forms of relief together and the court's remedial powers would be unduly constrained. I favour the second interpretation, that a court can order relief in terms of section 35(1)(a) to (d) together with "alternative relief" in terms of section 35(1)(e). This interpretation accords with this Court's

[35] *Dikoko* above n 31 at para 95.

[36] Id at para 97.

recognition that section 35 generally confers extensive remedial powers.[37] And it is in line with the generous, rather than formalistic, interpretation of the Restitution Act, which best achieves its purposes.[38]

[34] The costs of the memorial plaque fall under section 35(1)(e) because it is a form of relief alternative, but not mutually exclusive, to an award of financial compensation which falls under section 35(1)(c). The Land Claims Court had broad discretion to determine an appropriate remedy and, accordingly, to award both forms of relief; as did the Supreme Court of Appeal. There is no reason to interfere with the Supreme Court of Appeal's discretion.

[35] Restitution is not only directed at righting the wrongs of spatial apartheid, but also at carrying out "important symbolic work by acknowledging histories of injustice and their impacts on individuals, families, and communities."[39] The Government itself recognised in argument that a *solatium* may be awarded by a court to recognise the dignity and worth of those who have been affected by forced dispossessions.

[36] It cannot, then, be said that the Supreme Court of Appeal's exercise of discretion fell outside the ambit of the purposes of the Restitution Act. Nor can it be said that the Supreme Court of Appeal failed to take into account relevant balancing

[37] *Goedgelegen* above n 20 at para 84.

[38] Id at para 53 and *Richtersveld Community and Others v Alexkor Ltd and Another* [2004] ZALCC 9; 2001 (3) SA 1285 (LCC) (*Richtersveld Community*) at para 36. Note that although *Richtersveld Community* was overturned on appeal this particular point remains unassailed.

[39] Hall "Reconciling the Past, Present and Future" in Walker et al (eds) *Land, Memory, Reconstruction and Justice: Perspectives on Land Claims in South Africa* (Ohio University Press, Athens 2010) at 17.

factors. It considered countervailing factors like the significance of the plaque for the Florence family and other families from the area and the possibility of usurping the functions of other state institutions. The exercise of discretion is not mechanical and a court does not have to check a laundry list of factors in order to decide properly.

[37] There is no reason to interfere with the Supreme Court of Appeal's exercise of discretion. Leave to cross-appeal should be refused.

Restitution and equitable redress

[38] Was the Land Claims Court's use of the CPI as a dispositive factor when determining equitable redress in the form of financial compensation appropriate? This hinges on the purpose of equitable redress, linked to the right to restitution, contained in the Restitution Act.

[39] Ms Florence argues that the purpose of equitable redress is to place the dispossessed owner in the position she would have been in if the land had not been taken. She contends that, although the Land Claims Court seems to accept this, its ultimate conclusion that "changes over time in the value of money" means "what a person can buy with money" – rather than interest on an investment – conflicts with this purpose.

[40] The Government states that, in line with section 2(2) of the Restitution Act,[40] compensation must make up for what was taken away at the time of dispossession. It is not the aim of equitable redress in the form of financial compensation to place a claimant in current terms in the position they would have been in had the dispossession not occurred. Further, section 25(3) of the Constitution[41] and section 33 of the Restitution Act[42] provide the factors that must be considered when determining if compensation is just and equitable. These include the general interests of the state and society. Thus, argues the Government, the Land Claims Court's decision correctly balanced these interests in ordering compensation equivalent to the value of the land taken at the time of dispossession, which is all the Restitution Act requires.

[41] It should be acknowledged that even restoration could not knit together the bones of history. The brutality of apartheid irreparably smashed them. The loss is more than money or interest on an investment. Even restoration of the property could hardly repair the deprivation of years during which Ms Florence and many others

[40] See above n 9.

[41] Section 25(3) provides:

> "The amount of 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 expropriation."

[42] See above n 12.

were unable to live in their chosen homes, and the communities that were broken apart, because of racist legislation and policies – less so redress in the form of money.

[42] What then is the purpose of equitable redress? The right to claim restitution of, or equitable redress for, dispossessed property derives from the Bill of Rights. 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*." (Emphasis added.)

[43] The Restitution Act similarly defines restitution of a right in land as either restoration of a right or equitable redress.[43] Equitable redress is—

> "any equitable redress, other than the restoration of a right in land, arising from the dispossession of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices, including—
> (a) the granting of an appropriate right in alternative state-owned land;
> (b) the payment of compensation".

A court interpreting the term "equitable redress" must (or "shall" as stated in the Restitution Act) "have regard to" a number of factors listed in section 33 in reaching its decision.[44]

[43] Section 1 of the Restitution Act. There is a difference between the terminology used in section 25(7) of the Constitution and section 1 of the Restitution Act. The Restitution Act uses "restoration" to refer to what the Constitution identifies as "restitution", namely the return of the land or a portion of the land. The Restitution Act uses "restitution" to refer to either restoration or equitable redress in the form of financial compensation. This difference does not seem material, since both sections are referring to a specific remedy: the return of the whole – or at least a portion of – the property of which persons were previously dispossessed. This judgment uses "restoration" as it is used in the Restitution Act.

[44] Any determination of appropriate "equitable redress" has to be case-sensitive, as the term is broad. It would not be wise to lay down rigid rules for how it should be understood.[45] This does not mean, however, that we cannot give content to the term, particularly in light of the purposes of the Restitution Act. Thus, I discuss what the Restitution Act aims at in principle. This enquiry logically precedes how we should go about achieving these purposes (including, for example, whether the CPI is an appropriate tool for doing so).

[45] This Court has stated that "[t]he Restitution Act must be understood purposively because it is remedial legislation umbilically linked to the Constitution."[46] When interpreting it, the spirit, purport and objects of the Bill of Rights must be promoted.[47] In *Alexkor* it held that the Restitution Act operates both on a wide public scale and a particularised individual one:

> "[A]lthough it is clear that a primary purpose of the Act was to undo some of the damage wreaked by decades of spatial apartheid, and that this constitutes an important purpose relevant to the interpretation of the Act, the Act has a broader scope. In particular, its purpose is to provide redress to those individuals and communities who were dispossessed of their land rights by the government because

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[44] See above n 12 for the wording of section 33.

[45] *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) (*Concerned Land Claimants*) at para 26:

> "What is appropriate property restitution or equitable redress in response to historical dispossession is bound to vary and be subject to the specific context."

[46] *Goedgelegen* above n 20 at para 53.

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

> of the government's racially discriminatory policies in respect of those very land rights."[48]

[46] Given these purposes, what should we make of Ms Florence's argument that because the Restitution Act permits both restoration and equitable redress, the latter should generally be equivalent to the former? In *Mphela* this Court held that "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."[49] This recognises the primacy of restoration. Equitable redress, including in the form of financial compensation, is generally "second prize". In *Goedgelegen* the Court noted that "the Restitution Act is an enactment intended to express the values of the Constitution and to remedy the failure to respect such values in the past, in particular, the values of dignity and equal worth."[50] In keeping with the ideal and constitutional value of equality, it seems that all claimants are entitled to at least roughly equivalent compensation – whether or not restoration of the land is possible.

[47] In this context we must consider the parties' arguments regarding the time at which compensation must be determined. Should the claimant be compensated in a way that puts her in the same position she would have been in measured: (a) at the time of dispossession (that is as if she had been compensated immediately after

[48] *Alexkor Ltd and Another v Richtersveld Community and Others* [2003] ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) (*Alexkor*) at para 98.

[49] *Mphela* above n 20 at para 32.

[50] *Goedgelegen* above n 20 at para 55.

dispossession); or (b) at the time of actual compensation?[51] The first scenario is argued for by the Government and seems to have been adopted by the Land Claims Court.[52] The second is argued for by Ms Florence. In my view the second option better accords with the purposive scheme of the Restitution Act for a number of reasons.

[48] First, the law's default position is that anyone whose property is taken must be justly compensated.[53] In *Goedgelegen* this Court noted that, in the context of the Restitution Act, "[w]e must prefer a generous construction over a merely textual or legalistic one in order to afford claimants the fullest possible protection of their constitutional guarantees."[54] So, in these circumstances, is it just to compensate an individual for the amount she *ought* to have been paid at the time of dispossession and calculate what that amount would be worth at the time of compensation? Such a conclusion may seem to correspond with the wording of section 33(eC).[55] But it does not provide the fullest possible protection of constitutional guarantees. After all, *just and equitable compensation* was *not* made at the time of dispossession. It should be

[51] This issue has not been definitively determined. The Supreme Court of Appeal in *Haakdoornbult Boerdery CC v Mphela and Others* [2007] ZASCA 69; 2007 (5) SA 596 (SCA) (*Haakdoornbult*) at para 48 stated that the "purpose of giving fair compensation is to put the dispossessed, insofar as money can do it, in the same position as if the land had not been taken." On appeal, this Court endorsed the Supreme Court of Appeal's opinion and found no reason to interfere with its discretion. See *Mphela* above n 20 at para 50. Still, the point in time of the "same position" to which the dispossessed must be returned has never been pinned down.

[52] The Land Claims Court interprets *Haakdoornbult* id, which focused on whether a party received compensation to the extent that she is excluded by section 2(2) of the Restitution Act from equitable redress or restoration of land (because she already received compensation or any other consideration which was just and equitable), as requiring position (a). But Ms Florence was not excluded by section 2(2) of the Restitution Act, and so this approach fails to persuade.

[53] See generally section 25(3) of the Constitution. For a Land Claims Court decision that goes a bit further, see *Hermanus* above n 8 at para 25 where the Court stated that "on ordinary principles of justice, a person who, under compulsion of law, has his property taken from him, should be compensated in full".

[54] *Goedgelegen* above n 20 at para 53.

[55] See n 12 above.

acknowledged that, although just and equitable compensation ought to have happened at the time of dispossession, it did not. The dispossessed person did not have the power to use the repayment money as she wished for more than four decades. In fact, the Florence family was forced to cancel their purchase of the property because of apartheid legislation – an appropriate amount hardly came into the picture.

[49] Measuring the position at the time that actual compensation takes place allows the dispossessed person to benefit from the appreciation of the land, or the interest that would likely have accrued on the monetary value of the property, had they received just compensation, in the intervening years. The claimant ought to receive this benefit because she was deprived of a low-risk, interest-accruing, long-term asset, namely property. It seems unjust to strip someone of such an asset and to replace it with the present-day equivalent of a non-interest-accruing amount 44 years later.

[50] Second, if the law prefers restoration of land above equitable redress, then – when the former is not feasible – equitable redress should generally aim to put claimants in as good a position as restoration. Were this not the case, again, there would be compounded injustice: the claimant does not have the actual property (which of course will also often mean that part of the important symbolic aim of restitution is not vindicated) *and* she will not be placed in as good a financial position as she would have been had restoration occurred. The ideal of equality before the law between those fortunate enough to have their property restored and those who have to settle for compensation would not be achieved. Because compensation assessed at the time of

dispossession will usually be less than compensation assessed at the time of actual compensation, the former is more likely to lead to an irrational disparity between a claimant whose property is restored and one who receives financial compensation.

[51] Third, using the actual time of compensation is more in line with the approach to restitution found in precedent.[56] None of the cases this Court has heard explicitly dealt with equitable redress in the form of financial compensation.[57] However, the principles espoused indicate that claimants should be treated as generously as possible. There is little reason why claimants entitled to restoration should be treated more favourably than those who have no option of restoration.

[52] It is helpful to consider foreign law when dealing with a right recognised in the Bill of Rights.[58] Some countries compensate claimants for restitution based on the market value of property at the time of adjudication of the restitution. A review of the countries that provide for restitution under national laws[59] reveals that many adopted a position similar to measuring compensation at the time of actual compensation.[60]

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[56] See *Haakdoornbult* above n 51, which this Court affirmed in *Mphela* above n 20 at paras 50-9.

[57] Id. See also *Kwalindile Community v King Sabata Dalinyebo Municipality and Others; Zimbane Community v King Sabata Dalinyebo Municipality and Others* [2013] ZACC 6; 2013 (6) SA 193 (CC); 2013 (5) BCLR 531 (CC) (*Kwalindile*); *Goedgelegen* above n 20; *Concerned Land Claimants* above n 45; *Alexkor* above n 48; and *Transvaal Agricultural Union v Minister of Land Affairs and Another* [1996] ZACC 22; 1997 (2) SA 621 (CC); 1996 (12) BCLR 1573 (CC).

[58] Section 39(1)(c) of the Constitution provides: "When interpreting the Bill of Rights, a court, tribunal or forum . . . may consider foreign law."

[59] This Court solicited responses to restitution-related questions from the Venice Commission, an organization of 68 countries – including those considered observers, associate members, and of a special status – and had eight responses from countries that provide for restitution under national laws. Of these eight, however, only seven provided pertinent information regarding calculation of compensation.

[60] It seems that Poland, Macedonia, Azerbaijan and Chile provide financial compensation at least equivalent to market value, where market value is measured either at the time the law was passed or at the time compensation was paid. Croatia has an established limit for the amount of compensation, which does not track market value,

[53] A key component in giving content to equitable redress, considering South African as well as foreign law and practices, is that a claimant should generally be placed in the position that she would have been in, but for dispossession. Of course, it cannot be determinative in every case, as it may not be possible or desirable for a claimant to be compensated fully so as to place her in that position. Many things might have changed over time. Section 33 of the Restitution Act allows for this by setting out the factors to which a court must have regard, some of which may tip the scale in a fact-sensitive enquiry. It therefore seems that measuring at the time of compensation, rather than at the time of dispossession, is generally preferable, in view of the purpose of the Restitution Act. The difference between the two points in time may or may not matter in every case though.

The CPI

[54] The judgments of the Land Claims Court and the Supreme Court of Appeal give exclusive predominance to the CPI. Published monthly by Statistics South

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and does not provide a helpful guideline with regard to the appropriate time at which compensation should be calculated. The Czech Republic compensates claimants based on the purchase price and related costs, though if the market value of the property has increased, claimants are compensated at higher rates. This approach corresponds more closely with measuring compensation at the time of actual compensation because it takes into consideration the present-day value of a home in determining appropriate compensation.

Some countries have specific regard for the CPI in compensating for wrongful property loss. In Chile, for example, individuals dispossessed of real estate are compensated according to the market value of the property at the time the law providing for restitution was published, deducting the value of improvements made to the property after confiscation, and having consideration for the subsequent inflation rate. In other words, the country also uses the time of actual compensation as a marker for real estate claims, but in a varied way: rather than allowing a claimant to establish market value at the time of the claim, a claimant is allowed to establish market value at the time the restitution legislation was passed. Were we to adopt a similar position in South Africa, Ms Florence's financial compensation would be equivalent to the market value of the property in 1994, rather than at the time of dispossession in 1970. In Poland, assessing compensation at the time of actual compensation is more clearly adopted. The amount of compensation for unlawful expropriation to which a claimant is entitled is determined based on the market value of the property at the time of adjudication of the claim. This compensation is reduced to account for the amount of money a claimant was paid at the time of dispossession.

Africa, it aims to measure changes over time in the prices of consumer goods and services that households acquire, use or pay for. It measures the changes in the price for a "market basket of consumer goods", which is a representative sample of what households buy and includes a broad array of goods and services. While it includes some housing-related considerations – such as furnishings, rent, maintenance, household equipment and other owner-occupier housing costs[61] – it also covers a wide range of other consumables.[62] The CPI quantifies inflation, which affects the amount of goods and services a household can buy with money.

[55] Ms Florence argues that the CPI is an inappropriate method of calculation because it does not achieve equitable redress and therefore fails to give effect to the purposes of the Restitution Act and, in particular, of financial compensation. She contends that money used as investment in property is different from money used for consumption. The former is a low-risk investment and amounts to savings. Because the CPI measures consumption rather than investment it is not appropriate for calculating compensation for deprivation of property. Because it does not compensate for the capital gain in the value of the property, it results in an irrational disparity between the value of restitution in the form of restoration and in the form of financial compensation. The money awarded as financial compensation calculated by using the

[61] Interestingly, owner-occupier housing costs form the largest single piece of the South African CPI, but the investment component of home ownership is excluded from the CPI, as the index is used to measure spending. See Statistics South Africa "Consumer Price Index: The South African CPI Sources and Methods Manual" (2013) version 2, available at http://www.statssa.gov.za/CPI/index.asp, at 22 and 34.

[62] These include food, beverages, tobacco, clothing, furnishings, health, transport, communication, recreation and culture, education, restaurants and hotels, and other miscellaneous goods and services. Id at 3.

CPI would not, she says, be sufficient to enable her to buy a property anywhere near equivalent to what the Florence family lost.

[56] According to Ms Florence, using the CPI also under-compensates the poor, because it is biased toward spending patterns of wealthier households. It fails to take account of the fact that the impact of inflation is more deeply felt by poorer families. She contends that "changes over time in the value of money" in section 33(eC) of the Restitution Act should not be interpreted to mean the CPI, but rather to require an investment metric.

[57] The Government argues that section 33(eC) was correctly interpreted to refer to the CPI, which is the proper indicator of the measure of the value of money over time. Furthermore, using the CPI better achieves the balance between the public interest (as it would protect the public purse from larger payouts) and the interests of those affected, as mandated by section 25(3) of the Constitution. Ms Florence has not presented evidence that the money awarded to her would be insufficient to purchase a home and there is no proof on the record that the Florence family falls within lower-earning brackets; and so her contention that using the CPI under-compensates the poor is inapposite.

[58] Neither of the parties disputes that the CPI relates principally to consumption and is not an investment benchmark. Their approach is correct.

[59] First, the CPI does not track changes in the immovable property market, both because housing costs are only one of many items in the basket of goods and services and because it measures expenditure rather than returns on investment. The fact that the CPI is intended to measure inflation in relation to spending makes it inadequate for determining the amount of financial compensation for the loss of an asset like a home. Homes are unique because they are the largest investment made by most individuals. While they are not typically purchased simply for their investment value, the appreciation of real estate is often one of the primary reasons individuals choose to buy rather than rent a home and to make a large down-payment.

[60] Ms Florence's argument that money may be used either for savings or consumption is persuasive. Money used as investment in a property works differently from money used for consumption, in that the former is a low-risk, long-term investment and amounts to savings. The CPI inadequately reflects this. The Land Claims Court's approach provides an amount of money sufficient to buy the same basket of consumer goods today as the Florence family could have bought had they been financially compensated in 1970. But this fails to appreciate that they were not fully compensated in 1970 and were prohibited from using the money as they wished. The amount of money reached by using the CPI is unlikely to be sufficient to buy either the property lost or an equivalent property. It seems that using the CPI – a non-investment metric – to calculate the value of property which, critically, yields investment value over time, is inapt.

[61] Second, using the CPI may result in a disparity between claimants who have their property restored and claimants who can only receive financial compensation. As argued earlier, if restoration of land, rather than equitable redress, is given primacy it should be true that, as a starting point, equitable redress should ordinarily put people in a position similar to restoration. Using the CPI as a means of achieving equitable redress in the form of financial compensation may often fail to put a claimant in this position. Because it measures inflation rather than capital gains on an investment, claimants may be compensated less than they would have been, had they received the property itself.

[62] Third, the CPI is a fairly blunt instrument for equitable redress, as it uses a nominal basket of goods not consumed by everyone. The data put forward by Ms Florence to show that the CPI is insensitive to the impact inflation has on poorer households is convincing. This is in part because the larger percentage of income that poorer families spend on food, is subject to greater price fluctuations based on inflation.[63] Therefore, even if we hope to measure purchasing power in terms of consumable goods and services with section 33(eC), the CPI may under-compensate the poor.[64] This consideration is, of course, not specifically related to land, nor

[63] See Finn et al "Poverty, Inequality and Prices in Post-Apartheid South Africa" *UNU-WIDER Growth and Poverty Project* (2013) at 19 where the authors note that "food is a larger component within the total expenditure for poorer households than in richer households." And at 36-7 they note:

> "Bread and cereals have a very high relative weight – poor households spend 3.5 times more than non-poor households on this expenditure category relative to their total expenditures – so that almost any rate of price increase above inflation would make this category a substantial contributor to the gap between poor and non-poor price indices."

[64] Id at 74: "In other words, the structure of the official CPI weights resemble more closely the expenditure patterns of wealthier, rather than poorer, households." This does not mean, however, that the CPI is not important in other contexts.

necessarily the Florence family. As the Government rightly argued, they did not establish that they themselves came from a lower-income bracket.

[63] The conclusion is inevitable that the CPI is not always the most appropriate launch pad for determining equitable redress in the form of financial compensation for property that accrues investment value. It is unfortunate, therefore, that other courts have used the CPI as a starting point.[65] It is even more problematic when used as a fixed determinant of a claimant's entitlement to equitable redress.[66]

[64] Are any alternatives to the CPI available to us? And how should section 33 be interpreted as a whole to give effect to the purposes of the Restitution Act?

Alternatives

[65] Counsel for Ms Florence suggested a number of investment-based metrics as alternative options to the CPI, some endorsed by experts, namely the—

(a) 32-day notice deposit rate;

(b) government bond rate;

(c) prime overdraft rate;

(d) mortgage rate;

(e) ABSA house price index; and

(f) current market value approach.

[65] See, for example, *Farjas* above n 17 and *Farjas LCC* above n 13.

[66] See [85] and [86] below for a discussion of when the CPI may be one of the appropriate factors for consideration.

[66] In order to explain the practical implications of these alternatives, it is useful to refer to the actual amounts these metrics will yield when applied. Dr Wittenberg, who testified for Ms Florence,[67] applied (a) to (d) to calculate the present-day value. The actual calculations were not disputed by Professor Nattrass[68] – who also testified for Ms Florence – and Professor Viruly, who testified for the Government.[69] The amounts, at the time the witnesses testified, were—

"1.	Using the CPI: R30 000 is now worth	R1 226 250.00
2a.	32-day notice deposit rate	R1 787 280.19
2b.	Bond yields	R3 341 708.86
3a.	Prime overdraft rate	R8 692 522.65
3b.	Mortgage rate	R8 095 370.39"[70]

[67] None of these is without pitfalls. In the absence of a national housing index, there is no unanimous expert voice on the optimal metric. One is only able to evaluate the alternatives for the purposes of this case in light of the evidence on record.

[68] Dr Wittenberg preferred the 32-day notice deposit rate as it is the only investment rate published by the Reserve Bank going back to 1970. This rate is an

[67] Dr Wittenberg is an associate professor of economics at the University of Cape Town.

[68] Professor Nattrass is a professor of economics at the University of Cape Town.

[69] Professor Viruly is a professor of property studies at the University of the Witwatersrand.

[70] Dr Wittenberg calculates the escalation of the under-compensation from October 1970 (when the contract of sale between Dr Yeller and the Florence family was cancelled and Dr Yeller refunded the Florence family R1 350) until December 2008. The calculations originally submitted by Dr Wittenberg used the approximate figure of R30 000 as a starting point. They also terminated in December 2008. This judgment has accordingly recalculated the amount, using the accurate starting figure of R30 513, up until June 2012 (the date of the Land Claims Court's judgment). Calculations updated to December 2010 were submitted by Dr Wittenberg. However, I have elected to rely on my own calculations from December 2008 onwards due to some uncertainty about the origin of the 32-day notice deposit rate figures for certain months.

investment option with a commercial bank, whereby a client invests and earns interest on an amount but can withdraw only a portion of the money after giving the bank 32 days' notice. It is, in his opinion, the most risk-free investment option available to a private individual and therefore the most realistic way of calculating the appropriate value of financial compensation for housing.

[69] However, the 32-day notice deposit rate is by its nature a short-term investment of the kind financial institutions offer from time to time. According to Professor Viruly the investment metric should reflect the investment period with which we are dealing; the 32-day notice deposit rate is not necessarily appropriate for a long-term investment such as the purchase of a house more than four decades ago.

[70] The government bond rate is also a risk-free investment metric and has the added benefit of being fairly long-term. It represents the rate at which the Government is able to borrow from the market. Professor Nattrass argued that although the calculated value of the property using this metric is significantly higher than the 32-day notice deposit rate, this higher burden on the Government is justifiable since it was then-government policy that facilitated the forced redistribution of wealth from the Florence family to Dr Yeller in 1970. According to Professor Nattrass this amounted to the Government effectively borrowing the purchase price from the family and therefore they are entitled to the interest rate on that loan. This can be measured by the government bond rate.

[71] This reasoning seems to go against the purpose of the Restitution Act, which is not to apportion blame or culpability to anyone, including the Government.[71] The scheme envisaged by section 25(7) of the Constitution and the Restitution Act is reparative rather than punitive in character.[72] Justifying a higher amount offered by the government bond rate because it would be poetic justice – as Professor Nattrass argues – would subvert this. The Restitution Act after all represents an attempt by democratic South Africa to address the injustice of apartheid South Africa. The burden on the fiscus is an important consideration since claims are paid from tax payers' money to advance a public purpose. Public funds must be used equitably, with the public interest as an important consideration.[73] In addition, government bonds are traditionally not open for purchase by private individuals, so it would be arbitrary to use this metric to convert a private person's foregone investment into present-day monetary terms.

[72] The prime overdraft rate is the lowest rate that a private borrower could expect when she borrows money to finance an asset other than a house. This metric is not specifically endorsed by any of the experts. However, Professor Viruly stated that this measure is a so-called "money-market rate", a short-term rate that is problematic for

[71] *Goedgelegen* above n 20 at para 67. See also para 68 where the Court states:

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

[72] Id at para 68.

[73] Id.

some of the reasons canvassed above. Further, the fact that this index is pegged to assets other than a house makes it inappropriate for present purposes.

[73] The mortgage rate, which is also not endorsed by any of the experts, is tied to the prime overdraft rate but has the advantage of being backed by an immovable asset. The difficulty with both the prime overdraft and the mortgage rates is that the estimation calculated by Dr Wittenberg is excessively high. The same considerations of pressure on the public purse apply. None of the experts fully explained or supported the use of either of these rates. It would be imprudent to rely on either given the scant information before us.

[74] The ABSA house price index, prepared by one of the major commercial banks, was referred to in passing. Since this is the closest version of a housing index we have in South Africa, it has to be considered an option. Unfortunately, none of the experts was confident enough about the make-up of the index to speak to its appropriateness for claims like the present one. The index itself seems to suffer from difficulties similar to those of the CPI – because it is based on the purchase and selling prices of ABSA clients and mortgagors, it is heavily influenced by the class and income levels of ABSA clients and therefore not an equitable measure to use when converting past loss into present-day monetary terms. The index is also only based on the prices of houses for which ABSA clients have sought finance and is therefore not a truly general standard.

[75] During oral argument, counsel for Ms Florence suggested using current market value[74] of the property in question at the time of compensation as a starting point. According to the particular facts and circumstances of the case, this value could be adjusted upward or downward as the purposes of equitable redress may require.

[76] A market-value approach may in appropriate cases have conceptual and practical advantages. If restoration is primary and equitable redress through financial compensation comes into play only because restoration is not feasible, parity between the two makes sense. This is best achieved by targeting the current value of the property, since that property is what would be restored if this were possible. This may, when reliable evidence related to market value is available, be preferable to determining an amount by way of an investment metric that targets average investment yields that are not comparable to investing in immovable property over a long period of time.

[77] Additionally, at least two section 33 factors in the Restitution Act can be understood to include the current value of the property as a consideration. A court must take into account the requirements of equity and justice.[75] It must have regard to "any other factor which the court may consider relevant and consistent with the spirit and objects of the Constitution and in particular the provisions of section 9".[76] The

[74] The term "market value" may have some loaded connotations because of its association with the notion of a free market and a particular economic ideology, which at times – and perhaps particularly in the context of land rights – are controversial. These connotations are not intended here. The current value of the property at the time of compensation is what is meant.

[75] Section 33(c), set out above at n 12.

[76] Section 33(f).

current value of property may well be a relevant consideration. As this measure is perhaps best able to ensure equivalent compensation of claimants entitled to restoration and those who are not. The current value of the property is also relevant to the constitutional guarantee of equality before the law[77] because it best ensures that complainants to whom the land can be restored and complainants to whom it cannot are treated equally. Moreover, section 25 of the Constitution explicitly lists market value as a relevant factor when determining the amount of compensation with respect to compensation for the expropriation of property.[78]

[78] Valuation of property already takes place in some Land Claims Court cases, as it did here. It does not seem overly onerous to require assessment of the current market value of the property. Further, this approach is not unheard of in other jurisdictions.[79]

[79] It has its pitfalls. One problem, as illustrated by the current case, is that sometimes the value is difficult to determine. Mr Margolius, the property valuer called by Ms Florence, acknowledges that his valuation would have been more accurate if he had had more time. A court cannot rely squarely on the current value of a property in the absence of reasonably accurate evidence.

[77] Section 9(1) of the Constitution.

[78] Above n 41.

[79] Market value was a factor in a significant number of the Venice Commission responses. Chile, Sweden, Poland and Azerbaijan provide financial compensation at least equivalent to the market value of the property, either calculated at the time of compensation or at the time the law in question was passed.

[80] The value of the property may also have changed so much over time that the current value unfairly prejudices or unduly benefits a claimant. A property may have been improved; subdivided and commercially developed (as in this case); or in some other manner either exponentially appreciated or depreciated in value, so as to amount to an excessive and unforeseen windfall or shortfall. An award for financial compensation inflexibly pegged to a distorted current market value would not be just and equitable.

[81] The current value of the property could thus be very useful in some instances, but should not be viewed as solely determinative of the amount of compensation. The scale may be tipped by other considerations. The current value of the property may in some cases be a good starting point and a court should then use its wide discretionary powers under section 33 of the Restitution Act to temper the value in the circumstances.

[82] Given the lack of unanimous support for a particular metric, it risks being arbitrary to pick one randomly and make it applicable in all cases. All of the proffered metrics are problematic. But the 32-day notice deposit rate – in the circumstances of this case – is the least so. For reasons set out later,[80] it balances the requisites of redress most closely, without unduly penalising the public purse.

[80] See [92] and [93] below.

Section 33

[83] Given the above, what meaning should be given to section 33(eC), on which the Land Claims Court and Supreme Court of Appeal relied heavily?[81] There are different possible routes.

[84] The first – which is tempting – is that "changes over time in the value of money" does not necessarily refer to inflation as measured by the CPI only, but instead to any measure that is ordinarily fairest in the circumstances to reflect a change in economic value over time. This may include the current value of the property. But the subsection specifically refers to changes in the "value of money". It might be a stretch to interpret the "value of money" as referring to the amount of money needed to purchase the property, simply because the value of property can be quantified in monetary terms. Further, because the market-value measure is already subsumed under other factors in section 33,[82] it would render section 33(eC) irrelevant if it, too, referred to current value. This would violate the interpretive presumption that no provision in a statute is superfluous.[83] For these reasons it is difficult to come to the conclusion that section 33(eC) refers to the value of the property.

[85] The second route is to agree with the Government's expert Professor Viruly, and the *Farjas* courts, that the phrase refers to inflation. While the CPI is problematic

[81] See above n 12 for the wording of section 33.

[82] Specifically, section 33(c) and (f). See [77] above.

[83] *Case and Another v Minister of Safety and Security and Others, Curtis v Minister of Safety and Security and Others* [1996] ZACC 7; 1996 (3) SA 617 (CC); 1996 (5) BCLR 609 (CC) at para 57 and *Attorney General, Transvaal v Additional Magistrate for Johannesburg* 1924 AD 421 at 436.

when employed in other ways, it is South Africa's best known measure of inflation. Therefore section 33(eC) could be interpreted as referring to the CPI.

[86] There are, however, two important caveats. First, the CPI is clearly not always appropriate when property was intended for investment and not consumption. Although current value will generally be relevant to determining investment claims, not all rights in land under the Restitution Act relate to ownership for the purposes of investment. Some rights in land relate to ownership for the purposes of consumption or profit and some do not relate to ownership at all.[84] This is where the CPI as a measure could be useful: in escalating these kinds of claims for equitable redress to current monetary terms.

[87] Second, the CPI as provided for in subsection 33(eC) cannot be used as a dispositive factor. It is not the only factor to be taken into account. The factors in section 33 must be balanced and considered with due regard to the particular factual context of a case and to the overarching purpose of the Restitution Act. So the issue is not so much about the exact meaning of section 33(eC) and whether it refers to the CPI. (In this regard I respectfully disagree with the judgment of my colleague Moseneke DCJ.) As submitted by Ms Florence, the issue is that section 33(eC) cannot, alone, be determinative of the question of what equitable redress in the form of financial compensation is. None of the section 33 factors can. Equitable redress

[84] Section 1 of the Restitution Act defines a right in land as—

> "any right in land whether registered or unregistered, and may include the interest of a labour tenant and sharecropper, a customary law interest, the interest of a beneficiary under a trust arrangement and beneficial occupation for a continuous period of not less than 10 years prior to the dispossession in question."

paid out as financial compensation cannot be rigidly fixed to the CPI. Instead, the other factors in section 33 would do the conceptual lifting to vindicate the aim that the claimants be put in a position as close as possible to restoration.

The Land Claims Court's discretion

[88] In view of the broad conceptual and principled terrain I have attempted to navigate, does the Land Claims Court's judgment warrant interference? I disagree with the judgment on two points. First, it used the CPI as a starting point for the enquiry for equitable redress in the form of financial compensation. As the CPI aims to measure inflation related to consumption, it is inapposite as an exclusive criterion for determining how the value of dispossessed real property changes over time. This is such a case. Second, not only was the CPI the start of the enquiry, it was also its end point. Once the Land Claims Court used the CPI as an escalation measure, it looked no further. Section 33(eC) – and thus the CPI – was exhaustive of the question of equitable redress, despite the rest of section 33. The Land Claims Court's exercise of discretion was moved by a wrong principle of law. This unduly constrained its assessment of the Florence family's entitlement to compensation. This Court may and should interfere.

Remedy

[89] If the reliance on the CPI by the Land Claims Court and Supreme Court of Appeal in *Farjas* and in this case is set aside, the question is what order would be appropriate. All factors in section 33 should be considered in a fact-sensitive enquiry,

within the context of the meaning and purpose of section 25(3)(c) of the Constitution and of the Restitution Act.

[90] The current value of the property may in many cases be an appropriate point to start. In this case, however, insufficient and inaccurate evidence was placed before the Court. We cannot without more award Ms Florence an amount equal to the current value of the property as assessed by the property valuer.

[91] It is tempting to remit the matter to the Land Claims Court to consider further evidence on the current value of the property as well as other relevant factors to reach a decision in light of the guidance provided by this judgment. It is open to an appellate court, in appropriate circumstances, to remit a matter for evidence to be obtained in the hope that, in doing so, the issues will be fully ventilated.[85] This Court, however, will be disinclined to remit when doing so would be speculative or would involve wasted costs and energy on further legal contests.[86] Remittal in this case will delay compensation and justice for the Florence family even longer. As their claim was lodged prior to 1998, they have already been waiting for over fifteen years for the restitution due to them. We have to finalise this case with the best available material before us.

[85] See, for example, *Road Accident Fund v Mdeyide* [2007] ZACC 7; 2008 (1) SA 535 (CC); 2007 (7) BCLR 805 (CC) at para 45.

[86] *KwaZulu-Natal Joint Liaison Committee v MEC for Education, Kwazulu-Natal and Others* [2013] ZACC 10; 2013 (4) SA 262 (CC); 2013 (6) BCLR 615 (CC) at para 34 and *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* [2011] ZACC 30; 2012 (1) SA 256 (CC); 2012 (3) BCLR 219 (CC) at para 79.

[92] Although the experts provided conflicting reasons for favouring one measure over another, the 32-day notice deposit rate seems – in this case – to strike an equitable balance between the need fairly to redress the Florence family's loss and the hesitance to overburden our young democracy's public purse. Based on the evidence of Dr Wittenberg, this rate provides for Ms Florence to receive approximately R500 000 more than the CPI rate provides as at December 2008,[87] and measures investment rather than consumption. While this rate is a short-term investment rate, it is the only rate published by the Reserve Bank going back to 1970. It also does not penalise the public purse, as some of the other investment measures may.

[93] In the circumstances, and based on available evidence, the most just and pragmatic order would be to provide a conclusion to the Florence family's long quest for compensation. It would therefore be in the interests of justice to grant Ms Florence's application for leave to appeal and uphold her appeal to provide for equitable redress calculated by the 32-day notice deposit rate.

[94] The rate should be calculated from the date of dispossession, which is the end of October 1970. It ought to run up until the compensation became due and payable, namely upon judgment by the Land Claims Court on 5 June 2012.[88]

[87] See [66] above. Dr Wittenberg calculated until December 2008; the difference would have changed since then but the argument about pressure on the public purse remains the same.

[88] The Land Claims Court elected to calculate the escalation of the initial value of the dispossession up until March 2012. There is no justification given for this date and so the date of the Land Claims Court's judgment is the better date as this is when the compensation becomes due and payable. See above n 70.

[95] When the Land Claims Court handed down judgment it should not have escalated the under-compensation from 1970 to 2012 using the CPI. The Supreme Court of Appeal did not interfere with that part of the order but I would. This judgment's order would effectively replace that of the Supreme Court of Appeal and therefore the order of the Land Claims Court.[89] Therefore the escalation of the amount of compensation should be calculated up to the date of the Land Claims Court's judgment – as if that Court had made that order. Having used the 32-day notice deposit rate to escalate the amount of under-compensation as at the end of October 1970 to the date of the Land Claims Court's judgment in June 2012, the amount of compensation to which Ms Florence would be entitled is R2 211 732.54.

[96] From the date that the Land Claims Court handed down its judgment, up until payment, *mora* interest should run on the amount of compensation at the prescribed rate.[90] Where an appeal against a judgment succeeds and the amount of the judgment debt is altered, the amended judgment debt is of force and effect retrospectively from the date of the trial court's judgment and not from the date of the appeal court's judgment.[91] This is the case here.

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[89] *Occupiers of Saratoga Avenue v City of Johannesburg Metropolitan Municipality and Another* [2012] ZACC 9; 2012 (9) BCLR 951 (CC) at paras 7-8 which quoted, with approval, *General Accident Versekeringsmaatskappy Suid-Afrika Bpk v Bailey NO* 1988 (4) SA 353 (A) (*General Accident*) at 358H.

[90] *Geyser v Pont* 1968 (4) SA 67 (W) at 68 and *International Tobacco Co (SA) Ltd v United Tobacco Co (South) Ltd (1)* 1955 (2) SA 1 (W) at 28. Unless provided for in the compensatory act – for a more comprehensive discussion of statutory compensation, here in the context of expropriation, see Gildenhuys "Expropriation" in *LAWSA* 2 ed (2012) vol 10(3) at para 37. In this case the Restitution Act does not provide for the accrual of interest. Interest accrues on a judgment pursuant to section 2(1) of the Prescribed Rate of Interest Act 55 of 1975 at the prescribed rate of 15.5%.

[91] *General Accident* above n 89 at 353.

Conclusion

[97] On the main appeal, I conclude that the Land Claims Court did not exercise its discretion properly in limiting equitable redress in the form of financial compensation to the CPI. On the facts of this case and in the interests of justice, Ms Florence must be compensated in line with the 32-day notice deposit rate. I note that regard must be had to the requirements of equity and justice and any other factor the Court may consider relevant and consistent with the spirit and objects of the Constitution and in particular the provisions of section 9.

[98] On the cross-appeal, I find that the Supreme Court of Appeal properly exercised its discretion. There are no grounds for interference.

[99] I would grant the application for condonation and leave to appeal in the main appeal but refuse leave to cross-appeal. I would uphold the main appeal and set aside the orders of the Supreme Court of Appeal and the Land Claims Court. Consequently, I would order the Government to pay equitable redress in the form of financial compensation to Ms Florence for the loss of the Florence family home in the amount of R2 211 732.54, being the amount of under-compensation escalated according to the 32-day notice deposit rate from the end of October 1970 to the date of the Land Claims Court's judgment. The respondent should accordingly pay *mora* interest at the rate of 15.5% per annum, from the date of the judgment of the Land Claims Court to the date of payment.

[100] The above is the most just and equitable redress in the circumstances of this case. In view of the history of apartheid land dispossession, the situation of the Florence family, the interests of the state and the wording and spirit of the Restitution Act and the Constitution, it is the most suitable outcome for this case in our attempt to address our undemocratic past and look towards a future recognising the dignity of all.

MOSENEKE ACJ (Skweyiya ADCJ, Dambuza AJ, Jafta J, Madlanga J and Zondo J concurring, and Khampepe J concurring only on the main appeal):

Introduction

[101] This appeal requires us to decide two prominent disputes. The one is whether, when a court makes an award of equitable redress in the form of financial compensation under the Restitution Act, the CPI is an appropriate metric to calculate "changes over time in the value of money".[92] Ms Florence vies for an investment-based measure and not the consumption-based CPI endorsed by the Land Claims Court and the Supreme Court of Appeal.

[102] The other dispute is whether the Land Claims Court had the power to make an order directing the state to pay for a memorial plaque the applicant wants erected on the subject property. This plaque would form part of equitable redress awarded to the

[92] Section 33(eC) provides:

> "In considering its decision in any particular matter the Court shall have regard to the following factors:
>
> . . .
>
> (eC) In the case of an order for equitable redress in the form of financial compensation, changes over time in the value of money".

applicant for the hurt her family suffered when they were dispossessed of their home under past racially-discriminatory laws.

[103] I am thankful to the main judgment for its narration of the facts and background. Also, I adopt its decisions on the preliminary issues. But I see the resolution of the two disputes differently. On the main claim, the appeal should falter. I find no gripping ground to set aside the decision of the Land Claims Court and of the Supreme Court of Appeal. On the present facts and a proper interpretation of section 33(eC) nothing persuades me that the CPI does not appropriately measure "changes over time in the value of money" in order to calculate financial compensation under the Restitution Act.

[104] On the memorial plaque claim, I am inclined to uphold the Government respondent's cross-appeal and to set aside the decision of the Supreme Court of Appeal. The ruling statute does not give the Land Claims Court the power to make the order sought. Even if the statute did, the claim has been compromised by a private treaty. I would also make no costs order relating to proceedings in this Court.

[105] At the trial, the Land Claims Court spotted four core issues it had to resolve. First was the extent of the loss suffered by the Florence family as a result of the dispossession of their rights to Sunny Croft in 1970. Second was whether the loss assessed would equate to a just and equitable compensation. Third was the time from which the compensation must be calculated. Lastly was the appropriate measure for

converting the past financial loss into present monetary value. There were two other issues that are not part of the appeal.[93]

[106] The Land Claims Court resolved these issues in this manner: it found for the Florence family and ordered the Government to pay equitable redress in the form of financial compensation to the Florence family in the amount of R1 498 890. It found that by 1970 the Florence family had effectively paid off the purchase price of Sunny Croft, the property, and should be treated as owners. It accorded Sunny Croft a 1970 value converted into present-day value. It assessed the Florence family's 1970 loss as the agreed market value of Sunny Croft being R31 778 plus the agreed removal cost (R85) less the agreed compensation received at the time of the agreement (R1 350) which resulted in a nett total of R30 513. The Land Claims Court went on and assessed the Florence family's equitable redress as the amount of their 1970 financial loss *at the time of the dispossession*. Then the Court used the CPI to convert the assessed 1970 loss of R30 513 to present value of R1 498.890.

[107] However, the Land Claims Court found against the Florence family on two issues. It rejected an investment-based index urged upon it by the Florence family and resorted to the CPI to convert their past loss into present-day value of money. It also rejected the Florence family's claim that the Government should pay their costs for the erection of a memorial plaque. Ms Florence approached the Supreme Court of Appeal and now this Court on these two grievances.

[93] These issues are the amount of financial compensation the Florence family should receive as a *solatium* for the hurt they experienced as a result of the home dispossession and litigation costs.

[108] The Supreme Court of Appeal dismissed the appeal and upheld the stance of the Land Claims Court that the CPI is the appropriate metric for converting a past loss into present value. The use of the CPI accorded with a purposive interpretation of section 33(eC) of the Restitution Act. The trial court was entitled to take judicial notice of the CPI as an accepted method to calculate "changes over time in the value of money". The Supreme Court of Appeal pointed out that, in any event, it and the Land Claims Court were bound by its earlier decision in *Farjas*[94] which ruled that the CPI may be resorted to for translating past loss into current terms. It held further that it could not be said that the Land Claims Court misdirected itself in adopting the same approach. On the costs of erecting a memorial plaque, the Supreme Court of Appeal upheld the appeal, dismissed the Government's cross-appeal and ordered the Government to pay the costs for the erection of the memorial plaque.

Ms Florence's contention in this Court

[109] In this Court Ms Florence urges us to set aside the decision of the Land Claims Court and by extension of the Supreme Court of Appeal. She says both Courts did not exercise their discretion judicially. This, she advances on five principal grounds. They are that the use of the CPI to compute present-day value of financial loss in 1970 (a) results in an irrational disparity between the value of restitution in the form of land restoration and of restitution in the form of financial compensation; (b) is inconsistent with applicable international law principles; (c) under-compensates poor people; (d) is

[94] *Farjas* above n 17.

based on an incorrect interpretation of section 33(eC) of the Restitution Act, and (e) fails to give effect to the purpose of financial compensation.

Test for appellate interference

[110] Ms Florence's case is girded by the unstated invitation that we replace the exercise of the discretion by the two preceding Courts with our own for the reason that the Land Claims Court or the Supreme Court of Appeal did not use their powers judicially. Since those Courts had resorted to the wrong principle of law, the submission runs, we are at large to prefer our view to their assessment of the metric for conversion.

[111] The power of an appellate court to interfere with the exercise of a discretion by a court *a quo* is not without restraint. It is limited by whether the discretion of the court in issue is discretion in the strict sense, sometimes called a strong or true discretion.

[112] In a land restitution matter in this Court, Mpati AJ restated the standard for appellate intervention when the Land Claims Court and later the Supreme Court of Appeal had exercised a discretion:

> "In coming to its decision on whether or not to order the return of the whole of the land claimed, the Supreme Court of Appeal exercised a discretion. The question whether leave should be granted will therefore require consideration of the circumstances in which this Court will interfere with the exercise by the Supreme Court of Appeal of its discretion.

> 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*, a 'strong' discretion or 'true' discretion, in the sense that a range of options was available to it. 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.'"[95]

[113] Where a court is granted wide decision-making powers with a number of options or variables, an appellate court may not interfere unless it is clear that the choice the court has preferred is at odds with the law. If the impugned decision lies within a range of permissible decisions, an appeal court may not interfere only because it favours a different option within the range. This principle of appellate restraint preserves judicial comity. It fosters certainty in the application of the law and favours finality in judicial decision-making.

[114] However, when a court of first instance, even though vested with a strict or true discretion, has not acted in a judicial manner, an appeal court may intrude to ensure a lawful and just outcome. The intervention would be in the interests of justice as the appeal court imposes fidelity to the law. The appellate court would be doing no more than correcting an instance where—

[95] *Mpela* above n 20 at paras 25-6. Footnotes omitted.

> "the court [that] has exercised its statutory power capriciously or was moved by a wrong principle of law or an incorrect appreciation of the facts or has not brought its unbiased judgment to bear on the issue or has not acted for substantial reason."[96]

[115] On the other hand, legislation may allow a court a weak or fettered discretion which must be exercised in a restricted or preset manner only. In that event, if a court were to veer beyond its limited range of permissible choices, again an appeal court would be at liberty to intervene.

May this Court interfere with the Land Claims Court's preference for the CPI?

[116] The Land Claims Court has a strict and true discretion. It enjoys wide adjudicative remedial powers.[97] Sections 33 and 35 of the Restitution Act confer on it a wide range of remedial powers geared only towards restoration of land or other equitable redress in the form of financial compensation. Under each of the two species of equitable redress there are numerous remedial options open to the Land Claims Court. Beyond these ample remedial variables available under section 35,[98]

[96] *Kwalindile Community* above n 57 at para 46. See also *Giddey* above n 28 at para 19; *Mabaso v Law Society, Northern Provinces and Another* [2004] ZACC 8; 2005 (2) SA 117 (CC); 2005 (2) BCLR 129 (CC) at para 20; *Geach* above n 28 at para 129; and *Kekana* above n 28 at 654F-G.

[97] *Goedgelegen* above n 20 at para 84 and *Richtersveld Community* above n 38 at paras 14-5.

[98] The remedial powers vested in the Land Claims Court in terms of section 35 of the Restitution Act include the power to order the restoration of land or any right in land in respect of which a claim is made. The Land Claims Court may order the state to grant the claimant an appropriate right in alternative state-owned land, to pay compensation to the claimant or to include the claimant as a beneficiary of a state support programme for housing or the allocation and development of rural land. The Land Claims Court may also determine conditions which must be fulfilled before a right in land can be restored or granted, make appropriate orders to give effect to any agreement between the parties regarding the finalisation of the claim and make such orders for costs as it deems just.

section 33 lists factors[99] to which a court may have regard in assaying the equitable remedy for past loss.

[117] The rationale for this generous jurisdiction is not hidden. The Restitution Act is truly ambitious. It hopes to facilitate and regulate nation-wide land restoration claims that have accrued in almost a century of dispossession. The dispossession of rights in land must have occurred under many diverse settings. Not all rights are registered or readily verifiable; nor would evidence to support claims be easy to garner. Whilst the equitable redress claim had to occur under the colour of the law, the adjudication process had to be flexible under a court with ample jurisdiction and with a strict and strong discretion to make prompt and permissible choices provided they are just and equitable. These considerations and more, point to a strict discretion conferred only on the Land Claims Court. This Court is constrained not to interfere with that Court's remedial determinations unless they are shown to be vitiated by decision-making.

Monetary conversion

(a) Was the appreciation of the facts incorrect?

[118] I will now examine the applicant's grievances on appeal. Ms Florence starts with a veiled complaint that the trial court was influenced by "an incorrect appreciation of the facts". Ms Florence's written argument half-heartedly criticised

[99] The factors which a court may have regard to include 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; the desirability of remedying past violations of human rights and the requirements of equity and justice. A court may also consider the feasibility of the restoration of a right in land; the desirability of avoiding major social disruption, the circumstances prevailing at the time of dispossession, the history of the dispossession, the current use of the land or any other factor considered relevant or consistent with the spirit and objects of the Constitution.

the factual findings of the Land Claims Court but stopped short of pushing for a re-evaluation of the facts. That was wise on her part because she advanced no ground nor can I find any that entitles this Court to alter the facts found by the trial court.

[119] On a closer look it turned out that she urged us to prefer the expert evidence of her witnesses, Dr Wittenberg and Professor Nattrass, who preferred an investment or capital-gain metric over that of the state expert witness, Professor Viruly, who urged the trial court to use the CPI measure. Thus Ms Florence's dissatisfaction is not much more than that the Land Claims Court was wrong to prefer the evidence of Professor Viruly as a prudent aid in interpreting the provisions of section 33(eC) of the Restitution Act. Thus her grievance in this Court on the evidence goes no further than that the Land Claims Court was wrong in law when it relied on the CPI rather than a 32-day deposit rate investment yield for calculation of "changes over time in the value of money". The complaint, if any, that the trial court assessed the facts incorrectly must fail.

(b) Interpretation of section 33(eC)

[120] Ms Florence charges that the decisions of the Supreme Court of Appeal and of the trial court are based on an incorrect interpretation of section 33(eC) of the Restitution Act. I think this contention is without merit.

[121] Land restitution, reform and equitable redress are compelling constitutional priorities located in section 25(7) of the Constitution.[100] A claimant dispossessed of property as a result of racially-discriminatory laws and practices is entitled either to restitution of that property or to equitable redress to the extent provided by an Act of Parliament. That Act is the Restitution Act. It has created the Land Claims Court, as a specialist court charged to administer and interpret the Restitution Act. As we have observed, the Court is vested with wide remedial powers set out in sections 33 and 35. It may order the state to pay the claimant financial compensation.[101] Should the Court so order, it must convert past financial loss of the claimant to present value. In the words of the statute, it must have regard to "changes over time in the value of money".

[122] However, this past-loss conversion consideration does not stand alone. It is located within the evaluative considerations listed in section 33. It is but one of several factors to which the Court must have regard "*in a particular matter*".[102] Not all factors will be relevant in the decision-making of a particular case. Some of the listed factors apply to all claims.[103] Two such generic considerations are that the Court must observe "the requirements of equity and justice" and must consider "the spirit and objects" of the Constitution and in particular its equality provisions. Other enumerated factors are limited to decisions concerned with restoration of a right in

[100] This Court has written much about our regretful history of widespread dispossession of land from individuals and communities. I need not say more. For instance see the following cases: *Kwalindile* above n 57, *Mphela* above n 20, *Alexkor* above n 48 and *Goedgelegen* above n 20.

[101] Section 35(1)(c).

[102] See the introductory phrase in section 33 above n 12.

[103] Section 33(b), (c), (eB) and (f).

land.[104] Yet another set of factors relates to compensation only.[105] These factors must be seen as a suite of guidelines, when relevant to *a particular matter*. The Court must bear them in mind and may not overlook them when it makes remedial orders permitted by section 35 of the Restitution Act.[106]

[123] Thus changes over time in the value of money in section 33(eC) is a factor that the Court may not overlook. Yet it must always be understood in the context of its location in and purpose of the Restitution Act.

[124] Equitable redress must be sufficient to make up for what was taken away at the time of dispossession.[107] The amount of compensation has to be just and equitable reflecting a fair balance between public interest and the interest of those affected after considering relevant circumstances listed in section 33 of the Restitution Act. For instance, a history of hardship caused by the dispossession may entitle a claimant to a higher compensation award in order to assuage past disrespect and indignity.[108]

[104] Section 33(a), (cA), (d), (e), (eB).

[105] Section 33(eA) and (eC).

[106] See *Mobile Telephone Networks (Pty) Ltd v SMI Trading CC* [2012] ZASCA 138; 2012 (6) SA 638 (SCA) at para 15 fn 8 and *Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd and Another* [2003] ZASCA 46; 2003 (6) SA 407 (SCA) at para 31.

[107] See *Haakdoornbult* above n 51 at paras 36-7. In this case, the government pressured black owners to sell their family farm called Haakdoornbult, which was located in a so-called "white farming area", to white farmers. With the purchase price received in 1951, the family was able to buy a farm valued at two thirds of that of Haakdoornbult. The Supreme Court of Appeal answered the question as to whether or not the family was entitled to restitution by determining whether the compensation received at the time of dispossession was sufficient. See also *Richtersveld Community* above n 38 at para 34.

[108] *Hermanus* above n 8 at para 11.

[125] But compensation within the scheme of the Restitution Act is neither punitive nor retributive.[109] It is not to be likened to a delictual claim aimed at awarding damages that are capable of precise computation of loss on a "but-for" basis.[110] It is a constitutionalised scheme paid out of public funds in order to find equitable redress to a tragic past. Ultimately, what is just and equitable must be evaluated not only from the perspective of the claimant but also of the state as the custodian of the national fiscus and the broad interests of society as well as all those who might be affected by the order made.

[126] With this context in mind, did the trial court misinterpret section 33(eC)? Ms Florence's charge that the Land Claims Court misinterpreted this provision amounts to this. It failed to give any or sufficient weight to section 33(c), being the requirement of equity and justice, and section 33(f), which requires the Court to consider any factor relevant and consistent with the spirit and object of the Constitution. This complaint is not about the interpretation of a section. Also it has no merit because the Court tells us that it has had regard to these factors.[111]

[127] An additional complaint is that the Court misinterpreted the section because it did not have regard to a principle known as nominalism of currency which is said to

[109] See *Goedgelegen* above n 20 at paras 67-8.

[110] In *Haakdoornbult* above n 51 at para 60, Harms ADP writing for the Supreme Court of Appeal expresses that a detailed calculation of compensation should be avoided because it makes the restitution process expensive and counter-productive, heightens emotions and leads to costly litigation. He also makes the point that, apart from being inappropriate, it is impossible to quantify many of the factors which need to be considered.

[111] Land Claims Court judgment above n 15 at para 19.

underlie all aspects of South African law.[112] I agree with the Land Claims Court that the principle is irrelevant to the proper adjudication of this matter. Parliament has adopted a conversion mechanism that is meant to ensure that compensation sounding in money must reflect changes in the value of past monetary loss. So our proper concern must be to understand the meaning of section 33(eC) rather than to impose on it notions of nominalism of currency. There is another reason why nominalism of currency is presently irrelevant. The claim against the state for equitable redress is not a civil debt.

[128] The last interpretive criticism is that the Land Claims Court was wrong in finding that "changes over time in the value of money could only mean loss of purchasing power as measured by the CPI". This is not an interpretive matter. It rather points towards the kernel difference between the parties, on which I will focus shortly. I am satisfied that the Land Claims Court and the Supreme Court of Appeal have not misinterpreted section 33(eC). But first let me clear an important hurdle on the timing for calculating past loss.

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[112] In *SA Eagle Insurance Co Ltd v Hartley* [1990] ZASCA 106; 1990 (4) SA 833 (A) at 839F-G nominalism is defined as a principle which—

> "underlies all aspects of South African law, including the law of obligations. Its essence, in the field of obligations, is that a debt sounding in money has to be paid in terms of its nominal value irrespective of any fluctuations in the purchasing power of currency. This places the risk of a depreciation of the currency on the creditor and saddles the debtor with the risk of an appreciation."

(c) At which date is financial loss calculated and what is the purpose of the compensation

[129] The Land Claims Court assessed the Florence family's equitable redress as the amount of their 1970 financial loss at the time of the dispossession.[113] It set the financial compensation at R30 513 as an amount that was consistent with putting the Florence family, insofar as money can do it, in the same position they would have been in immediately after dispossession "calculated at the time of the dispossession" and *not* at the time of compensation.

[130] It is somewhat unclear whether Ms Florence contests that past loss must be calculated at the time of dispossession. It appears not, because the assessed 1970 loss was agreed upon between the parties. What is clear is that she disagrees that the purpose of the compensation is to put claimants in the same position they would have been in immediately after the dispossession. She contends that the object of compensation is to place claimants in the same position as if the land had not been taken. This difference is important for how one assesses and converts past loss. On the applicant's stance one must imagine the continued ownership of the property and compensate for its loss and accretion of capital worth. On the approach preferred by the trial court, one accepts the loss and compensates at the point of dispossession and adjusts the monetary value to present-day value.

[113] Land Claims Court judgment above n 20 at para 19.

[131] In my view the Land Claims Court was correct in calculating the financial loss at the time of the dispossession and for the purpose of placing the Florence family in the same position they would have been in immediately after the dispossession. The starting point and main plank of the Restitution Act is an acknowledgment of widespread dispossession that occurred since 19 June 1913 and the need for equitable redress in the form of restoration of land or financial compensation. The legislation does not warrant an approach that fixes compensation as if the loss never occurred. Nor does it warrant awarding a full replacement value of the taken subject property.

[132] Section 2(2) of the Restitution Act provides powerful indicators in support.[114] First, it expressly prohibits relief to any person who received just and equitable compensation or a similar consideration at the time of dispossession.[115] This means that the scheme of the Restitution Act makes the time of dispossession the critical starting point of an assessment of financial compensation. The Government is right that the purpose of the financial compensation is to provide relief to claimants in order to restore them to a position as if they had been adequately compensated immediately after the dispossession. It must be correct that just and equitable financial compensation does not aim to restore claimants in current monetary terms to the position they would have been in had they not been dispossessed, but rather the financial loss they incurred at the time of dispossession. The Land Claims Court was correct to set the loss at the time of the dispossession as the market value of the

[114] See above n 9 for the wording of section 2(2).

[115] See *Haakdoornbult* above n 51 at para 35 and *Ash and Others v Department of Land Affairs* [2000] ZALCC 54; [2000] 2 All SA 26 (LCC) at para 24.

property less the amount of compensation the applicants had received at the time of dispossession. This equated to the nett amount of R30 513. It is that amount that the Court correctly converted to present-day monetary value.

[133] Further support for this approach is to be found in the very enactment of section 33(eC) of the Restitution Act. The scheme of the Restitution Act undoubtedly aims to compensate financial loss as at the time of dispossession. That explains why just and equitable compensation would have to reflect the change, from the time of dispossession to the time of compensation, in the value of money. If compensation were based on the fiction of continued ownership of the property, its possible financial trajectory or capital-gain would be difficult to compute. The purpose of compensation advanced by Ms Florence is inconsistent with the purpose of the Restitution Act and in any event unwieldy and would lead to over-compensation.

[134] The Land Claims Court correctly ordered the Government to pay the Florence family the equivalent of R30 513 calculated at the time of dispossession and transposed to present monetary value.

(d) Core of the monetary-conversion dispute

[135] The core dispute between the parties relates to the appropriate conversion metric when a court adjusts its award for "changes over time in the value of money". The Land Claims Court considered the expert evidence before it and thereafter resorted to the CPI as the appropriate metric for the conversion of historical loss to

present-day value. In doing so, it relied on its own earlier decisions[116] and was, in any event, bound by the Supreme Court of Appeal's decision in *Farjas.*

[136] Ms Florence has levelled a number of criticisms at the reasoning in *Farjas*. She, in effect, invites us to overrule *Farjas* and to hold that claimants for financial compensation can only be adequately recompensed when their past loss is treated as an investment and adjusted to present-day value by applying compound interest and thus recognising their lost capital-gains on the adjudged historical loss. I am unable to agree. I can find no misdirection on the part of the Land Claims Court in following the decision of *Farjas*. Hence, the invitation to set aside the decision of the Supreme Court of Appeal in *Farjas* must be declined. I can find no wrong principle of law in it which entitles us to set it aside.

[137] *Farjas* correctly held that a claim for compensation under the Restitution Act is in a class of its own (*sui generis*). It is a claim against the state and has a reparatory and restitutionary character. It is neither punitive in the criminal justice sense nor compensatory in the civil sense. It advances major public purpose and deploys public funds in an equitable way to deal with the egregious and identifiable forms of historic hurt.[117] Fair compensation is not necessarily equal to the monetary value of the dispossessed property and restitution has little or nothing to do with investing or commercial transactions. It has to do with addressing massive social and historical

[116] *Farjas LCC* above n 13.

[117] Above n 17 at para 22.

injustice. Beyond a mere calculation of financial loss a court must have regard to several non-financial considerations listed in section 33 of the Restitution Act.

[138] The reasoning in *Farjas* is correct that the application of compound interest or of capital-gain on a historical loss will threaten the overarching purpose of the Restitution Act and the pointed object of compensation envisaged in sections 33 and 35. It is likely to result in over-compensation of claimants, an outcome which is at odds with the purpose of the Restitution Act.

[139] The Land Claims Court was indeed entitled to take judicial notice of the CPI for the good reasons detailed in *Farjas*.[118] In this matter, the trial court did not need to resort to that judicial aid. Ample evidence was led on what the CPI is and why it would be an appropriate measure to compensate for inflation but not for a capital-gain on property which would have been held as a long-term investment. I find no misdirection in the trial court preferring the expert evidence of Professor Viruly. He explained cogently:

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

[140] And later, Professor Viruly explained the "value of money" with remarkable clarity:

[118] Id at para 24.

> "It is consumption that we are talking about. But it is not even consumption, it is what happens to the value of money, how you use that money is something that we can't foresee what people over 30 years spend their money on, whether its investment or consumption – all we are trying to do here is find a formula which allows us to measure what has happened to the value of money, over time, and for that we have one indicator, the CPI."

[141] The CPI essentially generates the inflation-adjusted value. It ensures that the "consumption power" of money is not eroded over time. Perhaps a clearer explanation of what the CPI is "is an index that adjusts the value of money for consumption purposes over time and compensates for diminishing value of money". It is thus fair to say that the CPI seeks to measure the value of money over time in order to avoid its diminishing value with the passage of time.

[142] The trial court and the Supreme Court of Appeal rightly refused to apply compound interest or a capital-gain on the historical loss of the applicant. 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 constitute fair compensation. The approach urged on us by Ms Florence will threaten the purpose of the Restitution Act. It is likely to result in over-compensation of claimants, an outcome which is at odds with the purpose of the Restitution Act.

(e) International precedent

[143] Ms Florence further contends that the Land Claims Court should have followed international law precedent. The leading international law case she relies on is

Chorzow.[119] It is said to have established two principles. The one is that restitution is to be directed at restoring the situation which would, in all probability, have existed if the dispossession had not taken place. The other is that compensation should be in the form of restitution in kind. Where this is not possible "payment of a sum corresponding to the value which restitution in kind would bear".[120]

[144] There are several difficulties with this line of reasoning. The first is that the *Chorzow* principles are distinguishable because they are applicable to expropriation of property of foreign nationals. The protection could be extended to internally displaced people. And seemingly the compensation should be an equivalent of restitution in kind. All three features of the principle apply in a context of dispossession that is vastly different from ours. Also, the Restitution Act does not entitle any claimant to restitution in kind or its equivalent. It is so that our courts observe the principle of primacy of restoration of dispossessed land when adjudicating land claims under the Restitution Act. Ordinarily a claimant would be entitled to the dispossessed land provided the restoration is feasible and does not lead to adverse consequences set out in the Restitution Act.[121] Also the purpose of the compensation under the principle is to compensate as if the expropriation never occurred. The scheme of the Restitution Act requires courts to determine value at the time of dispossession and to convert it into the present-day value of money. Put differently the principle announced in *Chorzow* is inconsistent with our own statutory scheme.

[119] *Factory at Chorzow* (*Germany v Poland*) (1928) PCIJ Series A No 17 (*Chorzow*).

[120] Id at paras 125-6.

[121] *Kwalindile* above n 57 at para 43; *Mphela* above n 20 at para 43; and *Concerned Land Claimants* above n 45 at para 23.

Our duty to interpret our law consistent with international law arises only when international law is not irreconcilable with our own explicit law.[122]

(f) CPI under-compensates poor people

[145] Ms Florence says the CPI under-compensates the poor and, therefore, it is not an appropriate factor for converting historical loss into present-day terms. The Government correctly points out that there is no evidence placed before the trial court that the Florence family were poor in the sense of being in the lowest quintile of household income. If anything, Dr Wittenberg was of the view that, were the Florence family in the top quintiles, then the CPI would be a fair measure to convert their loss.

[146] In another case where the evidence shows that the claimants are poor and it appears that a conversion of past loss based on the CPI will result in compensation that is not just and equitable, it will always be in the court's hands to make such an adjustment in the quantum of the compensation that would eliminate the prejudice. It therefore avails not Ms Florence to raise prejudice against or under-compensation of the poor in the air. The remedial power of the Land Claims Court in section 35 taken together with section 33 makes it plain that the Court must "in any particular matter" have regard to many factors. It must ensure that the compensation is just and equitable and is not at odds with constitutional values. In this regard, the right to equality finds special mention in the section. There is no merit in the Ms Florence's

[122] *Glenister v President of the Republic of South Africa and Others* [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC) at para 115.

assertion that because the CPI conversion metric might under-compensate in a given setting, it ought not to have been applied in this case.

(g) Disparity in awards

[147] One of Ms Florence's objections to the use of the CPI for the translation exercise is that it results in an illogical discrepancy between the value of restitution in the form of restoration and restitution in the form of financial compensation. The essence of this objection is that the financial compensation ought to allow the Florence family to buy a new house of equivalent value. In other words, the extent of the disparity between the two forms of restitution is the difference between the CPI and the investment return. That difference, Ms Florence says, would be between R1.3 million calculated using the CPI and R1.9 million calculated using the 32-day notice deposit rate.

[148] Ms Florence's claim in this case was not for the restoration of a right to land but was for equitable redress in the form of compensation. We have already held that the purpose of financial compensation is to compensate the claimant in order to restore them to the position they would have been in immediately after the dispossession. Nothing in the scheme of the Restitution Act provides that financial compensation shall be an equivalent of restoration in kind. A claimant is entitled only "to the extent provided by an Act of Parliament". And the Restitution Act makes it clear that compensation may be granted in lieu of the land claimed or that it will be determined as an equivalent of the restoration of the subject land.

[149] The appeal on the main claim must fail.

Cross-appeal

[150] In my view, the cross-appeal must succeed. The Court's power to make a restitution order is derived from section 35 of the Restitution Act. It is so that it has open to it "a wide variety of potential forms of relief".[123] However the Land Claims Court's power to grant alternative relief does not include the power to order that the Government pay for the erection of a memorial plaque on the dispossessed land. Consequently the Land Claims Court was correct in concluding that it had no power to order the respondent to pay for the erection of a memorial plaque under section 35 of the Restitution Act. I consequently concur in the judgment of Zondo J. Also, Ms Florence and the present owner of the property have agreed that a memorial plaque may be erected. Thus Ms Florence's claim for the erection of a plaque has been settled by a private treaty and for that reason has been compromised.

Order

[151] The following order is made:

1. Leave to file the supplementary record is granted.
2. Condonation is granted.
3. Leave to appeal is granted.
4. Leave to cross-appeal is granted.

[123] *Goedgelegen* above n 20 at para 42.

5. The appeal is dismissed.

6. The cross-appeal is upheld.

7. There is no order as to costs.

ZONDO J (Moseneke ACJ, Skweyiya ADCJ, Dambuza AJ, Jafta J and Madlanga J concurring):

Introduction

[152] I have had the opportunity of reading the judgment prepared by my Colleague, Van der Westhuizen J as well as the judgment by Moseneke ACJ. The main judgment grants Ms Florence leave to appeal on the basis that—

(a) the matter clearly raises a constitutional issue,

(b) there are reasonable prospects of success, and

(c) it is in the interests of justice that leave to appeal be granted.

For the reasons that the main judgment gives, I agree that leave to appeal should be granted.

[153] The main judgment concludes that the appeal should be upheld. I am unable to agree with the main judgment in this regard. In his judgment, Moseneke ACJ concludes that the appeal should be dismissed. For the reasons that he gives, I agree with him that the appeal should be dismissed.

[154] I would also grant the Government leave to cross-appeal.[124] I would do so because the cross-appeal also raises a constitutional issue, namely, the interpretation of legislation enacted to give effect to the Constitution. It raises important issues and there are reasonable prospects of success for the cross-appeal. The main judgment concludes that the cross-appeal should be dismissed. I take a different view. In my view the cross-appeal should succeed. In what follows I explain my reasoning that leads me to this conclusion. This judgment deals with the cross-appeal only.

Brief background

[155] The main judgment fully sets out the factual background to this matter. For that reason, it is not necessary to do the same in this judgment. It will suffice to state only those facts that are necessary for a proper understanding of this judgment.

[156] In 1970 Mr Florence and his two brothers were dispossessed of their property as a result of racially discriminatory laws or practices of the apartheid government. No just and equitable compensation was given to them at the time for the dispossession of their property.

[157] The Florence family's dispossession of their property was not an isolated incident. Both under colonial rule and successive minority white governments, the dispossession of black people of their land was a critical feature of their oppression in

[124] Leave to cross-appeal is required by Rule 19(5) of the Rules of this Court.

this country. In turn black people placed the restoration of their land at the centre of their struggle for liberation.

[158] It was no wonder then that one of the first pieces of legislation to be passed by the first-ever democratically elected Parliament in this country in 1994 was the Restitution Act. That Act was aimed at addressing the demand for the restoration of land to people who had been dispossessed of their land as a result of racially discriminatory laws or practices. Both the appeal and the cross-appeal before us raise the interpretation of certain provisions of that Act.

[159] In the present case Mr Florence lodged a claim under the Restitution Act for the restoration of a right in land as provided for in section 2 arising from his and his brothers' dispossession of a right in land in 1970. The current owner of the property was cited in the claim. At some stage, while the claim was pending before the Land Claims Court, Mr Florence, as the applicant then, reached a settlement agreement with the current owner of the property. In terms of that settlement agreement Mr Florence abandoned the claim for the restoration of a right in land. In return the current owner of the property agreed that Mr Florence could put up a memorial plaque concerning the dispossession on the site. Mr Florence then pursued against the Government a claim for equitable redress and a claim for the payment of an amount for the costs of the erection of the memorial plaque. In the light of the settlement agreement, the current owner of the property withdrew from the proceedings in the Land Claims Court and has not taken part in any subsequent proceedings regarding the matter.

[160] Mr Florence died and Ms Florence replaced him in these proceedings. The Land Claims Court awarded Ms Florence an amount of R1 498 890 as equitable redress which the Government was ordered to pay. That amount was made up of R1 488 890 as compensation for the loss of the right in land that the Florence brothers had suffered when they were dispossessed of their property (less an amount that they had received at the time of dispossession) and an amount of R10 000 as a *solatium*. The Land Claims Court dismissed the claim for the payment of an amount for the costs of the erection of the memorial plaque. It held that it had no jurisdiction in respect of such a claim because the claim arose from a private agreement between the applicant and the current owner of the property to which the Government was not a party.

[161] In an appeal to the Supreme Court of Appeal, that Court dismissed the applicant's appeal against the amount of compensation that the Land Claims Court had awarded her as equitable redress but upheld her appeal against the order of the Land Claims Court dismissing her claim relating to the costs for the erection of a memorial plaque. The Supreme Court of Appeal held that the Land Claims Court had jurisdiction in respect of the claim and could have made an order under section 35(1)(e)[125] of the Restitution Act. It set aside the order of the Land Claims Court concerning the costs of the memorial plaque. It replaced that order with an

[125] Section 35(1)(e) reads:

> "The Court may order—
>
> . . .
>
> (e) the grant to the claimant of any alternative relief".

order that the Government pay an amount of R50 000 for the costs of a memorial plaque. It is against this order that the Government has noted a cross-appeal.

[162] The cross-appeal raises the question whether, for the dispossession of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices, a person who is awarded restoration of a right in land or equitable redress under the Restitution Act is entitled, in addition to such relief, to an amount for the costs of the erection of a memorial plaque. In what follows I consider the question whether the applicant is entitled to such a remedy or whether the Land Claims Court has jurisdiction in respect of such a claim or whether an order for the payment of such an amount is competent under the Restitution Act when an order for equitable redress has been granted.

Costs of the memorial plaque

[163] In my view Ms Florence is not entitled to an amount for the costs of the erection of a memorial plaque, or, indeed, to any remedy, in addition to equitable redress. This view is based on section 25(7) of the Constitution and various provisions of the Restitution Act, particularly the terms: "restitution of a right in land", "restoration of a right in land" and "equitable redress" in sections 1, 2(1), 2(2) and 22 of the Restitution Act. I consider these and other provisions below.

[164] Section 25(7) of the Constitution 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".

As this Court said in *Mphela,*[126] the Restitution Act gives effect to section 25(7) of the Constitution. The purpose of the Restitution Act is—

> "to provide for the restitution of rights in land to persons or communities dispossessed of such rights after 19 June 1913 as a result of past racially discriminatory laws or practices; to establish a Commission on Restitution of Land Rights and a Land Claims Court; and to provide for matters connected therewith."[127]

[165] Before I go further, it is necessary to refer to the definitions of certain terms used in the Restitution Act that, in my view, require a proper understanding in order to appreciate the principles underlying the Restitution Act. A proper understanding of these different terms is also necessary in order to follow the analysis of the Restitution Act that leads me to my conclusion. I refer below to the key terms and their respective definitions.

[166] The phrase "restitution of a right in land" is defined in section 1 as—

> "(a) the restoration of a right in land; or
> (b) equitable redress."

The phrase "restoration of a right in land" is defined as—

[126] *Mphela* above n 20 at para 24.

[127] See the Preamble to the Restitution Act.

> "the return of a right in land or a portion of land dispossessed after 19 June 1913 as a result of past racially discriminatory laws or practices."

The term "equitable redress" is defined as—

> "any equitable redress, other than the restoration of a right in land, arising from the dispossession of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices, including—
> (a) the granting of an appropriate right in alternative state-owned land;
> (b) the payment of compensation".

[167] In order to achieve its object, the Restitution Act sets out in section 2 the fundamental principle upon which it seeks to bring justice to those individuals, families and communities who were subjected to the indignity of the dispossession of their land as a result of past racially discriminatory laws or practices. Section 2(1)(a) captures the fundamental principle of the Restitution Act. It reads:

> "A person shall be entitled to restitution of a right in land if:
> (a) he or she is a person dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices".

[168] In essence section 2(1)(a) provides that, if a person was dispossessed of a right in land as contemplated in section 2(1)(a), she "shall be entitled to restitution of a right in land".

[169] Section 2(1) creates a specific cause of action and prescribes a specific remedy for that cause of action. The cause of action that it creates is dispossession "of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices".

For convenience I shall refer to this cause of action simply as "dispossession of a right in land". The remedy that section 2(1) prescribes is "restitution of a right in land." Accordingly, where a person lodges a claim based on that cause of action under the Restitution Act and satisfies the court that she was dispossessed of a right in land, the only remedy that she can be granted is "restitution of a right in land". In this regard it must be remembered that the term "restitution of a right in land" is defined as meaning "(a) the restoration of a right in land; or (b) equitable redress". Accordingly, the remedy of restitution of a right in land can take the form of the restoration of a right in land or equitable redress. It must also be borne in mind that "equitable redress" may take the form of payment of compensation or the granting of an appropriate right in alternative state-owned land.

[170] The "restitution of a right in land" as defined is the full redress cognisable by the Restitution Act for the dispossession of a right in land. Where a statute creates a new cause of action and prescribes a specific remedy for that cause of action, the prescribed remedy is the only remedy available for that cause of action. Therefore, a claimant who has been awarded restitution of a right in land, be it in the form of the restoration of a right in land or equitable redress, has been awarded full redress for the dispossession of a right in land and is not entitled to any other relief in addition.

[171] The construction that the remedy of the restitution of a right in land is the only remedy prescribed by the Restitution Act for the wrong of dispossession of a right in

land as envisaged in section 2(1) is reinforced by section 2(2) of the Restitution Act. Section 2(2) provides as follows:

> "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
>
> (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".

[172] In my view compensation awarded to a claimant as equitable redress under the Restitution Act would constitute just and equitable compensation as envisaged in section 25(3) of the Constitution. Section 2(2) means that there is no entitlement by anybody to restitution of a right in land (which also means there is no entitlement by anybody to a restoration of a right in land or to equitable redress) if, at the time of dispossession of the relevant right in land, just and equitable compensation was received.

[173] The fact that a person who was dispossessed of a right in land and was given just and equitable compensation or some other just and equitable consideration at the time of dispossession is precluded by section 2(2) from claiming restitution of a right in land entails the following. It necessarily means that that person may also not lodge a separate claim for the costs of the erection of a memorial plaque on the property even if the current owner of the land has no objection to its erection. Once a person

who was dispossessed of a right in land has been granted restitution in any of its forms, justice has been done and that is the end of the matter.

[174] There is another reason why such a person would not be able to lodge a separate claim for the costs of the erection of a memorial plaque. An applicant for restitution under section 2(1) is required to lodge a claim with the Land Claims Commission on Restitution of Land Rights in terms of section 10 read with section 11 or to lodge an application with the registrar of the Land Claims Court in terms of Chapter IIIA. Under the Restitution Act only one type of a claim may be lodged. It is a claim defined in section 1 as meaning—

> "(a) any claim for restitution of a right in land lodged with the Commission in terms of this Act; or
> (b) any application lodged with the Registrar of the Court in terms of Chapter IIIA for the purpose of claiming restitution of a right in land".

The definition of the word "claim" under the Restitution Act contemplates only a claim for restitution of a right in land. So, a person who was dispossessed of a right in land cannot under the Restitution Act lodge a claim for anything else in respect of the dispossession once he or she has been awarded restitution of a right in land, be it in the form of restoration of a right in land or equitable redress. A claim for an amount for the costs of erecting a memorial plaque falls outside the definition of "claim" in the Restitution Act. Therefore, it is a claim that is not contemplated or cognisable under the Restitution Act.

[175] Furthermore, section 10(1) of the Restitution Act, which is the section that provides for the lodgement of claims for restitution, restricts the lodgement of claims to claims for restitution.[128] Those are claims as defined in section 1 of the Restitution Act. Section 11 deals with the procedure to be followed after a claim has been lodged.[129] Section 14 deals with the referral by the relevant regional land claims commissioner of a claim to the Land Claims Court when, after investigation of the claim, he or she is of the opinion that the claim is ready for hearing by that court. Once again, the claim to which reference is made in that section is a claim as defined in section 1.

[176] Section 38B(1), which deals with direct access to the Land Claims Court, makes provision for a person entitled to restitution of a right in land and who lodged a claim not later than 31 December 1998 to "apply to the Land Claims Court for restitution of such right" provided, among other things, that the leave of that Court is first obtained in certain cases. This all relates to claims as defined in the Restitution Act. If the view that that person is entitled to payment of an amount for the costs of

[128] Section 10(1) reads:

> "Any person who or the representative of any community which is entitled to claim restitution of a right in land, may lodge such claim, which shall include a description of the land in question, the nature of the right in land of which he, she or such community was dispossessed and the nature of the right or equitable redress being claimed, on the form prescribed for this purpose by the Chief Land Claims Commissioner under section 16."

[129] Section 11(1) reads:

> "If the regional land claims commissioner having jurisdiction is satisfied that:
>
> (a) the claim has been lodged in the prescribed manner;
>
> (b) the claim is not precluded by the provisions of section 2; and
>
> (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."

the erection of a memorial plaque as a separate claim in addition to the restoration of a right in land or equitable redress is correct, why is it then that such a claim cannot be lodged separately under the Restitution Act?

[177] Section 22(1) establishes the Land Claims Court and provides for some of its powers. Section 22(1) reads—

> "[t]here shall be a court of law to be known as the Land Claims Court which shall have the power, to the exclusion of any court contemplated in section 166(c), (d) or (e) of the Constitution" and, thereunder appear paragraphs (a) to (d).

Paragraphs (a) to (d) cannot, by any stretch of the imagination, be said to give the Land Claims Court any power to make an order such as the one under consideration in addition to compensation constituting equitable redress. To show this, a discussion of paragraphs (a) to (d) is necessary.

[178] Paragraph (a) of section 22(1) gives the Land Claims Court the power "to determine a right to restitution of a right in land in accordance with this Act". Paragraph (b) gives that court the power "to determine or approve compensation payable in respect of land owned by or in possession of a private person upon expropriation or acquisition of such land in terms of this Act". Paragraph (cB) confers power "to determine whether compensation or any other consideration received by any person at the time of dispossession of a right in land was just and equitable". The Restitution Act grants the Land Claims Court specific powers to determine whether the compensation awarded was just and equitable. Once the Court has so determined,

the claimant has received equitable redress. That person has received justice and is not entitled to any further or additional relief, including costs for a memorial plaque.

[179] Section 22(2) sets out further powers of the Land Claims Court in paragraphs (a), (b) and (c). Of these provisions, only paragraph (c) deserves comment. Under that provision the Land Claims Court has—

> "the power to decide any issue either in terms of this Act or in terms of any other law, which is not ordinarily within its jurisdiction but is incidental to an issue within its jurisdiction, if the Court considers it to be in the interests of justice to do so."

Section 22(2)(c) was not relied upon by Ms Florence for the proposition that the Land Claims Court had power to make the order sought by her in regard to the costs for the erection of a memorial plaque nor was it relied upon by the Supreme Court of Appeal. Indeed, the main judgment also does not rely upon it. In my view it cannot be relied upon in this case.

[180] If Ms Florence sought to rely on section 22(2)(c) for the proposition that it is in the interests of justice that the Land Claims Court entertain the claim for the payment of the costs of a memorial plaque, that case should have been made first and foremost before that Court so that it could take a view on the matter. That case was not made in that Court. In any event, in my view it could not have been in the interests of justice that the Land Claims Court entertain the claim for the costs of the memorial plaque. Firstly, Mr Florence could and should have extracted those costs from the current owner of the property as part of the settlement agreement. Either he did not try to do

so or he tried but failed and then sought to claim it from the Government. Secondly, there is no reason why Ms Florence cannot or should not use part of the compensation awarded as equitable redress to pay for the costs of the erection of the memorial plaque.

[181] Section 39(2) of the Constitution enjoins that, when interpreting any legislation, every court must "promote the spirit, purport and objects of the Bill of Rights". Furthermore, it is now trite that legislation must be interpreted consistently with the Constitution whenever this can be done without doing violence to the language of the legislation.[130] The interpretation in this judgment that under the Restitution Act a claimant under section 2(1) is not entitled to any further relief in addition to a restoration of a right in land or equitable redress is consistent with section 25(7). Section 25(7) says that a person is entitled to either the restoration of that property or to equitable redress. It does not leave room for any further or additional relief.

[182] The view that under the Restitution Act a person who was dispossessed of a right in land as envisaged in section 2(1) is entitled to payment of an amount for the costs of the erection of a memorial plaque in addition to equitable redress means that two persons against whom the same wrong was committed are not treated equally just because one received her compensation at the time of dispossession and the other

[130] *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) at para 23.

receives it later. In this regard I refer to section 2(2) which I have already discussed above. That view seems to me to be based upon an interpretation of the Restitution Act that allows arbitrariness. If at all possible, a statutory provision should not be construed in a manner that permits arbitrariness. The construction I give to the Restitution Act does not produce any arbitrariness.

[183] The arbitrariness lies in the fact that, on that construction of the Restitution Act, two persons who were dispossessed of properties on the same day will be treated unequally when it comes to the relief they receive. If one of the two was given equitable redress or just and equitable compensation for the dispossession of her right in land at the time of the dispossession, she will not be entitled to an amount for the costs of a memorial plaque. However, the one who did not receive just and equitable compensation at the time of dispossession will be entitled not only to restoration of a right in land or equitable redress if she claims one, but also to an amount for the costs of a memorial plaque in addition to equitable redress. That would be something to which her colleague who received just and equitable compensation at the time of dispossession would not be entitled.[131]

[131] In *S v Mhlungu* [1995] ZACC 4; 1995 (3) SA 867 (CC); 1995 (7) BCLR 793 (CC) at para 8 this Court had to construe certain provisions of the interim Constitution to determine whether the interim Constitution applied to that case. Kentridge AJ construed the relevant provision to mean that, if the criminal proceedings concerned had commenced before 27 April 1993, the interim Constitution did not apply but, if they commenced after 27 April 1993, the interim Constitution did apply. Mahomed J, with the concurrence of a number of the Justices of the Court, did not agree with Kentridge AJ's construction and thought that it would produce arbitrariness. He said that Kentridge AJ's construction would result in the unequal or discriminatory treatment of two co-accused in the same case if one had been served with the indictment before 27 April 1993 and the other had been served after 27April 1993. Mahomed J then said:

> "The literal interpretation would invade all these objectives in its arbitrary selection of one category of persons who would become entitled to enjoy the human rights guarantees of the Constitution and the arbitrary exclusion of another group of persons from such entitlement. The Courts must strive to avoid such a result if the language and context of the relevant provision, interpreted with regard to the objectives of the Constitution, permits such a course.

[184] In *Makwanyane*[132] Ackerman J said the following about arbitrariness:

> "Arbitrariness must also inevitably, by its very nature, lead to the unequal treatment of persons. Arbitrary action or decision making is incapable of providing a rational explanation *as to why similarly placed persons are treated in a substantially different way*. Without such a rational justifying mechanism, unequal treatment must follow."[133] (Emphasis added.)

[185] I do not understand the main judgment to be to the effect that a person who is precluded by section 2(2) from entitlement to restitution of a right in land is entitled to claim an amount for the costs of a memorial plaque on the basis that section 2(2) says nothing about such a claim. Of course, the reason why section 2(2) says nothing about such a claim is that such a claim is not contemplated by the Restitution Act. If the view is held that such a person may lodge such a claim even though he cannot lodge a claim for restitution of a right in land since he or she is precluded by section 2(2) from doing so, then the difficulty will be: since such a claim falls outside the definition of "claim" in the Restitution Act, under what section will such a claim be lodged? It, obviously, cannot be lodged under section 10 because section 10 is for the lodgement of claims as defined in the Restitution Act. What procedure would apply to it after lodgement? The procedure in section 11 applicable after lodgement of a claim will not be applicable to such a claim because it is for claims as defined in the

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> What must be avoided, if this is a constitutionally permissible course, is a result which permits human rights guaranteed by the Constitution to be enjoyed by some people and denied arbitrarily to others."

[132] *S v Makwanyane and Another* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC).

[133] Id at para 156.

Restitution Act. Nor can such a claim be pursued by lodging an application with the registrar of the Land Claims Court in terms of section 38B(1) of the Restitution Act because such an application also relates to claims as defined in the Restitution Act.

[186] In terms of section 2(2) a person who was dispossessed of a right in land but was awarded just and equitable compensation at the time of dispossession is not entitled to restoration of a right in land or equitable redress under the Restitution Act. The question that arises is: would such a person be entitled to lodge a claim for the payment of the costs for the erection of a memorial plaque under the Restitution Act even though he would be disqualified from lodging a claim for equitable redress?

[187] On the approach adopted in this judgment, he or she would not be able to do so because he or she would have in effect been afforded equitable redress. However, on the approach of the main judgment and the judgment of the Supreme Court of Appeal, he or she should be able to do so because those judgments take the view that a person who was dispossessed of a right in land is entitled to claim costs for the erection of a memorial plaque in addition to equitable redress. However, the question is: under which section of the Restitution Act would he or she lodge such a claim? In my view, there is no such section in the Restitution Act.

[188] The main judgment concludes that leave to cross-appeal should be dismissed. It holds that the Land Claims Court did have jurisdiction and that, in setting aside its decision on this part, the Supreme Court of Appeal was exercising a discretion and

there is no basis to interfere. In my view, the Land Claims Court does not have jurisdiction in regard to such a claim as an independent and separate claim and does not have power to order the Government to pay an amount for the costs of the erection of a memorial plaque in addition to paying equitable redress. That a person has been granted equitable redress necessarily means that that person has been granted what he or she justly and equitably deserves for the wrong that was done to him or her.

[189] The only cause of action upon which Ms Florence relied is the dispossession of a right in land. Once she is awarded equitable redress for that cause of action, she has been granted justice and has no right to additional relief. To order the Government to pay anything further to the applicant in addition to equitable redress is to make not only an unjust and inequitable order but also to make an order that falls outside the ambit of the Restitution Act. As the Land Claims Court is a creature of statute, it has no power to grant an order that falls outside the Restitution Act and is not provided for by any other statute. The issue of the discretion does not even arise. The Supreme Court of Appeal also has no such jurisdiction or power.

[190] The Supreme Court of Appeal justified its decision to set aside the Land Claims Court's dismissal of the claim for the costs of the memorial plaque on two bases. The one was that it could not see why such costs should not fall within the ambit of a *solatium*. It did not elaborate on this. Assuming that such costs do fall within the ambit of a *solatium*, the Supreme Court of Appeal was wrong to overturn the Land Claims Court's decision to dismiss this part of the claim because the Land

Claims Court had awarded a *solatium* in the amount of R10 000 and there was no appeal against that amount. Therefore, this reason advanced by the Supreme Court of Appeal does not support its decision. It supports the conclusion that Ms Florence's appeal on this part of the matter should have been dismissed by the Supreme Court of Appeal.

[191] The other basis advanced by the Supreme Court of Appeal was section 35(1)(e). Section 35(1) confers power on the Land Claims Court to make various orders. The orders that the Land Claims Court may make are listed in paragraphs (a) to (e) of section 35(1). Under paragraph (a) the Land Claims Court may order the restoration of land or a portion of land or any right in land. Under paragraph (b) it may order the state to grant a claimant an appropriate right in alternative state-owned land and, where necessary, order the state to designate it. Such an order falls within the definition of "equitable redress" in the Restitution Act. Under paragraph (c) the Land Claims Court may order the state to pay the claimant compensation. Such an order also falls under "equitable redress". Under paragraph (d) it may order the state to include an applicant as a beneficiary of a state support programme for housing or the allocation and development of rural land. This order would also fall within the wide definition of "equitable redress in the Restitution Act. Under paragraph (e) the Land Claims Court may grant the claimant "any alternative relief".

[192] The main judgment agrees with the Supreme Court of Appeal that section 35(1)(e) of the Restitution Act gives the Land Claims Court power to order the Government to pay Ms Florence an amount for the costs of the erection of a memorial plaque in addition to equitable redress. The Supreme Court of Appeal judgment does not examine the meaning and scope of "alternative relief" contemplated in section 35(1)(e).

[193] The Supreme Court of Appeal seems to have taken section 35(1)(e) to read "any appropriate relief". This is not how section 35(1)(e) reads. It reads: "any alternative relief". In my view this means that the relief contemplated in section 35(1)(e) can only be granted as an alternative to relief under paragraphs (a) to (d). It cannot be granted together with such relief. Alternative relief must be alternative to something. We know that the relief of equitable redress was granted in the place of the relief of the restoration of a right in land that the applicant abandoned. So, the question is: as an alternative relief to what is the amount of the costs for the erection of the memorial plaque being awarded to Ms Florence?

[194] On the Supreme Court of Appeal's approach and the approach of the main judgment the answer is: as an alternative to nothing. That is contrary to the clear language of section 35(1)(e). The South African Concise Oxford Dictionary gives "alternative" the following meaning:

> "adj. (1) (of one or more things) available as another possibility. (of two things) mutually exclusive. (2) of or relating to activities that depart from or challenge traditional norms. n. one of two or more available possibilities".

In my view the meaning of "alternative" in section 35(1)(e) is that the alternative relief is mutually exclusive of the other forms of relief provided for in section 35(1).

[195] Section 6(2)(b) supports this understanding of "alternative relief" in section 35(1)(e). Section 6(2)(b) is to the effect that the Land Claims Commission may "make recommendations and give advice to the Minister regarding the most appropriate form of *alternative relief, if any, for those claimants who do not qualify for the restitution of rights in land in terms of this Act*." (Emphasis added.) It is clear from this provision that "alternative relief" is applicable in a case where a claimant does not qualify for other relief or where such relief is not appropriate. That is in line with the ordinary meaning of the adjective "alternative".

[196] Where a word or phrase appears more than once in a statute, it is presumed that it bears the same meaning throughout the statute.[134] The meaning that "alternative relief" bears in section 6(2) is the same meaning it bears in section 35(1)(e). Since, in section 6(2) that phrase means relief that may be or will be made available to claimants who do not qualify for restitution of a right in land, then in section 35(1)(e) the phrase must mean alternative relief to other forms of relief in section 35(1)(a) to (d). As equitable redress is competent and appropriate relief was awarded by the Land Claims Court in this case, it would not have been competent for that court to grant the applicant relief under section 35(1)(e).

[134] *Head of Department, Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* [2009] ZACC 32; 2010 (2) SA 415 (CC); 2010 (3) BCLR 177 (CC) at para 70.

[197] The meaning the main judgment gives to "any alternative relief" strains the language of the statute. The meaning I prefer accords with the ordinary meaning of the word and with the purpose of the statute.

[198] In the circumstances the cross-appeal should be upheld, the order of the Supreme Court of Appeal relating to the costs for the erection of the memorial plaque set aside and the order of the Land Claims Court on the issue of costs for a memorial plaque restored.

FRONEMAN J:

[199] I find myself in the unfortunate position of the curate given a stale egg at the bishop's table: I consider some parts of each of the judgments of Van der Westhuizen J and Moseneke ACJ persuasive, others not. As this is only an explanatory concurrence I shall be brief.

[200] I agree with Moseneke ACJ that the starting point for determining financial redress is the value of the property at the time of dispossession. The Restitution Act refers to the position that existed "at the time of dispossession of the right". Section 2(2) speaks of the compensation payable then and section 33(eC) builds on that by providing for "changes over time in the value of money" where financial redress is at stake. So the starting point is that the claimant must be put in a position

as close as possible as the dispossessed owner would have been had she been adequately compensated at the time.

[201] That does not, however, translate without more into the market value at the time of dispossession, because the compensation that needed to be paid at that time must be just and equitable compensation as determined under section 25(3) of the Constitution. Market value is only one of the factors that need to be considered under the section. Just and equitable compensation should be paid also having regard to the factors set out in section 25(3)(a), (b) and (e). This appears to me to be the position accepted by the Supreme Court of Appeal in *Haakdoornbult*.[135]

[202] In the ordinary financial-redress case, the starting point would be to determine what just and equitable compensation was payable at the time of dispossession and then adjust for "changes over time in the value of money". That initial compensation at the time of dispossession would not always simply be market value, because market value cannot adequately compensate for losing one's land *because of racially based dispossession policies*. Theoretically, therefore, the determination of just compensation at the time of dispossession should include compensation for the value of the dispossessed property.

[203] I find it difficult, however, to conceive how one can ever adequately determine proper compensation for people who were forced to sell their property at the time of

[135] See *Haakdoornbult* above n 51 especially at paras 46, 48 and 50.

dispossession. The only way to compensate them for their loss is restoration or, if restoration is not possible, something as close as possible in financial terms to restoration. In this kind of case the CPI, as representing the change in the value of money, may be inappropriate, and the present market value of the property could serve as evidence of its inappropriateness. The caution in relation to the use of current market value is, however, that it must be present market value calculated with regard to the comparable use and location of the property as at the time of dispossession.

[204] In the case where people who were forced to sell their property, rather than finding either the CPI or the present property value to be the only correct approach, the courts may be able to determine financial redress in a different manner. In a case where the claimant proves that (1) she would not have sold her property at the time of the dispossession even if she were properly financially compensated, and (2) the present market value of that kind of property is in excess of the CPI-valued increase of money, a different method may then be appropriate, having regard to all the other factors in section 33.

[205] Has that been shown in this case? I think so. Firstly, the applicant wanted to keep the property (that is, she did not want to sell it); and, secondly, the evidence of market value, albeit imprecise, showed an upward movement in excess of the CPI since dispossession – which was not rebutted.

[206] These factors were not considered in the Land Claims Court and, contrary to Moseneke ACJ, I thus consider it open for us to determine proper compensation. For the reasons given by Van der Westhuizen J I agree that under the circumstances use of the 32-day notice deposit rate will be just and equitable compensation.

[207] For these reasons I concur in the finding by Van der Westhuizen J in the appeal. I also agree with his approach in respect of the cross-appeal.

KHAMPEPE J:

[208] I have read the judgments of my brothers Moseneke ACJ, Van der Westhuizen J and Zondo J. I concur in the judgment of Moseneke ACJ in the main appeal and in the judgment of Van der Westhuizen J in the cross-appeal.

For the Applicant:	P Hathorn, F Jakoet and S Harvey instructed by the Legal Resources Centre.
For the Respondent:	B Joseph instructed by the State Attorney.