THE RESTITUTION OF LAND RIGHTS

A Workbook

by

VINODH JAICHAND
B.A. (UDW), LL.B. (Natal), LL.M. (Miami), LL.M. (Notre Dame), J.S.D. (Notre Dame)

ASSOCIATE PROFESSOR OF LAW:
DEPARTMENT OF PRIVATE LAW
UNIVERSITY OF DURBAN-WESTVILLE
ADVOCATE OF THE HIGH COURT
OF SOUTH AFRICA

KAAN
4

LEX PATRIA
Johannesburg



THE AUTHOR

Vinodh Jaichand has been associate professor of Law at the University of Durban - Westville since January 1992.

Born in Northdene, Queensburgh, Durban on 19 March 1951, the author completed his schooling in Durban, graduated at the University of Durban-Westville and taught English at the Woodlands Secondary School for more than 7 years.

It was during the latter period that his passion for the Law was nurtured: In 1980 a Bachelor of law degree was earned at the University of Natal and 4 years later a Masters degree was awarded by the University of Miami. Continuing in the USA, the author obtained a further Masters (magna cum laude) at the University of Notre Dame, Indiana in 1987 and in May 1996 a Doctor of Juridical Science degree was awarded at the same institution.

Vinodh Jaichand is also the recipient of numerous scholarships and awards, has attended and spoken at conferences and workshops in the USA, Canada, France and South Africa, and has had a number of articles appear in Law Journals, both in South Africa and abroad.

This is his first book.

In 1968 Jaichand and Minavathy Mungar, together with their then 5 children, were evicted from their home at 41 Mungar Road, Northdene, Queensburgh, Natal. Their house had been expropriated in terms of the Group Areas Act. The faded background on this cover is a reproduction of a photograph taken in 1959 and shows the author on the veranda of the family home some 9 years before its expropriation. With him are his sisters and one brother. The author is second from the right.

PERP
3

THE RESTITUTION OF LAND RIGHTS

A Workbook

by

VINODH JAICHAND
B.A. (UDW), LL.B. (Natal), LL.M. (Miami), LL.M. (Notre Dame), J.S.D. (Notre Dame)

ASSOCIATE PROFESSOR OF LAW:
DEPARTMENT OF PRIVATE LAW
UNIVERSITY OF DURBAN-WESTVILLE
ADVOCATE OF THE HIGH COURT
OF SOUTH AFRICA

LEX PATRIA
Johannesburg

Dedicated to all persons who suffered the cruel indignity of being compelled to leave their homes under threat of apartheid laws.

Lex Patria Publishers, Johannesburg, a member of Kagiso Publishers
Copyright © 1997
All rights reserved

ISBN 0 628 03652 3

First edition 1997
Set in 11 on 13 pt. Times Roman
Printers: Perskor, Doornfontein, Johannesburg

FOREWORD

I had never been to South Africa, but it had a prominent place in my thought and my imagination long before Professor Jaichand did me the honour of asking me to supervise his doctoral studies. Indeed, it has had one as long as I can remember. I absorbed descriptions of it in Kipling's Anglophile cadences before I was old enough to know what he was talking about. I learned English translations of Afrikaner folksongs from listening to Joseph Marais on the radio at a time when he was one of only two or three folksingers performing. Sometime in the fifties, I saw a film called *Pennywhistle Blues,* which imparted a deceptive charm to the life of the poor in the African townships. At about the same time, like almost everyone I knew, I read *Cry, the Beloved Country,* and responded to its evocation of the beauty of the land, the mindlessness of the oppression, and the patience of the oppressed.

Here at Notre Dame, I have had the chance to make friends with a number of visiting South African academics over the years, and many of my colleagues, led by our peripatetic President (now President Emeritus), Father Theodore M. Hesburgh, have visited South Africa. All have conveyed the same impression – charming and vigorous people, beautiful and much loved land, and crying injustice, all inextricably mingled. One of the Psalms, in the version I use, says, "The mountains shall yield peace for the people, and the hills justice." The hills of South Africa as I pictured them were in Alan Paton's words, "lovely beyond any singing of it". But I despaired of seeing them yield justice in my lifetime.

I first met Vinodh Jaichand in 1987, when he came to Notre Dame under a programme developed by Father Hesburgh and Justice Goldstone for enabling South African lawyers to take advanced degrees here. In one of his courses, I set an examination making the student a Deputy Attorney General of a mythical American state, with various kinds of advice to give to other officials. Vinodh remarked in passing that it was not easy for a person of colour in South Africa to imagine himself a government lawyer. It was a joyful surprise for both of us when he was able to return seven years later and write a dissertation on implementing a new South African constitution with a guarantee of racial equality.

For me, it was a challenge also. As a teacher of Jurisprudence in a Christian institution, I had been concerned with the relation between law and justice for most of my career. And here was Vinodh with the legal tools for dismantling one of the most flagrant (and surely the most juridical) of the multiple injustices of the twentieth century. Furthermore, he was not, like

me, a mere academic observer of the system being dismantled; he had grown up under it and suffered under it.

For his particular study of the dismantling process, Vinodh chose the restitution of land rights. He could not have chosen a more difficult subject, or one more fraught with danger to the whole process. The bonds between people and real estate are multiplex and subtle. Moral bonds arise more promiscuously and adhere more tenaciously than legal ones do, and emotional bonds are the most promiscuous and the most tenacious of all. In the eighty years between the first racially discriminatory Land Act and the Interim Constitution abolishing apartheid, there was time for one set of people to be uprooted from land their ancestors had occupied for a century; for another set to put heart and soul into making farms and homes on the same land; for a third to raise their families on the same land while working on it for wages; and for a fourth to build on it an industrial plant essential to the prosperity of that section of the country. All the resulting bonds have colourably just claims to recognition. Some of them it would be imprudent or even disastrous not to recognize.

The principles of justice governing such claims as these are complicated and highly debatable. It is generally felt that a person who first puts unproductive land to productive use has a right to possess it, but whether that right can be transferred or inherited is a debatable question. Another question is whether forest or savanna land should be considered unproductive if tribes of herdsmen or hunters and gatherers live off it, when it can be made to grow sugar cane, soybeans, or grain. It is also generally felt that people should all have some place or other to call their own. But at whose expense should they be given such places if they lack them? Theorists are often content in the end to let the positive law take its course and say that people have just claims to whatever property the positive law gives them. But here the positive law has been *ex hypothesi* unjust for eighty years.

By and large, the framers of the Interim Constitution, the Final Constitution, and the Restitution of Land Rights Act, 1994, did not address philosphical questions of this kind. Rather, after a good deal of hard bargaining, they buried such questions in exquisitively complicated and, in the end, ambiguous language. As a result, a black man whose grandfather was put off of a pasture in 1923 could plausibly hope for a free and clear title to the hotel that was built on the site in 1970. At the same time, a white man who bought a house at a bargain basement price when the original owner was put out under the Group Areas Act, 1966, might hope with equal plausibility to collect full market price for giving it back. And all were given a plausible hope of having the differences between their conflicting expectations made

up out of the public treasury – ignoring the likelihood of bankrupting the programme and probably the State.

Vinodh has worked his way through all these emotional, philosophical, linguistic, and political entanglements with cool observation, wide-reaching empathy, and incisive analysis. He begins by describing the multifarious legislative measures to which the programme of apartheid gave rise over the years, and the varieties of land tenure that they had put in place by the time the era of apartheid came to and end. He follows with a description of the two constitutional pillars of equality and property, and of the statutory procedure that they support, and are intended to justify. He then proceeds to show, in one situation after another, how the procedure can be used to produce a decent, workable, and reconciliatory solution. He concludes with a few general observations on the constitutional and statutory texts, with some modest suggestions for improvement.

This is very much a practitioner's book. Its focus is on solutions that lawyers can in good conscience pursue for their clients, and in good conscience advise their clients to accept. They are also solutions that judges and officials administering the land restitution programme should find to be in keeping with law and policy, and within constraints imposed by the available resources. Vinodh does not lose sight of the moral outrage and the affront to human dignity in the dispossessions of the past, but he recognizes that beneficiaries and victims have a future to build together. He also recognizes that no background reflection, however compelling, can absolve a legal author of the duty of analyzing the applicable texts and procedures. The constitutional and statutory provisions covered in this book are complicated, and the procedures are elaborate. They are set forth here carefully, lucidly, and in detail.

A highlight of the book is its use of hypothetical cases. Vinodh is first and foremost a law teacher, and illustrating laws with hypothetical cases is a major skill of his calling. It is done to perfection here. Vinodh has discerned the major confusions and dubieties in the legislation, and has conjured up an array of South Africans all across the spectrum of situations and colours to illustrate. In one case, we encounter Rouser Lapha, the orchid eating black activist, and Johan du Preez, the failed white farmer. Another involves the children of Comfort Radebe, a labour tenant with an acre of ground and a cow. Another is brought by Jane Mthembu, who was left behind when her too-vocal husband had to flee to Swaziland, and whose home is now the site of a cement factory. Along with all the other claimants there is Mark James, a white man, whose house has been made the clubhouse for an Indian golf course. It is typical of Vinodh to include a white

man among his victims of apartheid. One feels that all these characters might have had a major place in South African fiction if Vinodh had chosen to be a novelist instead of a law teacher. As it is, they provide an effective vehicle for appropriating the nuances of the law.

It is an honour and a pleasure to present this elegant and useful work by my friend, colleage, and one-time student, Professor Vinodh Jaichand, to the followers of my profession in a country very far from my home but very near to my heart.

ROBERT E. RODES Jr.
Professor of Law
Notre Dame Law School

ACKNOWLEDGEMENTS

I am indebted to several persons and organisations without whose assistance and guidance this work would neither have been undertaken nor completed.

None of this might have been possible without firstly acknowledging the grant of study leave from the University of Durban-Westville. For financial assistance I am beholden to several sources. I am thankful for the scholarship from the Center for Civil and Human Rights at the University of Notre Dame Law School. To the Ford Foundation, especially Aubrey McCutcheon and John Gerhardt, I express my gratitude for the individual grant that facilitated my period of study. I am also grateful to the United States Institute of Peace for the Peace Scholar award under the Jennings Randolph Fellowship Program. Special mention must be made of the support of Dr Tim Sisk and Dr Sally Blair.

I am grateful to the late Rev. William M. Lewers, Professor of Law and Director of the Center for Civil and Human Rights, and the Assistant Director Garth Meintjes, for the opportunity to return to Notre Dame Law School and the Center as a scholar. I express my sincere thanks for the ever-willing and invaluable assistance of Tina Jankowski, Assistant to the Directors. I benefitted immeasurably from the efficient and courteous service of the staff of the Kresge Law Library who attended to my every whim.

The debt I owe to my dissertation advisor, Professor Robert E. Rodes Jr., is immeasurable. I have been singularly honoured to work under his erudite and meticulous guidance. I am grateful that he has found the time to write the Foreword to this book for it was first his acute observation that this should happen. I am also thankful to Professor Gerard V. Bradley for his sound advice and to Professor A. Peter Walshe for his assistance and for his perceptive recognition of my latent ability as a narrator.

I am thankful to Ms Caroline Narsiah from the Department of Private Law, and Ms Indirani Naidoo from Academic Computer Services at the University of Durban-Westville for their help. I am grateful to my friend and colleague, Mr Michael C. Wood-Bodley, for his support and constant supply of relevant documents.

Finally, I wish to thank Mr Johan Rhoodie of Lex Patria Publishers for his professionalism and infectious enthusiasm.

TABLE OF CONTENTS

	Page
FOREWORD	i
ACKNOWLEDGEMENTS	v

CHAPTER I

THE HISTORICAL CONTEXT OF LAND SEGREGATION	1

CHAPTER II

AN ANALYSIS OF LAND RIGHTS AT THE DISMANTLING-OF-APARTHEID STAGE	9

CHAPTER III

LAND RESTORATION AS IMPLEMENTATION OF THE PRINCIPLE OF EQUALITY	23

CHAPTER IV

FACTORING IN THE PROPERTY CLAUSE	35

CHAPTER V

THE RESTITUTION OF LAND RIGHTS ACT	53
PART I – PROCEDURE OF A CLAIM UNTIL RESOLUTION	53
PART II – THE REMAINING PROVISIONS	69

CHAPTER VI

SOME QUESTIONS IN LOOKING FOR ANSWERS	77

CHAPTER VII

CONCLUSION	115

BIBLIOGRAPHY

BIBLIOGRAPHY	121

APPENDIX I

The Restitution of Land Rights Act, 1994. (As amended)

CHAPTER I

PREAMBLES 125
DEFINITIONS 127
ENFORCEMENT OF CLAIM FOR RESTITUTION 129
CLAIMS AGAINST NOMINEES 129

CHAPTER II

COMMISSION ON RESTITUTION OF LAND RIGHTS 130

CHAPTER III

THE LAND CLAIMS COURT 144

CHAPTER IV

MISCELLANEOUS PROVISIONS 165

APPENDIX II

RULES REGARDING PROCEDURE OF COMMISSION 167

APPENDIX III

PROPOSED AMENDMENTS 181

APPENDIX IV

Additional Provisions of the Land Restitution and Reform Laws Amendment Act, 1996.

SECTIONS 23 TO 33 183
(Not amending the Principal Act)

ALPHABETICAL WORD INDEX 187

CHAPTER I

The Historical Context of Land Segregation

The landing of the first white settlers in 1652, employed by the Dutch East India Company to found a resting station at the Cape under Jan van Riebeeck, heralded the beginning of the policy of land segregation in South Africa. The clash between individual and communal notions of land occupation, use and ownership took place as soon as the Khoi people were driven away from their grazing lands at the foothills of Table Mountain.[1]

In 1806 the British assumed the governance of the Cape Colony. Between 1835 and 1837, a significant minority of descendants of the Dutch colonists, known as the Boers, moved away from the Cape Colony in protest against British liberal rule and established their own republics in the north named the Orange Free State and the South African Republic (later known as the Transvaal).[2] In 1843 Natal was colonised by Britain and in 1860 the first Indians arrived as indentured labourers destined to work on the sugar farms of the same colony.

The Franchise Issue

Although the Anglo-Boer War was fought between the British and the Afrikaners for their own political ends from 1899 to 1902, the other race groups who had a vested interest in the outcome postulated that should the British emerge victors, there would be a strong likelihood of a non-racial society being established in South Africa.[3] However, in the post-war negotiations Britain permitted, in the Treaty of Vereeniging,[4] the Transvaal and the Orange Free State constitutions the right to maintain their previously

---

1 KEITH R MCCALL, *The Use of Expropriation to Bring about a Redistribution of Land in South Africa,* in COMPENSATION FOR EXPROPRIATION: A COMPARATIVE STUDY 245, 250 (Gavin M Erasmus ed., 1990).
For a general discussion of the relationship between the Dutch settlers and the Khoi people see ALBIE SACHS, JUSTICE IN SOUTH AFRICA 28–31 (1973).

2 INTERNATIONAL COMMISSION OF JURISTS, South Africa and the Rule of Law, 14–17 (1960).

3 PETER WALSHE, THE RISE OF AFRICAN NATIONALISM IN SOUTH AFRICA 15 (1971).

4 Signed on 31 May 1902.

entrenched policy of racial segregation.[5] This was undertaken as a strategy to placate the vanquished Boer Republics after a bitterly fought civil war.[6]

When the Union of South Africa was established in 1910 the African people felt further betrayed because the Act did not extend the franchise to them beyond the Cape.[7] Prior to the enactment of the South Africa Act of 1909 a number of Native and Coloured persons qualified to vote and be elected to Parliament in the Cape via the property and wage qualifications. In 1880 there were some 12 000 Native voters and by the turn of the century they comprised 6% of the voters while Coloureds made up 10%.

In Natal a few Natives and a number of Indians also qualified to vote. In the former Boer Republics only whites qualified. Section 35 of the South Africa Act of 1909 provided Parliament with the power to prescribe the qualifications of voters for the election of members of the House of Assembly, but any alteration to the voting rights of Natives and Coloureds required a two-thirds majority of the total number of members of both Houses in joint session.[8]

In response to the colour-bar clause in the South Africa Act and the Land Act being debated in Parliament, various leaders gathered in Bloemfontein on 8 January, 1912 to form the South African Native National

---

5 In the Orange Free State the franchise was limited to the male white person and native affairs were governed by a white commandant. Natives were permitted to retain their own laws and custom. See GILBERT W DOLD & C P JOUBERT, THE UNION OF SOUTH AFRICA 14–17 (1955). The Constitution of the South African Republic stated explicitly: "The people desire to permit no equality between the coloured races and the white inhabitants" and provided for a superintendent of native affairs. See *id.* at 18–19.

6 WALSHE, *supra* note 3, 22–25.
See also VINODH JAICHAND, *The Promise in the Right to Vote,* 26 THE COMPARATIVE AND INTERNATIONAL LAW JOURNAL OF SOUTH AFRICA 1, 1 (1993) and unpublished LL.M. dissertation by Vinodh Jaichand *The Rise and Fall of the Black Right to Vote: A Comparative Analysis of the Right to Vote in the United States and South Africa* 1987 (on file at the Kresge Law Library, Notre Dame).

7 See DAWID VAN WYK, *Introduction to the South African Constitution* 131 especially footnote 1, in RIGHTS AND CONSTITUTIONALISM (Dawid Van Wyk *et al,* 1994). Also DANIEL VISSER & THEUNIS ROUX, *Giving back the country: South Africa's Restitution of Land Rights Act, 1994 in context* 89 at 90 in CONFRONTING PAST INJUSTICES, APPROACHES TO AMNESTY, PUNISHMENT, REPARATION AND RESTITUTION IN SOUTH AFRICA AND GERMANY (M R Rwelamira & G Werle (eds.) 1996).

8 DOLD & JOUBERT, *supra* note 5, 42–43.

Congress.[9] The South African Native National Congress (which in 1923 became the African National Congress – ANC) took upon itself the task of scrutinising bills and acted as a lobby group in the absence of the Africans' direct voice in the legislature.[10]

In his address to the Native Congress of 1925, Prime Minister Hertzog[11] made it clear that his government would continue with their stated policy of racial segregation. Furthermore, the franchise would not be extended as the "European feels, quite rightly, that the right to vote is the fruit of centuries of civilised government, and that he is the result and the heir of a civilisation in which the Native does not share."[12]

Hertzog introduced the Coloured Persons' Rights Bill in 1925 which planned to excise Africans from the Cape common voting roll. Coloureds, however, were to retain their franchise. Because of the controversial nature of this Bill, it took a further ten years before the African Cape franchise was finally upset. The required two-thirds majority was not obtained in 1929 and 1930 at joint sittings of both Houses of Parliament, as required by section 35 of the South Africa Act of 1909. The amended Representation of Natives Act

9 WALSHE, *supra* note 3, at 38.

10 I do not wish to leave the impression that this was the only movement that opposed the actions of the Government. TIMOTHY D SISK, DEMOCRATIZATION IN SOUTH AFRICA 61 (1995) refers to the ANC as "Africa's oldest liberation organization" having been founded around two years before the National Party. The main protagonists in the land struggle were essentially these two parties. The African Peoples' Organisation was a mainly Coloured movement, led by Dr Abdurahman, which participated with the ANC and the Industrial and Commercial Workers Union (ICU) in a non-European unity conference in 1927. For further details, see SHULA MARKS & STANLEY TRAPIDO, *The Politics of Race, Class and Nationalism in Twentieth Century South Africa,* in THE POLITICS OF RACE, CLASS AND NATIONALISM IN TWENTIETYH CENTURY SOUTH AFRICA 30 (Shula Marks & Stanley Trapido eds.) The Non-European Unity Movement (NEUM) formed in 1936 disputed with the ANC that body's claim to be the only African national party. COLIN BUNDY, *Land and Liberation: Popular Rural Protests and the National Liberation Movements in South Africa 1920–1960,* in THE POLITICS OF RACE, CLASS AND NATIONALISM IN TWENTIETH CENTURY SOUTH AFRICA, 255 (Shula Marks and Stanley Trapido eds., 1987). Another movement was the Communist Party of South Africa. In 1959 the 'Africanists', as a dissident group within the ANC, formed the Pan-Africanist Congress (PAC).

11 General Hertzog became Prime Minister in 1924 in coalition with the Labour Party. For three years thereafter, he remained Prime Minister with an absolute majority. From 1933 to 1939 his party eventually fused with South African United National Party.

12 WALSHE, *supra* note 3, at 110.

of 1935 was passed which provided that Africans in the Cape on the common roll would remain, but no further Africans might register as voters.[13] By 1956 the Cape Coloured voters were also removed from the common roll after a protracted legislative and legal struggle.[14]

The Land Issue

When concern was expressed in Parliament about the presence of Natives[15] residing near whites, some members advocated the restriction of Native land purchases to certain areas. The African land allocation had already been confined to certain reserves or locations under the control of various chiefs who assigned the land to individuals under the existing customary norms. However, a number of Africans owned freehold farms which were then the cause for white concern as white expansion crept nearer.

Some members of Parliament began to play on white fears of an African land takeover. As a consequence of General Hertzog's efforts, the Land Act, Number 27 of 1913 was passed which established segregated possession in separate Native and white homelands.[16] Residence of persons in each other's areas was permitted only on certain conditions. The Act did not permit the movement of Natives from farm to farm and required those who chose to remain on white property to work ninety days per annum for

13 See *Ndlwana v Hofmeyr* 1937 AD 229 and JOHN DUGARD, HUMAN RIGHTS AND THE SOUTH AFRICAN LEGAL ORDER 28–34 (1978).

14 ANTHONY LEMON, APARTHEID IN TRANSITION 50 (1987). See also *Harris v Minister of Interior* 1952 (2) SA 428 (A), *Minister of Interior v Harris* 1952 (4) SA 769 (A), *Collins v Minister of Interior* 1957 (1) SA 552 (A) and Erwin N Griswold, *The 'Coloured Vote Case' in South Africa,* 65 HARV. L. REV. 136 (1952).

15 The term "Native" is interchangeably used with "Black" to describe the African people of South Africa. The earlier legislation uses the former term and the more recent, the latter. I regret any confusion or other connotation changing terminology creates. The details on the classification of Indian, Coloured and whites under the Population Registration Act, Number 30 of 1950 include the following definitions: (a) a "White" person means a person who in appearance obviously is, or who is generally accepted as, a white person, but does not include a person who, although in appearance obviously a white person, is generally accepted as a Coloured person; (b) "Native" means a person who in fact is, or is generally accepted as, a member of any aboriginal race or tribe of Africa; (c) a "Coloured" person means a person who is not a "white" person or a "Native". The sub-groups of Coloured included: (i) Cape Coloured (ii) Cape Malay (iii) Griqua (iv) Chinese (v) Indian (vi) Other Asiatic (vii) Other Coloured.

16 WALSHE, *supra* note 3, 44. For another view of the 1913 Land Act see MICHAEL H ROBERTSON, *Segregation Land Law: A Socio-Legal Analysis,* in ESSAYS ON LAW AND SOCIAL PRACTICE IN SOUTH AFRICA 285, 285–317 (Hugh Corder ed., 1988).

that privilege. Sharecropping was terminated and individuals were offered the choice of returning to overcrowded reserves or seeking employment on the mines in the city. The third choice of living on a white person's farm ensured a steady and loyal labour supply. Reaction to the Land Act of 1913 was sharp and it allowed the South African Native National Congress to mobilise its constituency around the principles of equality of opportunity.

The Native Trust and Land Act, Number 18 was enacted in 1936. It included a final allocation of land for incorporation into the homelands. The Act committed Parliament to acquiring the land on behalf of Africans rather than establishing freehold tenure. One writer stated the reason for the white capitalist's support for this principle was that they "had no intention of allowing their supply of labour to be cut off by giving the Natives in the reserves so much of land as to make them economically independant of employment outside".[17]

The ANC continued, to no good effect, its strategy of negotiating with the Government and attempting to impress upon the Smuts regime the prudence of changing the Native policy. The ANC was therefore compelled to consider alternative methods to deliver social, economic and political freedom to its constituency. In 1943 it produced "African Claims" in which it listed the basic demand of the removal of the colour bar, representation on the basis of adult suffrage, access to land throughout the country and a list of other civil, political, economic and social rights.

The Trading and Occupation of Land Restriction Act, Number 35 of 1943, often referred to as the Pegging Act[18], was designed to freeze the then existing Indian residential and business holdings which were burgeoning. The Act was introduced initially in response to demands by whites in

17 ROBERTSON, *supra* note 16, 292.

18 The Act was intended to peg land holdings until a comprehensive statute could be tabled. This Act is believed to be the model on which the Group Areas Act has been based. See Brij Maharaj, Apartheid Urban Segregation and the Local State: Durban and the Group Areas Act in South Africa, 18 URBAN GEOGRAPHY (in Press) 1997 and Brij Maharaj, The Land State and Residential Segregation: Durban and the Prelude to the Group Areas Act, SOUTH AFRICAN GEOGRAPHICAL JOURNAL (1995) Vol. 77(1) p. 33 *et. seq.*

Durban.[19] A similar restriction was placed on Indians in the Transvaal in 1939 as a "temporary" measure. The effects of the Pegging Act were made permanent in 1946 under the Asiatic Land Tenure and Representation of Indians Act, Number 28. This Act removed all qualified Indian voters from the general voters' lists and provided for an Indian voters' list for the election of special representatives for Indians. The ANC entered into an alliance with the Indian Congress when the latter was involved in passive resistence campaigns against the enactment of this Act in 1946.

In 1946 the Government enacted the Coloured Persons Settlement Act, Number 7 of 1946 which provided for settlement areas throughout South Africa in which only the State or a Coloured person could acquire or hold any interest in land.[20]

Prime Minister Malan's election manifesto in 1948 was based on apartheid, a system of separating the race groups to safeguard the racial privileges of whites. He made it clear that the country's racial groups were to be segregated rigidly with equality being achieved in each group's own area. The reserves were to become the national homelands of the Natives and other Natives working in the urban areas would be regarded as migratory labourers with no rights in the white areas. Malan's election campaign referred to "total apartheid as the ultimate goal of a natural process of separate development".[21] Malan's legislative programme included the Group Areas Act of 1950 which set out to segregate each racial group in its own residential area.[22]

In 1952 the ANC joined the Congress Alliance, made up of the white Congress of Democrats, the South African Indian Congress, the Coloured People's Organisation and the South African Congress of Trade Unions to launch the defiance campaign. In 1955, in a meeting in Kliptown, Johannesburg one of the highlights of the Alliance was the production of the Freedom Charter. This espoused a common South Africa for all, one devoid

19 MARKS & TRAPIDO, *supra* note 10, 191.
The large majority of Indians lived in this city and others were scattered in towns throughout Natal and some cities in the Transvaal. Very few were found in the Cape and none in the Orange Free State.

20 MCCALL, *supra* note 1, 255–256.

21 WALSHE, *supra* note 3, at 286.

22 LEMON, *supra* note 14, at 51.

of racial exclusivity and with strong ideals of traditional liberalism.[23] On the question of land the Charter stated that "South Africa belongs to all who live in it". It also declared that the national wealth of the country should be restored to and shared by the people and that all land should be redivided amongst those who work it.

With regard to the land aspirations of African people the National Party government decreed that they could secure these and other political ambitions in their respective homelands. After the Republican Constitution came into effect on 31 May 1961 the National Party set about implementing its homeland policy in earnest. The Transkei (1976), Bophuthatswana (1978), Venda (1979) and Ciskei (1981) were all granted "independence" while homeland status was granted to Gazankulu, KaNgwane, KwaZulu, KwaNdebele, Lebowa and QwaQwa. All Africans were citizens of one of the "independent" territories or homelands depending on which language they spoke.

Theoretically, South Africa had no African citizens because they were to express their "right to self-determination" in one of the designed territories. The Indian and Coloured people were accommodated under the tricameral dispensation of the 1983 Constitution[24] in which each race group had its own legislative chamber. The Constitution, however, was so structured as to ensure that the whites maintained control over Parliament.

In 1975 Minister de Klerk said:

> Never in history have so few legislated so programmatically, thoroughly and religiously, in such a short time, for so many divergent groups, cultures and traditions, than the nationalist Afrikaners of the second half of the twentieth century.[25]

23 SISK, *supra* note 10, at 62.
According to A J VAN DER WALT, *Property Rights, Land Rights and Environmental Rights,* in RIGHTS AND CONSTITUTIONALISM 478, at 481 (Dawid Van Wyk *et al,* 1994), the draft Bill of Rights eventually proposed by the ANC was based largely upon the Freedom Charter.
For an analysis of the principles of property and the proposals for a land clause and a property clause in the South African context see *id.* 478–501.

24 REPUBLIC OF SOUTH AFRICA CONSTITUTION ACT, NUMBER 110 OF 1983.

25 LEMON, *supra* note 14, at 53.

By 1990 the same de Klerk, then President, had to face the reality that apartheid had become the millstone around the neck of South Africa and was drowning it and its people.[26] He unbanned the ANC and other political parties, released Nelson Mandela and created the climate for a negotiated solution.[27]

The ANC recognised that the political manifesto of the Freedom Charter had to be translated into constitutional principles and published a set of constitutional guidelines as early as 1988. By 1993 a "Preliminary Revised Version" of the ANC Draft Bill of Rights was published in which Article 12 dealt with land and environment.[28]

On December 20 and 21, 1991 the Convention for a Democratic South Africa (CODESA) was held, attended by most of the major parties, at which it was decided that a new constitution for a "united, democratic, non-racial and non-sexist" South Africa would be drawn up according to an agreed set of principles.[29] While some progress was achieved in the Working Groups at the Convention (CODESA I) in preparation for a second meeting, the proceedings were becalmed for various reasons.[30] They were resuscitated in early March 1993 under the title of the Multi-Party Negotiating Process which eventually negotiated an Interim Constitution for a period of five years. The task of the Constitutional Assembly, which is the National Assembly and the Senate sitting together, was to approve the final constitution within two years from the first sitting of the National Assembly.[31] In April 1994 South Africa's first free democratic elections were held which the ANC won with an officially declared gain of 62.65 per cent. On 10 May 1994 Nelson Mandela was inaugurated as President.

---

26 For details of the period before the negotiations began see Hugh Corder, *Towards a South African Constitution,* 57 MOD. L. REV., 491, 493–494. See *also* Van Wyk, *supra* note 6, at 137–156 and SISK, *supra* note 10, at 82–88.

27 Corder, *supra* note 26, at 495.

28 See end of Chapter II for text.

29 Corder, *supra* note 26, at 497.

30 *Id.* at 499-500. See also Van Wyk, *supra* note 7, at 137–156 and SISK, *supra* note 10, at 248.

31 Chapter 5 of the CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1993, Act 200 of 1993, hereinafter referred to as the INTERIM CONSTITUTION. The [FINAL] CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, Act Number 108 of 1996 was adopted on 8 May 1996 by the Constitutional Assembly. After certification by the Constitutional Court, President Mandela signed it on 10 December 1996 and it became the law of the land in February 1997.

CHAPTER II

An Analysis of Land Rights at the Dismantling-of-Apartheid Stage

On 2 February 1990, President F W de Klerk announced to the world his earnest intention to dismantle apartheid with the release of Nelson Mandela from prison and the unbanning of the ANC, the South African Communist Party and the Pan-Africanist Congress.[32] The effect of the laws relating to rights in land, as of that date and earlier, is analysed in this chapter.

In introducing the right to land under South Africa's apartheid laws, Budlender and Latsky[33] commented on the intricate system that was developed over time in the following language:

> It is the kind of labyrinthine complexity which cannot and did not arise from a single flash of misguided brilliance. Rather, it is the result of generations of legal tinkering, of piecemeal and painstaking technical embellishments of structures created, on the one hand, in the service of the grand apartheid plan and on the other hand, in response to ideological, developmental and economic realities from time to time and from area to area.

The principal legislation which regulated land distribution under the "grand apartheid" era included the Native Land Act of 1913, the Native Trust and Land Act of 1936 and the Group Areas Act of 1966. Where necessary, these were supplemented by a host of other laws which controlled and regulated the freedom of movement, health and the labour supply.

In attempting to arrive at the ultimate effect of this maze of legislation I have chosen to present it under the following headings:

a) The division of rural land between Blacks[34] and non-Blacks and the resultant rights in land for Blacks.

---

32 For a full text of the speech see 1990 Debates of Parliament, column 1 as cited in Van Wyk, *supra* note 7, 131. See also Corder, *supra* note 26, 495.

33 Geoffrey Budlender and Johan Latsky, *Unravelling Rights to Land and to Agricultural Activity in Rural Race Zones,* 6 SOUTH AFRICAN JOURNAL OF HUMAN RIGHTS 155, 155 (1990).

34 The word "Black" is used at this point because the statutes use this term.

b) The division of urban land between Blacks and non-Blacks.
c) The division of non-Black land among whites, Indians and Coloureds.
d) Inadequacy of compensation paid to those displaced.

a) The division of rural land between Blacks and non-Blacks and the resultant rights in land for Blacks

The Native Land Act of 1913 remained the central legislation and, by schedule, it designated 34 750 square miles (which constituted 7% of all land in South Africa)[35] for the exclusive use of Blacks. It provided that only Blacks or the later Native Trust might acquire "scheduled" land, that is, it prevented acquisition by any one else.[36] The Native Trust was created under the Native Trust and Land Act in 1936.[37]

The schedule left out extensive areas of Black freehold and of unsurveyed lands which had long been regarded as Black land. It was mostly non-contiguous land and characterised as "black spots".[38] Blacks who occupied non-scheduled land without freehold tenure were mere squatters and could be removed at any time.[39]

The Native Land Act effectively prohibited land purchases by Blacks everywhere outside the "scheduled" Black areas, unless the approval of the Minister of Education and Development Aid was obtained.[40]

---

35 McCALL, *supra* note 1, 251.

36 The Trust might dispose of its land to non-Blacks only with the approval of Parliament in terms of section 18(2) and (3) of the Native Trust and Land Act of 1936. Budlender & Latsky, *supra* note 33, at 157 maintained that the restriction did not apply to a lease to a non-Black 'for the support, advantage or well-being of Blacks'.

37 In 1978 the Native Trust was renamed the South African Development Trust and in 1984 the South African Development Trust evolved into the South African Development Corporation.

38 Aninka Claassens, *Compensation for Expropriation: The Political and Economic Parameters of Market Value Compensation*, 9 SOUTH AFRICAN JOURNAL OF HUMAN RIGHTS 422, 424 (1993) cites estimates of people removed under this category from LAURINE PLATZKY & CHERRYL WALKER (eds.) THE SURPLUS PEOPLE: FORCED REMOVALS IN SOUTH AFRICA (1985) figures of 614 000.
A "Black Spot" was an official expression which referred to African freehold land which was located outside of the scheduled or released areas.

39 McCALL, *supra* note 1, at 252–253.

40 Budlender & Latsky, *supra* note 33, at 156–157.

The Native Trust and Land Act, Number 18 of 1936 (which was renamed the Bantu Trust and Land Act and, again, recast as the Development Trust and Land Act) provided for "released" areas which were in theory released from the restrictions of the Native Land Act of 1913. Much of this land was in fact owned by the Development Trust although some released land was owned by Africans. The 1936 Act authorised the acquisition of another 24 000 square miles which were to be added to the reserves scheduled under the Native Land Act of 1913. The Beaumont Commission had proposed 27 000 square miles but complaints from white farmers reduced the allocation by 3 000 square miles.[41]

The South African Development Trust became owner of all state-owned land reserved or set aside for Blacks and all state-owned land within the scheduled and released areas. The legal character of the trust is unclear;[42] it was not a common law trust where the trustee held certain property for the benefit of the beneficiaries.[43]

41 McCALL, *supra* note 1, at 250. The Beaumont Commission was appointed to investigate the possibility of including more land for allocation to Blacks.
As a palliative for the lost African voting rights in the Cape and representation for them through elected white representatives, the Government made this gesture.

42 Some may well argue that the Trust only consolidated the existing land allocation systems already in place. Therefore no new land allocation system was created.
According to DOLD & JOUBERT, *supra* note 5, at 219–220 many such trusts were in existence. The Natal Native Trust, constituted under Letters Patent in 1864, administered 2 million acres of location land for the benefit of the natives living on it. Between 1862 and 1887 both locations and mission-reserves were held under deeds of grant from the Government. The Zululand Native Trust was set up under a deed of grant in 1903. The Trust was responsible for the administration of 21 Zululand native reserves which measured nearly 3 million acres.
McCALL, *supra,* note 1 at 250, cites examples in the Transvaal where some 2 120 square miles were set aside for reserves while the Orange Free State created two tiny reserves totalling about 1 289 square miles. In the Cape Province about 21 000 square miles were set aside by 1905.

43 Budlender & Latsky, *supra* note 33, at 164.
This kind of trust may be described as a system of paternalism which was more self-serving to the needs of the trustee than for those for whom the benefit was intended. Budlender & Latsky maintained that the fiction of the State as a trustee for the various tribes was not a valid one because "where the State is hostile to the tribe, the 'trusteeship' provides little or no protection . . ."

Budlender and Latsky observed that:

> Almost all the rural land set aside for Blacks under the two Land Acts is State-owned – through the RSA government, the national states [that is, the homelands] or the Trust.[44]

There were significant pockets of land owned in registered freehold by African communities and tribes which were acquired before the enactment of the Native Land Act of 1913. One example was land granted to a group of Africans and registered in the name of the Minister of Native Affairs "in trust for" Gabriel Ngema and his heirs and successors.[45] This was a common law trust in which the trustee was obliged to exercise his powers for the benefit of the beneficiaries who had legally enforceable rights to the land.

The 1936 Natives Trust and Land Act, like its 1913 predecessor, prohibited, except with the approval of the Minister, the acquisition of land in a released area from another Black by a person other than the Trust or a Black. Section 13 empowered the Trust, for the purposes of acquiring released land, to expropriate it. It also empowered the Governor-General to expropriate land owned by an African outside the areas in which he would be permitted to acquire land when the Governor-General considered "for reasons of public health or for any other reason it would promote the public welfare or be in the public interest to do so." Compensation was payable in terms of the consolidated Expropriation Act, Number 63 of 1975.[46]

44 *Id.* at 165.

45 *Id.*

46 The Expropriation Act, Number 63 of 1975 was introduced to consolidate South African expropriation law. Section 26(1) expressly provided that several other statutes authorising expropriation remained effective (inter alia, sections 13 to 18 of the Development Trust and Land Act), unless the taking occurred after 1976. See MARCUS JACOBS & ANTONIE GILDENHUYS, *Expropriation in South Africa,* in 1 COMPENSATION FOR EXPROPRIATION: A COMPARATIVE STUDY, 373, 373–399 (Gavin Erasmus ed., 1990).

Tenure:

A series of measures, ending with the Black Areas Land Regulations of 1969[47] regulated the legal structure of African land tenure. According to Olivier, the regulations were "to a large extent a re-enactment of the indigenous law".[48] There were two main forms of African land tenure, namely, quitrent land (surveyed) and permission-to-occupy land (unsurveyed). Both forms gave the holder a permanent right to occupation and rights to use the common grounds. However it was uncertain whether this constituted "true ownership".

Quitrent land might be granted for arable, residential, farming or trading lots by the Director-General[49] under authority of the Minister, and was registered in the Chief Commissioner's registry of land titles for the area. It conferred the right to possess the land in perpetuity but did not grant the right to alienate it. The holder could not transfer, mortgage or let the land except to another African male person, and then only with the Chief Commissioner's consent. An African female would not be eligible to purchase or inherit these rights. All mineral rights vested in the Trust. Land was not subject to execution for any debt other than a debt secured under a registered mortgage bond or a debt due to the Trust or other statutory body which had been granted administrative control of the land. Succession to the quitrent land was by the customary law heir whose identity was determined

47 Proclamation R188 of 1969 based on section 8 of the Native Administration Act, Number 38 of 1927 which was modelled on the Glen Grey Act, Number 25 of 1894.
According to DOLD & JOUBERT, *supra* note 5, at 222–223, as the white occupation of the annexed territories grew, provision was made for native occupation of land reserved for that purpose. In some instances the tribal system of occupancy allotment by the chief, subject to notification to the local magistrate or native commissioner, was allowed to continue.
One of the earliest attempts at regulation of native land use was contained in the Cape Act, Number 40 of 1879. The Act contemplated the division of each location into a sufficient number of agricultural and residential allotments to permit grants to be made to the location residents. Any unallocated land remained as commonage for the use of the registered holders. However, the system failed because the small holdings of about 10 acres could be transferred only by means of a formal deed – a costly procedure which sometimes exceeded the actual value of the land being transferred. Native owners therefore ignored the system even though the allotments frequently changed hands.

48 Olivier N J J, *Indigenous Land Law in South Africa,* in SOUTHERN AFRICA IN NEED OF LAND REFORM 70, 76 (Sanders A J G M ed. 1981).

49 of the Department of Education and Development Aid.

according to the "Tables of Succession", contained in an annexure of the regulations, based on male primogeniture.[50]

Quitrent land might be expropriated, subject to the granting of compensatory land or payment, by the Minister, if in his opinion, *inter alia,* it was being used to cause soil erosion or was needed for the benefit of the State, the Trust or the public.[51] The Minister might also, after an administrative inquiry, cancel the quitrent title if the holder: failed to comply with the conditions contained in the regulations; failed to pay charges associated with the quitrent land for consecutive years; no longer used the land for the purposes for which it was granted; had been convicted more than once for stock theft, or on any law relating to habit-forming drugs and had, on second or subsequent conviction, been sentenced to imprisonment for 12 months or longer.[52] Upon cancellation the land again vested in the Trust.

The permission-to-occupy land holder was in a very similar position to the quitrent holder. The main difference was that the Commissioner, rather than the Chief Commissioner, exercised the powers and functions of administration over this holder.

Freehold land bestowed the usual rights of ownership, that is to use, possess and enjoy a thing, the powers to transfer and abandon rights and the freedom to consume and destroy.[53] Where land was tribally held the allocation and administration was done in accordance with custom. Where land was freehold held in undivided shares by descendants of the original purchasers, the allocation and administration might be a mixture of the following systems:

1. The descendants of the original purchasers might have a right to the use and occupation of both residential and arable land and might sell their undivided shares.

50 Budlender & Latsky, *supra* note 33, at 168.
51 *Id.* at 168.
52 *Id.*
53 Thomas Bennett, *Constitutional Protection of Customary-Law Interests in Land,* 1 THE HUMAN RIGHTS AND CONSTITUTIONAL LAW JOURNAL OF SOUTHERN AFRICA, (1996) 8 at 9.

2. There might be a customary system of allocation and allotment, which would take place through the tribal council and heads of the clans. Outsiders might gain membership in the tribe or clan by paying a fee.[54]

Labour tenancy:

There was one more way of linking an individual or his family to the land, and that was through labour tenancy. A farmworker might be entitled to the use of residential land for him and his family, grazing for his stock and land for cultivation in exchange for his labour. The labourer might or might not be paid a cash wage in return for his labour. The tenancy contracts were entered into for an indefinite period and might pass on from generation to generation. The Appellate Division of the Supreme Court (in *de Jager v Sisana* 1930 AD 71) described the labour tenancy as an innominate contract which did not confer on the labourer tenant a right in the land itself. When the farmer sold the land, the labour tenancy came to an end. However, the employer had to give the labourer tenant reasonable notice, which must allow him sufficient time to harvest his crops.[55]

b) Division of urban land between Blacks and non-Blacks

The Natives (Urban Areas) Act, Number 21 of 1923, subsequently replaced by the Black (Urban Areas) Act, Number 25 of 1945,[56] set aside certain locations for occupation by Africans. The aim of the Act was to clear out Africans from mixed residential areas in the cities and rehouse them in the locations.[57] African "advisory boards" were established by the white municipalities for local government. In a few exceptional circumstances, for example, Alexandra in Johannesburg and Fingo Village in Grahamstown, African ownership was permitted.[58]

The policy of the National Party government was to confine the increasing numbers of Blacks entering the urban areas under the terminology of "influx control" which was essentially a network of legislation and

54 Budlender & Latsky, *supra* note 33, at 169.

55 *Id.* at 170.

56 As amended by the 1952 Act.

57 Claassens, *supra* note 38, at 425 cites the figure of 730 000 who were removed in this category.

58 HERMAN GILIOMEE & LAWRENCE SCHLEMMER, FROM APARTHEID TO NATION-BUILDING 86 (1989).

regulations which controlled Black access to the urban-industrial areas in what was claimed to be white South Africa.[59] The control was achieved incrementally over the years aided by harsh legislation.[60]

With the enactment of the Abolition of Influx Control Act, Number 68 of 1986, many of these hurdles fell only to be replaced by problems of homelessness as a result of people migrating to the urban areas in search of a living.

c) Provisions for dividing non-Black land amongst Whites, Indians and Coloureds

The Group Areas Act, Number 41 of 1950, consolidated by Act Number 77 of 1957, and eventually by Act Number 36 of 1966, allocated to all races areas reserved for them throughout South Africa on the extension of the established principle for Black reserves.[61]

Under the Act there were ten types of areas which were defined dealing with ownership and occupation of residential or business property. Control was exercised over the use and development of areas and such control could be temporarily withdrawn at any time.[62] The Group Areas Development Act, Number 69 of 1955 provided for procedures for compensation and regulated the sale price of property in the open market. It also provided for the expropriation of properties under a system of public acquisitions for Group Areas development.[63] Without delving into the provisions in detail the Act, and its amendments, set aside:

1. Controlled areas, that is, areas in which both occupation and ownership of land were controlled. All areas, except for areas set aside for exclusive occupation by Blacks, were controlled areas.

---

59 GEOFFREY BINDMAN, INTERNATIONAL COMMISSION OF JURISTS, SOUTH AFRICA: HUMAN RIGHTS AND THE RULE OF LAW 18 (1988).

60 Some of these included the Native Laws (Amendment) Act of 1952, the Resettlement of Natives Act of 1954, the Prevention of Illegal Squatting Act of 1951, the Natives (Abolition of Passes and Coordination of Documents) Act of 1952 and the Black Community Development Act of 1983.

61 It relied upon the Population Registration Act, Number 30 of 1950 to classify individuals. See note 15 *supra.*

62 MCCALL, *supra* note 1, 258–260.

63 LEMON, *supra* note 14, at 216–217.
The Expropriation Act Number 65 of 1975 eventually consolidated South African expropriation law. See note 47.

2. Specified areas in which occupation, but not ownership was confined to a particular race group.
3. Defined areas which were usually owned and occupied by one race group, but destined for another race. All further building developments in these areas were frozen.
4. Use areas which could be occupied by Coloureds and Indians for trading purposes, but only with a permit.
5. Future group areas, that is, areas considered suitable for future proclamation as group areas. This designation allowed a measure of control over their use and development while planning was being completed.
6. Border strips, that is, physical barriers or divides between adjacent group areas set aside for different groups. Ownership and occupation, and use and subdivision were controlled.
7. Future border strips created with the same objective as border strips but for use in the future.[64]

Whites were the main beneficiaries of the Group Areas Act and the vast majority of those moved were Coloureds and Indians. Approximately three million Blacks were also victims of Group Areas planning. They were excluded from official statistics of Group Areas removals, because they were moved in terms of earlier legislation.[65]

McCall stated that, as of 31 August 1984, 2 771 traders had been forced to vacate their premises and 126 176 families comprising 83 691 Coloured, 40 067 Indian and 2 418 white families had been removed from their homes under the Group Areas Act. Official figures indicated that 3 790 Coloured, 2 366 Indian and 258 white families were due for removal after 31 August 1984. It is not known whether these removals took place.[66]

The Group Areas Act had been regularly amended to the point where many sections of the Act were no longer decipherable. It was a criminal offence to own or occupy land contrary to the provisions of the Act or to allow such occupation. Over and above imposing a penalty on any disqualified person who was convicted of such an offence the court might also order

64 McCall, *supra* note 1, at 258–259.

65 Lemon, *supra* note 14, at 217.

66 McCall, *supra* note 1, at 261.
However, Claassens, *supra* note 38, at 425, cites the figure of 860 000 people who were removed under the Group Areas Act.

him to be ejected from the property. The Minister might dispose by expropriation of immovable property held in contravention of the Act. He might also declare shares held by a disqualified person or a disqualified company in immovable property owned by a private company to be forfeited to the State.[67] The last provision was enacted to prevent disqualified persons from owning property under a juristic person which had no race.[68] Under the Group Areas Act a company was deemed to be a member of the race group of the persons holding a controlling interest in the company.

d) Inadequacy of compensation paid to those displaced

There were many reasons for Black rural communities receiving no compensation when they were subjected to forced removals.[69] One is that because the laws prohibited formal Black ownership the affected communities might not have had title deeds even though they had occupied the land in question since time immemorial.

In some cases even where people did have documentary proof of ownership, no compensation was ever paid after expropriation. An example that Claassens[70] cites includes the following facts: in the 1960's the Bakubung-Monnakgotla tribe was awarded compensatory land in the Pilanesberg and an amount of R400,000 in compensation. The Pilanesberg land was, however, registered in the name of the President of Bophuthatswana and he incorporated it into the Pilanesberg Game Reserve. The affected people never obtained access to the land, nor did they receive the monetary compensation. People were often removed from one area to a resettlement area only to discover that the latter area had been incorporated into one or other homeland.

> Queries about non-payment were invariably met with the response that Pretoria officials had no jurisdiction to negotiate with 'foreigners' who must submit their complaints to the homeland concerned. This occurred in scores of recorded cases and is one of the reasons which triggered the 1991 decision of over 30 communities to resort to reoccupation of their original land.

67 McCall, *supra* note 1, at 260.

68 See *Dadoo Ltd. v Krugersdorp Municipality Council* 1920 AD 530 where Indians registered a company to acquire immovable property in the Transvaal.

69 Claassens, *supra* note 38, at 423 footnote 4.

70 *Id.*

In other instances of expropriation,[71] initially under the Community Development Act, Number 3 of 1966 and later consolidated under the Expropriation Act, Number 63 of 1975, compensation was inadequate for many reasons. Where for example, land was frozen under one of the freezing provisions, there was no open market in which to gauge its value through comparable sales. In cases where arbitrators fixed the price to be paid by the Community Development Board when it exercised its pre-emptive right, the arbitrator had to determine the value of the property subject to the freezing notice preventing its development.

Indians and Coloureds whose homes or business premises were expropriated under the Group Areas Act, and who were not relocated in other premises or housing, were usually obliged to purchase new business premises or homes far from the central sites they formerly occupied. Because of the artificial land shortage the Group Areas Act created for Indians and Coloureds, the prices they had to pay were often considerably higher than what was paid to them for the expropriated land.[72] White speculators, who were reputed to have close contacts in the National Party and therefore to know in advance the effect of impending proclamations on certain land, made large sums of money from expropriated property.[73]

Various attempts were made to "reform" the land laws of the "grand apartheid" era. The Black (Urban Areas) Act Number 25 of 1945, was repealed by the Abolition of Influx Control Act, Number 68 of 1986 on

71 McCALL, *supra* note 1, at 271, questions the 'public purpose' of taking land away from one racial group and reserving it for another. However, the general principles of the law of expropriation were subverted to achieve what the apartheid state intended.
A J VAN DER WALT, *The Future of Common Law Landownership,* in LAND REFORM AND THE FUTURE OF LANDOWNERSHIP IN SOUTH AFRICA (A J van der Walt (ed) 24–25 is a lot more critical of property lawyers *per se*:
The very belief that Roman-Dutch private law is politically neutral has allowed property lawyers to tactfully turn their theoretical backs by occupying themselves with the fine distinctions that characterise "pure" Roman-Dutch property law . . . When the end of the apartheid era dawned, property law experts were caught with their theoretical pants around their dogmatical ankles, and for the most part their responses to the new challenges have been superficial.

72 McCALL, *supra* note 1, at 271–272.

73 BINDMAN, *supra* note 59, at 18. See also A J van der Walt, *supra* note 71, 24.

1 July.[74] This act abolished the notorious "pass system", which had for many years been used to control and prevent the free entry of Africans into the urban areas.

Not always as certain about the policy of racial segregation as it had been in the past, the National Party government enacted the Free Settlement Areas Act, Number 103 of 1988 which created "open" residential areas[75] in which people of all races could choose to live together. At the same time a Group Areas Amendment Bill was presented to Parliament which provided more stringent penalties for violations of the Group Areas Act.[76] After public protest against the proposed measures, the government dropped the Bill. On 1 February 1991, President de Klerk announced that the Group Areas Act and the Land Acts of 1913 and 1936 were to be abolished. The Abolition of Racially Based Land Measures Act Number 108 was passed in 1991,[77] which enabled all persons to purchase property anywhere in South Africa.

As predicted by many, the mere abolition of racially biased laws was not going to suffice. Positive steps to redress the inequities needed to be taken. The National Party government also appreciated the first point but was reluctant to take positive steps because it affected their constituency.[78] The government was, however, under pressure to redress the plight of victims of forced removals and the Advisory Commission on Land Allocation was established in 1991. It was empowered, at first, to identify undeveloped state land and other rural land for agricultural resettlement. Even though its mandate was extended, in 1993, to include urban land the effect of this Commission's work was minimal.[79]

However, the ANC's recommendations in its 1993 Draft Bill of Rights went further when it considered environmental rights and claims from those in need and those wrongfully dispossessed under Article 12:

---

74 See also note 60.

75 These were usually referred to as "grey areas".

76 McCall, *supra* note 1, at 263.

77 As amended by Act Number 110 of 1993.

78 T W Bennett, *Redistribution of Land and the Doctrine of Aboriginal Title in South Africa* 9 South African Journal of Human Rights 443, 443 footnotes 1 and 3 (1993).

79 John Murphy, *The restitution of land after apartheid: the constitutional and legislative framework,* in Confronting Past Injustices. Approaches to Amnesty, Punishment, Reparation and Restitution in South Africa and Germany. (M R Rwelamira & G Werle eds.) 113, 114–5 1996).

(1) The land, the waters and the sky and all the natural assets which they contain, are the common heritage of the people of South Africa who are equally entitled to their enjoyment and responsible for their conservation.

(2) The system of property rights in relation to land shall take into account that it is the country's primary asset, the basis of life's necessities, and a finite resource.

Rights to Land

(3) South Africa belongs to all who live in it.

(4) Access to land or other living space is the birthright of all South Africans.

(5) No-one shall be removed from his or her home except by order of a Court, which shall take into account the existence of reasonable alternative accommodation.

(6) Legislation shall provide that the system of administration, ownership, occupation, use and transfer of land is equitable, directed at the provision of adequate housing for the whole population, promotes productive use of land and provides for stable and secure tenure.

(7) Legislation shall provide for the establishment of a tribunal for land claims which shall have the power to adjudicate upon land claims made on equitable grounds, and in particular shall have:

a) the power to order the restoration of land to people dispossessed by forced removals, or where appropriate to direct that compensation be paid or other suitable acknowledgement be made, for injury done to them;

b) the power to award particular portions of land, or rights to land, to such claimants, where there are special circumstances arising out of use, occupation or other similar grounds, which make it equitable for such an award to be made.

(8) Legislation shall also make provision for access to affordable land to be given as far as possible, and with due regard to financial and other resources available to the state, to those historically deprived of access to land by past statutory discrimination.

(9) All such legislation shall guarantee fair procedure and be based on the principle of achieving an equitable balance between the public interest, including the above objectives, and the interests of those whose existing titles might be affected.

(10) Any redistribution of land or interest in land required to achieve the above objectives shall be subject to just compensation which shall be determined according to the principle of equitable balance between public interest and the interest of those whose existing titles might be affected.

(11) In the case of a dispute regarding compensation, provision shall be made for recourse to an independent tribunal, with an appeal to the courts.

(12) All natural resources below and above the surface area of the land, including the air, and all forms of potential energy or minerals in the territorial waters, the continental shelf and the exclusive economic zone of South Africa, which are not otherwise owned at the time of coming into being of this Constitution, shall be vested in the State acting as trustee of the whole nation.

(13) The State shall have the right to regulate the exploitation of all natural resources, grant franchises and determine royalties subject to payment of just compensation in the event of interference with any existing title, mining right or concession.

It is illuminating to compare what effect this draft had on the ultimate land reform strategy of the first democratic government of South Africa.

CHAPTER III

Land Restoration as Implementation of the Principle of Equality[80]

As has been shown, one of the most pervasive forms of racial inequity in apartheid South Africa was the practice of systematic land dispossession. The Preamble of the Final Constitution of 1996 "recognises the injustices of the past" and vows to

> Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights.

Chapter 2, section 7, of the Final Constitution of 1996 articulates the fundamental role of the Bill of Rights in that it is "the cornerstone of democracy in South Africa" which

> enshrines the rights of all people in our country and affirms the democratic values of human dignity, *equality* and freedom. [my emphasis]

Of the trio of democratic values the call for equality, without attempting to dilute the importance of the other two, has enjoyed a central focus in our constitutional history because it is the antithesis of the basic principles of apartheid. The Equality Clause now forms section 9 of the Final Constitution of 1996 and reads:

---

80 Roger Plant, *Land Rights in Human Rights and Development,* 51 INTERNATIONAL COMMISSION OF JURISTS – THE REVIEW 10, 24 (1993) gives us some idea of the gravity of land restitution problems, albeit not racially based, in other parts of the world:

> In many Baltic and East European countries, land reform and land privatization programmes since the early 1990's have been based on the principle of restitution to previous owners. In some cases, notably in the Baltic States, the emphasis has been on physical restitution of lands to which previous landowners lost rights during the collectivization era, without payment of compensation. In other cases restitution may involve the payment of compensation to previous landowners, rather than the physical restoration itself . . . [An emphasis] on restitution can be seen in the land reform law and politics of Bulgaria, the Czech Republic, Hungary, and Romania since 1990. Parliaments adopted new land laws in the course of 1991, recognizing the rights of landowners immediately prior to collectivization and establishing procedural mechanisms for reinstating these property rights.

9. (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.[81]

Formal equality[82] is established in sections 9(1), 9(3) and 9(4) which ensure that the playing field is levelled. If this were all that was required, it

81 The Equality Clause of the Interim Constitution read:

8. (1) Every person shall have the right to equality before the law and to equal protection of the law.

(2) No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.

(3) (a) This section shall not preclude measures designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms.

(b) Every person or community dispossessed of rights in land before the commencement of this Constitution under any law which would have been inconsistent with subsection (2) had that subsection been in operation at the time of the dispossession, shall be entitled to claim restitution of such rights subject to and in accordance with sections 121, 122 and 123.

(4) Prima facie proof of discrimination on any of the grounds specified in subsection (2) shall be presumed to be sufficient proof of unfair discrimination as contemplated in that subsection, until the contrary is established.

82 See generally, VIERDAG E W, THE CONCEPT OF DISCRIMINATION IN INTERNATIONAL LAW 7–18 (1973).

could have been achieved as regards land by the abolition of the Native Land Act of 1913, the Native Trust and Land Act of 1936, the Group Areas Act of 1966 and other legislation that controlled the free movement of people. But formal equality is not enough unless there is in place a just social order in which all persons can exercise their rights. To cure inequality is simple: one need only ensure that the same right is extended to all according to the same standard of measurement. But if nothing more is done any entrenched inequality will be ignored. A level playing field will not serve the purpose if the score piled up before the levelling is still on the board.

Substantive equality is established in section 9(2). The subsection views the aftermath of apartheid and takes definite steps to remedy it.[83] Albertyn and Kentridge argue that substantive equality

> . . . requires us to examine the actual social and economic conditions of groups and individuals in order to determine whether the Constitution's commitment to equality is being upheld.[84]

This commitment is best understood by a reference to the Constitutional Principles which served as a meta-Bill of Rights in that the Constitutional Court had to certify that the provisions of the text of the Final Constitution of 1996 comply with the Constitutional Principles contained in Schedule 4 of the Interim Constitution.[85] Constitutional Principle V reads:

> The legal system shall ensure the equality of all before the law and an equitable legal process. Equality before the law includes laws, programmes or activities that have as their object the amelioration of the conditions of the disadvantaged, including those disadvantaged on the grounds of race, colour or gender.

---

83 See Catherine Albertyn & Janet Kentridge, *Introducing the Right to Equality in the Interim Constitution,* 10 SOUTH AFRICAN HUMAN RIGHTS JOURNAL, 149, 152 (1994) where they argue for the purposive, contextual approach to be taken in interpreting the constitution because it

> reveals that within the constitutional vision of democracy lies an expansive and substantive conception of equality which encompasses the need to remedy inequality as well as to remove discrimination, to give in the present that which was unjustly withheld in the past, and to restore in the present that which was wrongfully taken in the past.

84 *Id.* at 152.

85 Section 71. See also section 73.

Therefore non-discrimination and affirmative action are integrally part of the South African definition and programme of positive action of equality.[86]

Without doubt, the achievement of equality as just amelioration of a previously unjust system is a central preoccupation of our recent constitutional history. Therefore the Interim Constitution echoes this principle throughout the text. The Preamble acknowledges

> the need to create a new order in which all South Africans will be entitled to a common South African citizenship in a sovereign and democratic state in which there is equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms . . .

Constitutional Principle I states that the

> Constitution of South Africa shall provide for the establishment of one sovereign state, a common South African citizenship and a democratic system of government committed to achieving equality between men and women and people of all races.

---

86 This obviously avoids some of the problems associated with the American definition of affirmative action where similar wording to subsection 8(3)(a) has been interpreted as permitting and disallowing affirmative action. In *Regents of the University of California v Bakke* 438 US 265 (1978) five judges of the Supreme Court held that section 601 of Title VI of the Civil Rights Act of 1964 did permit some forms of affirmative action while the others decided that the University's admission policy was illegal because it excluded a white applicant on account of his race contrary to the "plain meaning of the statute" (at 412).
See also the dissent of Rehnquist J (as he was then) in *United Steelworkers of America, AFL-CIO-CLC v Weber et al* 443 US 193 (1979) at 220.
Section 9(2) is in keeping with the American doctrine of affirmative action to the extent that the cases permit the redress of past discrimination.
For one of the earlier attempts to address this issue in another jurisdiction see the Permanent Court of International Justice case of *Minority Schools in Albania* (1935), Series AB/64, 17 where the Court attempted to distinguish between equality in law and equality in fact as follows:

> . . . Equality in law precludes discrimination of any kind; whereas equality in fact may involve the necessity of different treatment in order to obtain a result which establishes an equilibrium between different situations.

Constitutional Principle II states that

> everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution, which shall be drafted after having given due consideration to inter alia the fundamental rights contained in Chapter 3 of this Constitution.

Constitutional Principle III states that the

> Constitution shall prohibit racial, gender and all other forms of discrimination and shall promote racial and gender equality and national unity.

The Postscript or Post-amble[87] contextualises the history of South Africa and expresses both hope and direction for all South Africans. It reads:

> This Constitution provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.
>
> The pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society.
>
> The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge.

87 This is the term used by the Constitutional Court to describe the postscript to the Interim Constitution.

> These can be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *ubuntu*[88] but not for victimisation.

In assessing the constitutional commitment to equality in the Interim Constitution, Albertyn and Kentridge[89] note the equality is a value foundational to the Interim Constitution.

The importance of equality is reiterated in the Limitations Clause[90] of the Final Constitution of 1996 which provides that a right may only be limited if it is "justifiable in an open and democratic society based on human dignity, equality and freedom . . ." Albertyn and Kentridge make the observation that the latter theme recurs throughout the Bill of Rights in the Interim Constitution because this "feature has a particular resonance in South Africa; for if any two features defined apartheid, it [*sic*] was inequality and the lack of freedom."[91]

It must be kept in mind that the Interim Consitution was the product of a negotiated settlement with each party making compromises. Corder illustrates this as follows:

> . . . both the inclusion of certain rights, the exclusion of others and the precise formulations adopted were the direct product of political negotiations and agreement, with the Government and

88 In the Constitutional Court case of *The State v Makwanyane and Mchunu,* Case No. CCT/3/94 dealing with the constitutionality of the death penalty in a sentence imposed on the accused for four counts of murder, Mokgoro J at paragraph 308, defined *ubuntu* as follows:

> Generally, *ubuntu* translates as humaneness. In its most fundamental sense, it translates as *personhood* or *morality.* Metaphorically, it expresses itself in *umuntu ngumuntu ngabantu,* describing the significance of group solidarity on survival issues so central to the survival of communities. While it envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality. Its spirit emphasises respect for human dignity, marking a shift from confrontation to conciliation. In South Africa *ubuntu* has become a notion with particular resonance in the building of a democracy. It is part of our rainbow heritage, though it might have operated and still operates differently in diverse community settings.

89 Albertyn & Kentridge, *supra* note 83, at 149.

90 Section 36.

91 Albertyn & Kentridge, *supra* note 83, at 150.

> the ANC being the driving forces. Once the notions of an interim constitution and a government of national unity with a five-year lifespan had become common ground, there was little difference of opinion over the inclusion and formulation of the commonly accepted civil and political rights, with two exceptions. The right to equality before and equal protection of the law became controversial once a list of those grounds on which discrimination would be unconstitutional (including 'sexual orientation') was introduced, along with the inclusion of the notion of affirmative action as part of the principle of equality.[92]

The Final Constitution of 1996 was no less a product of compromises. The right to equality was vigorously sustained as one of the pivotal rights in the Bill of Rights in spite of the fluctuating character of the negotiating process through the two stages of the constitutional drafting process because of excesses of inequality of the past.

The Interpretation clause of the Interim Constitution[93] directs that

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

Section 39(1)(*a*) of the Final Constitution of 1996 provides that "a court, tribunal or forum must promote the values that underlie an open and democratic society based on human dignity, equality and freedom".

Albertyn and Kentridge call for a purposive, contextual interpretation of the Bill of Rights as set out in the Canadian *R v Big M Drug Mart* [1985] 1 SCR 295 at 344; 18 DLR 321[94] at 359–360 by Dickson J (later Chief Justice of Canada) in which the purpose of a right in the Canadian Charter of Rights and Freedoms is sought by reference to:

---

92 Corder, *supra* note 26, at 513.

93 Section 35 of the Interim Constitution.

94 Big M Drug Mart was charged with carrying on the sale of goods on Sunday contrary to the Lord's Day Act. Big M Drug Mart defended by challenging the constitutionality of the legislation as, inter alia, offensive to the guarantee of "freedom of conscience and religion" in section 2 of the Charter of Rights. The Court, after it had examined the various principles used to interpret a bill of rights, held that the Act did infringe upon the guarantee of freedom of conscience and religion and that the infringement could not be justified on the basis of section 1 of the Charter. Therefore the Act was unconstitutional.

(1) the character and larger objects of the Charter,
(2) the language chosen to articulate the specific right or freedom,
(3) the historical objects of the concept enshrined, and
(4) the meaning and purpose of other specific rights and freedoms with which it is associated in the text . . .

The writers add that the purposive approach focuses on the fact that the business of constitutional litigation and adjudication is ultimately about assessing, weighing and balancing principles, values and policy considerations in the context of the broad aims and objectives of the Interim Constitution. Closely linked to the purposive method is a meticulous concern with the context in which particular rights and freedoms are claimed.[95] That context for South Africa includes the dismantling of apartheid and its effects.

Since the scope of the inquiry in this chapter is limited to the achievement of equality through the restitution of rights in land, we may note that Section 9(3) lists a number of grounds on which an "unfairly discriminated" against individual could challenge the alleged discrimination and that "race" is a listed basis. By proscribing only "unfair" discrimination in Section 9 the drafters appear to have rejected the theory that all discrimination produces unjustifiable inequality.[96] The word clarifies that what is prohibited is not simply differentiation, but differentiation which inequitably benefits or disadvantages certain groups or individuals. That is, only malign

95 Albertyn & Kentridge, *supra* note 83, 151.
In the case of *Zuma and Two Others v The State,* Case Number CCT/5/95, the accused were indicted on two counts of murder and one of robbery. A trial-within-a-trial ensued when counsel for the accused maintained that the voluntary confessions made by the accused before a magistrate were inadmissible as evidence because they were obtained after the accused were assaulted. The matter came before the Constitutional Court on 5 April 1995, in terms of section 98(5) of the Constitution which empowers the Constitutional Court to declare a law to be inconsistent with the Constitution, by way of referral by the judge presiding over the trial.
In holding section 217(b)(ii) of the Criminal Procedure Act to be invalid, and after having traversed through the history of the right to a fair trial and the common law in South Africa, Kentridge A J approved of the principles articulated by Dickson J:

> Both Lord Wilberforce [of the Privy Council in *Minister of Home Affairs (Bermuda) v Fisher* [1980] AC 319PC, 328–9] and Dickson J emphasised that regard must be paid to the legal history, traditions and usages of the country concerned, if the purposes of its constitution are to be fully understood. This must be right.

96 This is the explanation offered by AZHAR CACHALIA, HALTON CHEADLE, PENUELL MADUNA & GILBERT MARCUS, FUNDAMENTAL RIGHTS IN THE NEW CONSTITUTION 28 (1994).

differentiation is prohibited.[97] However, cognizance must be had of the effect of subsection (5) which makes discrimination on any of the listed grounds in subsection (3) *prima facie* unfair and shifts the burden of proof to the respondent.

In terms of section 9(2) of the Final Constitution of 1996 there is an acknowledgement that positive action, in the form of remedial measures, will be undertaken to redress the disadvantage caused by the subjugating effect of apartheid. Albertyn and Kentridge maintain that

> the [Interim] Constitution is best understood as subscribing to a substantive conception of equality. Hence the legality of measures designed to undo inequality is implicit in the very notion of equal protection of the law.[98]

In the historical context for South Africa that means taking positive steps to dismantle apartheid and its resultant effects. They also state that this section was included as a cautionary measure to prevent "litigation on the question of whether affirmative action is consonant with the promise of equal protection of the law". Given the emerging efforts to mobilise politically against affirmative action in the United States, this may yet prove to be a worthy precaution, especially since Section 39(1)(c) of the Final Constitution of 1996 permits a court, tribunal or forum in interpreting the provisions of the Bill of Rights, to "consider foreign law".

It must be noted that although section 8(3)(b) of the Interim Constitution extended the redressing of inequality principle to a defined inequality, namely land, for which there arises a right to restitution the Final Constitution of 1996 omits this. Because the dispossession of land featured so prominently in the realm of apartheid, the negotiating parties, especially the

97 Albertyn & Kentridge, *supra* note 83, at 160–63.
The authors also offer the explanation that it was intended that the word "unfairly" be used deliberately as a substitute for a list of prohibited grounds of discrimination, which would have been more effective in distinguishing between permissible and impermissible distinctions in the Interim Constitution, according to one research published by the Cape academics.

98 Albertyn & Kentridge, *supra* note 83, at 173.

ANC, insisted on restitution under the Interim Constitution.[99] During the course of negotiations over the Property Clause in the Interim Constitution, the National Party representatives felt that the land restitution principle should not be located in the proposed Property Clause. They finally agreed to it being located in the Equality Clause of section 8. The Final Constitution cures this aberration and locates the land restoration principle in the Property Clause, specifically in section 25(7).

Section 8(3)(b) of the Interim Constitution continues to be relevant to the current land restoration procedure because it cross-referenced the constitutional history with the legislation. It referred to such claims being made in accordance with Sections 121, 122 and 123 of the Interim Constitution. These sections provided for the creation of a Land Commission and a Land Court. Sections 121, 122 and 123 of the Interim Constitution regulated the restitution of land rights procedure. Section 121 announced that an enabling Act of Parliament was to govern the restitution of land rights. This was the basis for the Restitution of Land Rights Act, Number 22 passed on 25 November 1994[100] which was amended by Act Number 84 of 1995 and Act Number 78 of 1996 on 20th November 1996.[101]

It provides that a person (or a direct descendant of such a person) or community who was dispossessed of a right in land, after 19 June 1913, under an abolished racially discriminatory law, may qualify as a claimant for the restitution of rights in land.[102] The date of 19 June 1913 serves as the historical cut-off time, the day the notorious Black [Natives] Land Act came into effect and created the Black reserves which entrenched the policy of separate development.

Section 121(2)(b) of the Interim Constitution provided that the claimant must show that the "dispossession was effected under or for the purpose of furthering the object of a law which would have been inconsistent with the prohibition of racial discrimination contained in section 8(2) . . ." The reference to the Equality Clause, ironically, reinforced the Interim

99 VAN DER WALT, *supra* note 23, at 499 observed that only the ANC saw it fit to treat land differently from other property rights. See also Matthew Chaskalson, *Stumbling Towards Section 28: Negotiations over the Protection of Property Rights in the Interim Constitution,* 11 SOUTH AFRICAN JOURNAL OF HUMAN RIGHTS, 1995, 222 AT 223.

100 Hereinafter referred to as the Act. For a full text of the Act see Appendix I.

101 Incorporated into the Act. See Appendix I.

102. Section 2 of the Act.

Constitution's commitment to eradicate racial discrimination against individuals or communities. According to Swanson, the Commission would allow standing not only to those forcibly removed or ejected as a result of apartheid laws but also to those who were subject to removal because by law they could not obtain title.[103]

Section 121(6) of the Interim Constitution provided that a claim shall not be justiciable by a court of law unless the claim has been dealt with by the Land Commission. In order to allow for the smooth operation of the Land Court this compulsory pre-curial procedure ensures that many of the necessary preliminary questions will be settled before the Court hears the matter.

Section 122 of the Interim Constitution set out the competence of the Land Commission as including the investigation of the merits of the claim, mediation and settlement of disputes arising from claims, the drawing up of reports on unsettled claims and submission of any other relevant evidence to the Court.

103 Edward Swanson, *A Land Claims Court for South Africa: Report on Work in Progress* 8 SOUTH AFRICAN JOURNAL OF HUMAN RIGHTS 332, 333 (1992).
See section 14(2)(c) of the Act.
As a result of the inadequate legal protection for persons in this category the Land Reform (Labour Tenants) Act, Number 3 of 1996 and the Communal Property Association Act, Number 28 of 1996 were enacted.

CHAPTER IV

Factoring in the Property Clause

Because the issue of property was so emotive and politically charged at both stages of negotiation for the Interim and Final Constitutions, the introduction of property rights into the Constitution caused the negotiators much consternation. It was compromised upon only at the eleventh hour.[104] The parties to the negotiating forums held[105] widely divergent views, from the National Party's protection of existing rights, to the ANC's concern that property rights would impact adversely on their planned legislative programme for those disadvantaged under the system of apartheid.[106]

Many commentators in South Africa felt that the inclusion of a property clause in the Bill of Rights would continue to favour the existing

---

104 For a complete account of the negotiation process with regard to the Property Clause in the Interim Constitution, see Matthew Chaskalson, *supra* note 99.
See also DANIEL VISSER & THEUNIS ROUX, *supra* note 7, at 92.

105 See Matthew Chaskalson, *The Property Clause: Section 28 of the Constitution,* 10 SOUTH AFRICAN JOURNAL OF HUMAN RIGHTS 131, 131 (1994) and A J van der Walt, *supra,* at 181.

106 Van der Walt, *supra* note 23, at 488 notes that the

> proposals of the main political parties leave the impression that the proposed property clauses have been drafted for the benefit of political negotiators in order to supply them with concession and compromise materials . . .

See also JOHN MURPHY, *supra* note 79, 118 who felt

> . . . that had the restitution of rights been juxtaposed alongside property rights in the bill of rights, the former might have assumed the character of inherent human rights, meaning that expropriations for restitution would automatically qualify as expropriations for public purposes. The social content and limits of property rights would have been circumscribed by the imperatives of land restitution and reform.

In addition, the author felt that the land restitution rights would have benefitted from the Interpretation Clause in that the rights would have been compared with similar rights in other jurisdictions outside South Africa.
The concerns articulated by Professor Murphy have been addressed in the Final Constitution of 1996.

title deed holders and therefore frustrate the full implementation of land reform and restitution.[107]

Others felt that market value provisions in the property clause would hamstring the whole land restoration process. Claassens best articulates this:

> If market value is the determinant, the cost of restoration will be prohibitively expensive, running into many billions of rands. Once the budget for historical land restitution is finished, all unmet claims for forced removal would be locked out of the court and restoration process and thereby deprived of any possible redress.[108]

The negotiation processes yielded Property Clauses reflecting the compromise reached. In explaining the interpretative paradigm of the Property Clause van der Walt[109] concludes that:

> . . . the property clause must be read against the background of a social policy aimed at striking a compromise between providing a simple but powerful constitutional guarantee for (inevitably) existing property rights on the one hand and a purposeful effort at removing some of the historical imbalances with regard to the distribution of land rights on the other.

---

107 Geoffrey Budlender, *The Right to Equitable Access to Land,* 8 SOUTH AFRICAN JOURNAL OF HUMAN RIGHTS 295 (1992); Matthew Chaskalson, *The Problem with Property: Protection of Property in the United States and the Commonwealth,* 9 SOUTH AFRICAN JOURNAL OF HUMAN RIGHTS 383 (1993); and Swanson, *supra* note 103, at 342. Chaskalson, *supra* note 107 at 389, states:

> In our country with its history of gross inequality and discrimination the constitutional protection of property rights makes very little sense. The protection of existing property rights would be extremely unjust. It would give constitutional security to the distribution of land produced by colonial conquest and apartheid. It would consolidate the massive existing disparities in society in such a way as to subvert any right to equality under the constitution.

108 Claassens, *supra* note 38, at 442.

109 A J van der Walt, *Notes on the Interpretation of the Property Clause in the New Constitution* 57 THRHR 181, 186.

The Property Clause in the Final Constitution of 1996[110] reads:

25. (1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

(2) Property may be expropriated only in terms of law of general application –

(a) for public purposes or in the public interest; and

(b) subject to compensation, the amount, timing, and manner of payment, of which must be agreed, or decided or approved by a court.

(3) The amount, timing, and manner of payment, of compensation must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant factors, including –

(a) the current use of the property;

(b) the history of the acquisition and use of the property;

(c) the market value of the property;

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

(e) the purpose of the expropriation.

(4) For the purposes of this section –

(a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and

(b) property is not limited to land.

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

(6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an act of Parliament, either to tenure which is secure, or to comparable redress.

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

110 The Final Constitution, Act Number 108 of 1996 became the law of the land in February 1997.

(8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).[111]

(9) Parliament must enact the legislation referred to in subsections [*sic*] (6).[112]

While section 28(1) of the Interim Constitution extended the principle of equality to all persons who have the right to acquire and hold "rights *in* property", as opposed to "rights *to* property"[113], the Final Constitution of 1996 has no such provision. Experience of the constitutions of Canada, New Zealand and Hong Kong indicates the absence of a "property clause" *per se* in modern constitutions as common.[114] The omission is unlikely to affect the rights of existing property holders who are adequately protected under our common law.

---

111 The Limitations Clause reads:

36. (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including –

(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation; and also
(e) less restrictive means to achieve the purpose.

112 The Property Clause in the Interim Constitution read:

28. (1) Every person shall have the right to acquire and hold rights in property and, to the extent that the nature of the rights permits, to dispose of such rights.

(2) No deprivation of any rights in property shall be permitted otherwise than in accordance with a law.

(3) Where any rights in property are expropriated pursuant to a law referred to in subsection (2), such expropriation shall be permissible for public purposes only and shall be subject to the payment of agreed compensation or, failing agreement, to the payment of such compensation and within such period as may be determined by a court of law as just and equitable, taking into account all relevant factors, including, in the case of the determination of compensation, the use to which the property is being put, the history of its acquisition, its market value, the value of the investments in it by those affected and the interests of those affected.

113 According to CACHALIA ET AL, *supra* note 96 at 92–3 "the intention of the clause appears to be to protect lesser rights than ownership such as the rights of tenants and occupiers."
See also Chaskalson, *supra* note 105 at 132.

114 Chaskalson, *supra* note 107, at 411.

Section 25(1) of the Property Clause of the Final Constitution of 1996 begins with the principle of legality, which is intended to eliminate arbitrariness, in that "no one may be deprived of property except in terms of law of general application."[115] The principle of legality is extended into section 25(2) and includes the principle of social obligation to the extent that the expropriation is permissible "for public purposes or in the public interest". The distinction between "deprivation" and "expropriation" is that in only the one instance is there a duty to pay compensation, namely, expropriation. This will no doubt assist the legislature's plans to regulate the exercise of property rights.[116]

Under a land rights claim in terms of Section 123(1)(b) of the Interim Constitution, would the expropriation of a piece of land from the owner for the claimant constitute expropriation for public purposes?[117] It would have had to; otherwise the Interim Constitution would have been internally inconsistent. Section 25(4) of the Final Constitution of 1996, however, now states categorically that "the public interest includes the nation's commitment to land reform".

In *Hawaii Housing Authority et al v Midkiff* 467 US 229 (1984)[118] the Hawaii legislature had in 1967 adopted a Land Reform Act authorising authorities to condemn the land of large landowners, transfer ownership of the condemned land to tenants or others and to lend funds or arrange for the financing of the land that was purchased. Although the landowners who were affected were paid compensation, they argued that their land had not been taken for a public purpose and that the taking was unconstitutional. Justice O'Connor held as follows:

---

115 *Cf.* the 5th amendment of the United States Constitution which provides: "No person shall . . . be deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation."
For a full comparative interpretation of this clause in other jurisdictions see Matthew Chaskalson, *supra* note 105, at 133–134; Matthew Chaskalson, *supra* note 107, at 395–404 and A J van der Walt, *supra* note 109, at 185–199.

116 Chaskalson, *supra* note 105, at 135 and Van der Walt, *supra* note 109, at 188–189.

117 However see Andra Eisenberg, *'Public Purpose' and Expropriation: Some Comparative Insights and the South African Bill of Rights* 11 SOUTH AFRICAN JOURNAL OF HUMAN RIGHTS 207(1995).

118 Cited with approval in *Davis and Others v The Minister of Lands, Agriculture and Water Development* High Court of Zimbabwe HH 185–95, HC 6289/93. See also Leonard W. Levy, *Property as a Human Right,* 5 CONSTITUTIONAL COMMENTARY 169, 179 (1988).

> The mere fact that property taken outright by eminent domain is transferred in the first instance to private beneficiaries does not condemn that taking as having only a private purpose. The Court long ago rejected any literal requirement that condemned property be put into use for the general public. 'It is not essential that the entire community, nor even any considerable portion, . . . directly enjoy or participate in any improvement in order [for it] to constitute a public use'. *Rindge Co. v. Los Angeles,* 262 US, at 707 '[W]hat in its immediate aspect [is] only a private transaction may . . . be raised by its class or character to a public affair.' *Block v. Hirsh,* 256 US, at 155. As the unique way titles were held in Hawaii skewed the land market, exercise of the power of eminent domain was justified. The Act advances its purposes without the State's taking actual possession of the land. In such cases, government does not itself have to use property to legitimate the taking; it is only the taking's purpose, and not in its mechanics, that must pass scrutiny under the Public Use Clause.

The fears of the so-called narrow test being used by our courts, as adumbrated by Cachalia *et al,*[119] have now been eliminated by the inclusion of section 25(4) of the Final Constitution of 1996.[120]

The state's commitment to land reform is reiterated in section 25(5) of the Final Constitution of 1996 where it undertakes to take the necessary steps, within its available resources, to facilitate a citizen's access to land.

Section 25(6) of the Final Constitution of 1996 contains a promise to ameliorate the predicament of those whose tenure of land is legally insecure. To this end the Land Reform (Labour Tenants) Act, Number 3 of 1996 was enacted to assist some 40 000 existing labour tenants in KwaZulu Natal and

---

119 CACHALIA ET AL, *supra* note 96, at 95.

120 25. (4) For the purposes of the section –

(a) The public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources...

See also Chaskalson, *supra* note 105, at 136–8. He states that in order to avoid anomalies of this nature in the Interim Constitution, the imperative language of the section must be read as being subject to the provisions of the general limitations clause, s 33(1). On a reading of s 28(3), an expropriation for a public purpose would survive constitutional challenge provided that the public interest in such an expropriation was sufficiently compelling.

the Eastern Transvaal by narrowing the grounds upon which their eviction is permissible. In addition, the Communal Property Associations Act, Number 28 of 1996 was passed to enable communities to acquire, hold and manage property in common. Section 25(8) of the Final Constitution of 1996 provides that any further land and environment reform by the state which may appear to depart from the existing provisions must be limited by the standards set in the Limitations Clause, that is, Section 36(1).

It is the rest of section 25(3) of the Final Constitution of 1996 that requires our closest attention because it lays down the principles for the calculation of the quantum of "just and equitable" compensation where expropriation of private land is ordered by the Land Court, especially in land restitution cases.[121] This is undertaken by the Court only where it believes it to be just and equitable to expropriate.

In this restitution process we need to examine the principles the Land Court is going to use to place a money-value on land that has to be expropriated. The Court may determine such compensation as being "just and equitable" by taking into account all relevant factors including: (a) the current use of the property;[122] (b) the history of its acquisition and use of the property;[123] (c) the market value of the property;[124] (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property;[125] and (e) the purpose of the expropriation.[126]

Although the language of the provisions in the Interim Constitution differs from the wording in the Final Constitution of 1996 the courts will endeavour to interpret the language as being the same unless it is clearly inconsistent with the Final Constitution. Also, references to the Interim constitutional provisions in the legislation (such as the Restitution of Land

121 Section 25(7) of the Final Constitution of 1996.
122 Phrased as "the use to which the property is being put" in section 28(3) of the Interim Constitution.
123 Phrased as "the history of its acquisition" in section 28(3) of the Interim Constitution.
124 Phrased as "its market value" in section 28(3) of the Interim Constitution.
125 Phrased as "the value of the investments in it by those affected" in section 28(3) of the Interim Constitution.
126 Phrased as "the interests of those affected" in section 28(3) of the Interim Constitution.

Rights Act) will, in time, be amended to reflect the provisions in the Final Constitution. Schedule 6 of the Final Constitution of 1996 provides for the Transitional Arrangements. Section 2 reads:

(1) All law which was in force when the new [Final] Constitution took effect, continues in force, subject to –

(a) any amendment or repeal; and

(b) consistency with the new [Final] Constitution.

(a) The current use of the property

The lessons from some former-colonial Southern African states might serve as a guide because of the similarly shared colonial background.[127] Having inherited a property clause in a bill of rights under which they were making slow progress towards expropriation of derelict and abandoned property, Zambia devised a new scheme which Malawi later emulated.

Under the Zambian Lands Acquisition Act Number 2 of 1970, section 15 provided that no compensation was generally payable in respect of undeveloped or unutilised lands. However, an absentee owner who was "beneficially entitled" to the land was entitled to compensation limited to the value of "unexhausted improvements" which was described as

> any quality permanently attached to the land directly resulting from the expenditure of capital or labour and increasing the productive capacity, utility or amenity thereof, but does not include the results of ordinary cultivation other than standing crops and growing produce.[128]

The meaning of "undeveloped" or "unutilised" depended upon whether it was situated in a rural or urban area. As a general rule land was deemed to be undeveloped "if it is inadequately developed bearing in mind the national need".

---

127 Clement Ng'ong'ola, *The Post-Colonial Era in Relation to Land Expropriation Laws in Botswana, Malawi, Zambia and Zimbabwe*, 41 INT'L & COMP. L Q, 117 (1992). See also S B O GUTTO, PROPERTY AND LAND REFORM, CONSTITUTIONAL AND JURISPRUDENTIAL PERSPECTIVES, 35 (1995) for some of the developments in different land tenure systems in Africa.

128 Ng'ong'ola *supra* note 127, at 130.

> Rural agricultural land would not be undeveloped unless such land has not been used for cultivation or pasturage . . . at any time during the period of two years immediately preceding the publication of the notice to yield up possession.

Rural land was also unutilised if ". . . the exploitation of the land is not in accordance with good estate management".[129]

As is apparent, the imprecise definitions would have encouraged litigation had the jurisdiction of courts not been ousted in cases of compensation for expropriation. As a result, Ng'ong'ola observes that

> [t]wenty years after the implementation of reforms, the practical and legal operation of the law in Zambia and Malawi remains inscrutible. This is one aspect of the reforms which must be decried, regardless of the fact that the underlying aim of reducing the amount of compensation payable was laudable, especially where idle settler land was required for redistribution to landless peasants.[130]

There is no doubt that the South African Land Court will have to consider whether the land is developed, undeveloped or under absentee ownership, without necessarily hoping to emulate the eventual procedure

129 *Id.* at 130.
130 *Id.* at 131.

adopted by our northern neighbours.[131] If the land is not being utilised[132] or is undeveloped, such a fact will militate against a high compensation assessment.[133] The Court will have to arrive at some guidelines in the future about the meaning of "undeveloped", with the divide, it is suggested, being between rural and urban land. More land will be found to be undeveloped or unutilised in the rural areas, because of the absentee owners of farms. The beneficiaries of claims in these areas will be largely those removed under the 1913 and 1936 Black Land Acts.

With regard to undeveloped urban land, I am ambivalent about any expropriation of such land with a view to restoring the rights of ownership to the claimant. The reason is that the land restitution scheme was originally envisaged for rural areas and has been extended to apply in the urban areas without too much thought being given to some of the possible results.

I feel that the Court in some cases, after ordering expropriation, should exercise its power in terms of section 35(4) of the Act "to adjust the

---

131 For example, the Land Acquisitions Act, Number 3 of 1992 of Zimbabwe provided for the identification of derelict land, for the machinery and guidelines of assessment of "adequate compensation" that is "fair and reasonable" and for the establishment of special courts and arbitrators to resolve disputes arising from the quantum of compensation. It also provided that no land in the rural areas could be sold and transferred before the state was given the first opportunity to buy it. This was aimed at the state's policy of land redistribution.
See S B O Gutto *supra* note 127, at 43.

132 Lawrence C. Becker, *The Moral Basis of Property,* in NOMOS XXII Property 187, 206 (J. Roland Pennock & John W. Chapman eds. 1980) gives the example of the practice in some agricultural societies of fallow land being used by anyone, even without getting the permission of the owner.

133 Some commentators have a continued preoccupation with market value of the property as the means of assessing compensation for expropriation. Antonie Gildenhuys, Judge of the Land Court, states:

> It is not clear how the current use of the property is intended to affect compensation: does it mean that the owner of an unused property is entitled to less compensation than an owner who uses his property, even though the non-use has no effect on the market value of the property? 1 The Human Rights and Constitutional Law Journal of Southern Africa 3, 3 (1996).

nature of the right previously held by the claimant" and determine the form of the future title.[134]

In considering the use to which the land is being put, land which ought not to be expropriated, rural or urban, would include sites on which essential services such as schools, hospitals, police stations and other public amenities are situated. In keeping section 33(d) of the Act in mind, "the desirability of avoiding major social disruption", the Court may be cautious about ordering expropriation of residential property. Also, in its determination about expropriating any commercial or industrial sites, the Court may dwell on the possibility of a loss of employment opportunities to that area as a whole. Where the Court is faced with the possible expropriation of a highly productive wheat farm, for example, to be used as future residential property, common sense should prevail and deny the expropriation.

(b) The history of the acquisition and use of the property

Under this principle, the Court will have to determine the facts surrounding the acquisition by the owner such as the method of acquisition, the dates of acquisition, the method of financing the acquisition and how long it has been in the possession of the owner. An examination of the history of its dispossession is also undertaken by the Court in terms of section 123(2) of the Interim Constitution (from the perspective of the claimant), but does not feature in the owner's just and equitable compensation equation.

The Court will be keen to ascertain whether the property in question was purchased or inherited by the owner or whether it was a gift. It may have been purchased, for example, from a speculator, from the former Department of Community Development (reputed to be the largest real estate agent in the hey-day of the Group Areas Act) or from the Land Bank.

134 Because undeveloped urban land is valuable the Court may grant the claimant lesser rights than ownership – leasehold rights, for example, for the period that the claimant was dispossessed after which the land reverts to ownership in the State – or rights subject to mortgage.

The right of first refusal to purchase ownership rights may also be coupled with such an order to the claimant. The reason for this suggestion is that this may turn out to be the way to finance the State land restoration plan. The Achilles heel of the plan is finance. The restitution of undeveloped urban land is going to result in windfalls to some claimants. Many victims of the Group Areas Act would fall into this category.

Large profits on bargain-basement purchases were made by various friends and relatives of Ministers then in government.[135]

Where land is inherited or received as a gift, it is not an unusual practice to make the transfer of such property subject to taxation. The Court will enquire into the details of such payments, or lack of them, when it determines the amount of compensation due.

The method of financing may reveal that some loans, for example, those granted by the Land Bank, attracted a very low interest rate which permitted deferred repayment in some instances. Compared to loans offered by other commercial banks for the purchase of land, Land Bank rates were very favourable for their white clientele.

The length of time the property was in the possession of the owner is also an important consideration. The longer the duration, the easier it is to justify a higher quantum of compensation as just and equitable, all other factors being equal.

(c) The market value of the property

Market value is a concept well-established in the expropriation laws of many countries and South Africa is no exception. It is defined in the Expropriation Act, Number 63 of 1975 (as amended by Act Number 45 of 1992) as "the amount which the property would have realised if sold on the date of notice in the open market by a willing seller to a willing buyer".[136]

---

135 See BINDMAN *supra* note 59 for details and Antonie Gildenhuys *supra* note 133, at 3.

136 Section 12(1)(a)(i) of the Expropriation Act.
However, section 34(5) of the Restitution of Land Rights Act of 1994 directs:

> If the Court orders the State to expropriate land or a right in land in order to restore it to a claimant, the Minister shall expropriate such land or right in accordance, *mutatis mutandis*, with the provisions of the Expropriation Act, 1975 (Act No. 63 of 1975): Provided that the owner of such land or right shall be entitled to the payment of just and equitable compensation, determined either by agreement or by the Court according to the principles laid down in section 28(3) of the Constitution: Provided further that the procedure to be followed by the Court in the determination of such compensation shall be provided in sections 24 and 32 of this Act.

These "willing" parties are not the expropriator and expropriatee, but notional parties to an "arm's-length" transaction.[137] A willing seller is not a seller willing to sell his property without reserve at any price he can obtain for it. A willing buyer is a person able and willing to buy, but not acting under any compulsion to buy.[138] Both have a free choice whether they will enter the transaction at all.[139] A willing buyer may be a buyer with a special need to purchase the property, such as the owner of adjacent land who would pay a premium to consolidate that land with land of his own.[140] An open market sale is a sale which takes place in circumstances of free competition and results in a price acceptable to both parties.[141] In addition to the compensation calculated on the market value of the property, the owner is entitled to an aditional sum for "any actual loss caused by expropriation".[142] What regard will a court have to this "actual loss"?[143] Clearly the payment of this solatium will place a strain on the budget set aside for land restitution.

Section 12(5) of the Expropriation Act of 1975 provides the guidelines for determining market value:[144]

> (1) Compensation is calculated on the basis of what the expropriatee has lost, and not on what the expropriator has gained. If the land has any special features of value on the open market, the owner must be compensated for them.[145]

137 *Bestuursraad van Sebokeng v M&K Trust en Finansiële Maatskappy (Edms) Bpk* 1973 SA 376 (A) at 385G.
For most of the information on South African "market value", I have relied on JACOBS & GILDENHUYS, *supra* note 46, at 377–383.

138 *Union Government v Jackson* 1956 (2) SA 389 (A) at 425A; *Colyvas v Valuation Court, Pretoria* 1960 (4) SA 34 (T) at 40D.

139 *Union Government v Jackson* 1956 (2) SA 398 (A) at 425A.

140 *Administrator Transvaal v Kildrummy Holdings* 1983 (4) SA 960 (T) at 970E.

141 *SAR v Theron* 1917 TPD 67 at 71; *Todd v Administrator of Transvaal* 1972 (2) SA 874 (A) at 881H–882B.
Compare these principles with the rules articulated in Calibresi & Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral* 85 HARV. L REV. 1089 (1972).

142 Section 12(1)(a)(ii) of the Expropriation Act, Number 63 of 1975.

143 See Antonie Gildenhuys, *supra* note 133, at 2.

144 JACOBS & GILDENHUYS, *supra* note 46, at 281–283.

145 *Bestuursraad van Sebokeng v M&K Trust en Finansiële Maatskappy (Edms) Bpk* 1973 (3) SA 376 (A) at 382 and *Gatooma Rural Council v Crook* 1974 (3) SA 840 (RA) at 843F.

(2) Unlawful use is disregarded.[146] However, this does not prevent the determination of compensation based on the property's possible lawful uses.

(3) An unregistered right in respect of other property must be disregarded (for example, a right of way over other property), while the unregistered right (for example, an unregistered lease) in respect of the expropriated property must be taken into account.[147]

(4) An owner is not entitled to be compensated for improvements completed with a view to obtaining increased compensation.[148]

(5) Any rise or fall in the value of the property, before or after expropriation, that arises from the purpose for which it is being expropriated, or as a consequence of any act that the expropriator performs, is not taken into account in determining compensation.[149]

In the past, it was the practice of the Department of Community Development, for example, to place restrictions on land earmarked for expropriation so that the value was kept low.[150] This is also likely to occur now, in some cases, even before claims are published in the *Gazette* under section 11(1) of the Act. While some writers were perturbed about the cost of the land restoration process, this might aid savings rather than lead to wanton increases because such changes in value are disregarded when the amount of compensation is calculated.

(6) Any value which an owner is likely to enjoy as a result of expropriation of his land is offset against the compensation which would otherwise have accrued to him or her.[151]

Section 2(1) of Schedule 6 of the Final Constitution of 1996 requires all law which was in force when the Final Constitution was effective shall continue in force until it is tested against the said Constitution. Therefore the

146 Section 12(5)(c) of the Expropriation Act of 1975.

147 Section 12(5)(e) of the Expropriation Act and *Estate Marks v Pretoria City Council* 1969(3) SA 277 (A).

148 Section 12(5)(3) of the Expropriaton Act of 1975.

149 Section 12(5)(f) of the Expropriation Act of 1975; *Southern Transvaal Buildings (Pty) Ltd v Johannesburg City Council* 1979(1) SA 949(W) at 954F.

150 JACOBS & GILDENHUYS, *supra* note 46 at 383.

151 *SAR v New Silverton Estates Ltd.*, 1946 AD 830.

validity of all provisions of the Expropriation Act, Number 63 of 1975 may be revealed shortly.[152]

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

Some of the details of the discussion on the history of the acquisition and use of the property earlier may be relevant here. The enquiry here relates to the assistance the state provided to the owner, especially farmers, to acquire and improve their property. In this regard Murphy states:

> White farmers, on the other hand, were consistently subsidised. In addition to direct subsidies, tax breaks and the creation of marketing monopolies, white farmers enjoyed extremely favourable borrowing facilities. In 1988 the accumulated debt of white agriculture stood at R13,6 billion, a figure in excess of agriculture's R8,7 billion contribution to the GDP in the same year. In 1967 more money was spent subsidising 100 000 farmers than was spent on education for 10 million black children.[153]

This also relates to the investment that the owner put into the property after acquisition, that is, improvements.[154] Usually, in the South African context, this is assessed under the market value principles because not all structures and improvements enhance the value of the property. The land may be over-capitalised or the structures may have no additional economic value with regard to enhancement. However, in the assessment of the quantum it may be more "just and equitable" to reward the expropriatee for value

152 Antonie Gildenhuys, *supra* note 133, at 3.
153 John Murphy, *supra* note 79 at 116.
154 JACOBS & GILDENHUYS, *supra* note 46, at 380.

added through his or her efforts[155] which are usually readily ascertainable[156] or tangible features of the property.

Under the Malawi Lands Acquisition Act, Number 21 of 1971 section 10(2) an assessment of compensation was calculated by adding together –

(a) the purchase price of the affected land;
(b) "the value of unexhausted improvements to the land made at the expense of the person entitled thereto since the date of his acquisition thereof;" and
(c) any other appreciation in the value of the land since acquisition.

It appears that Malawi also found the Zambian principle of "unexhausted improvements" compelling enough to include into its law without the complicated definitions that applied to developed and undeveloped land.[157]

(e) The purpose of the expropriation

It is envisaged that the state may wish to expropriate land for its national land reform programmes in terms of sections 25(5), 25(6) and 25(8) of the Final Constitution of 1996. Section 25(7) pertains to one part of the national land reform scheme, those who have been dispossessed of land after 19 June 1913 as a result of past racially discriminatory laws.

If the reason for expropriation is part of the state's plan for land reform, does it mean that the owner will receive less compensation than an

---

155 According to Locke's two *Treatises of Government* the justification for creating an entitlement is that one creates a resource by mixing ones labour with it.
See CHRISTOPHER J BERRY, *Property and Possession: Two Replies to Locke- Hume and Hegel, in* NOMOS XXII PROPERTY 89, 90 (J Roland Pennock & John W Chapman eds. 1980) and EDWARD J ERLER, *The Great Fence to Liberty: The Right to Property in the American Founding,* in LIBERTY, PROPERTY & THE FOUNDATIONS OF THE AMERICAN CONSTITUTION 43, 52–53 (Ellen Frankel Paul & Howard Dickman eds. 1989).

156 In *Southwestern Bell Telephone Co. v Public Service Commission of Missouri* 262 U.S. 276, 67 L.Ed. 981, 43 S. Ct. 544 the U.S. Supreme Court discussed some of the methods of ascertaining the value of property. In dismissing the rule in *Smyth v Ames* 169 U.S. 466, 18 S.Ct. 418, 42 L.Ed. 819 which was based on the cost of reproducing or replacing the property, Justice Brandeis was in favour of calculating the value of property, including the investments in it, as "capital honestly and prudently invested under normal conditions."

157 Ng'ong'ola, *supra* note 127, at 130.
Apparently, the Zimbabwe government has declared an intention to include the notion of "unexhausted improvements" in its legislative reform. *Id.* at 135.

owner who has similar land in the same neighbourhood which is expropriated for a new highway?[158] It seems that if land is subject to restitution, its market value will be affected and therefore the amount payable if it is taken for a highway. Since the market value will be no higher than the expected compensation to the buyer if the land is taken for restitution, the compensation for the highway taking should be no higher either.

Does it mean that a claim heard earlier by the court will receive "just and equitable" compensation while later claims may not? If the budget is exhausted, what happens to the land restitution programme? It is an unfortunate reality that the whole scheme is dependent on adequate funds from the State coffers.

In research into the different constitutional formulations of compensation clauses conducted at the Centre for Applied Legal Studies, at the University of Witwatersrand, Eisenberg concludes that where the court has to award compensation according to a whole range of factors including public interest, the result is a potentially low award. She cites the examples of the Italian and German constitutions, both of which contain property clauses, which achieve this.[159] Therefore we may conclude that the listed factors, above, compel contextualisation of the quantum of compensation and the Court may, therefore, award just and equitable compensation at an amount less than the market value.[160]

---

158 Based on the assertions of Judge Antonie Gildenhuys, supra note 133 at 3.

159 Andra Eisenberg, *Different Constitutional Formulations of Compensation Clauses*, 9 SOUTH AFRICAN JOURNAL OF HUMAN RIGHTS 412, 420–421 (1993).

160 See CACHALIA ET AL, *supra* note 96, at 97; Chaskalson, *supra* note 105 at 138 and Van der Walt, *supra* note 109, at 199 where he states that

> . . . all the social factors to be taken into account by a court when determining just and equitable compensation apply in the absence of agreement only, which seems to suggests that agreement on compensation can be reached without taking these factors into account.

In VAN DER WALT, *supra* note 23, at 495–6 he draws our attention to the fact that the National Party proposals envisaged the payment of compensation at market value only:

> The ANC approach was probably borrowed from the German Basic Law in an effort to establish a more balanced view of the relationship between private property and social justice and equality.

See John Murphy, *Insulating Land Reform from Constitutional Impugnment: an Indian case study*, 8 SOUTH AFRICAN JOURNAL OF HUMAN RIGHTS 362 (1992) for an insight into the way in which the Indian Supreme Court thwarted the land reform plans of Nerhu.

CHAPTER V

The Restitution of Land Rights Act[161]

The Restitution of Land Rights Act, Number 2 of 1994,[162] was enacted in terms of the Interim Constitution of the Republic of South Africa, Act No. 200 of 1993[163] to permit persons or communities who were dispossessed of their rights in land under past racially discriminatory laws to claim for the restitution of those rights from the state.

The analysis of the Act in this Chapter is divided into two parts, the first of which traces the stages a possible claim may proceed through until it is resolved. The second examines the remaining provisions of the Land Commission and the Land Claims Court. In both these parts the reader's attention is drawn to the Rules Regarding Procedure of Commission (Appendix II).

PART I
PROCEDURE OF A CLAIM UNTIL RESOLUTION

Qualifications of a claimant and the resultant procedure

A person who was dispossessed of a right in land[164] under a racially discriminatory law, a direct descendent of such a person, or a community dispossessed under such a law, may qualify as a claimant for restitution. The

---

161 For the full text see Appendix I.
This Chapter is based on *The Right to Restitution of Land,* in THE BILL OF RIGHTS COMPENDIUM, 3FA-1/3FA-20, published in October 1996..

162 Hereinafter referred to as the Act, which came into effect on 2 December 1994 according to *Gazette* 16106 GN 2011/1994 of 25 November 1994 and *Gazette* 16166 Proc R 176/1994 of 2 December 1994 and amended by Act Number 84 of 1995. THE LAND RESTITUTION AND REFORM LAWS AMENDMENT ACT, NUMBER 78 OF 1996 came into effect on 20 November 1996 in *Gazette* Number 17540. In this book both amendments have already been incorporated into the Act. See Appendix I.

163 Ss 121–123.

164 The inclusion of the term "rights *in* land" as opposed to "rights *to* land" has been explained by Cachalia, *et al*, *supra* note 96, at 92–3, as an intention to protect lesser rights than ownership such as the right of tenants and occupiers.
Rather than committing these rights to the altar of South African property law, the Act defines, in section 1(xiv), a right in land as:

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

claim must be lodged with the Commission within three years after 1 May 1995.[165] The dispossession must have taken place after 19 June 1913.[166] Section 2(1A) provides that a person who was paid just and equitable compensation shall not be entitled to enforce restitution of a right in land.

The Act defines a "direct descendant" to include the spouse or partner in a customary law union whether such a union has been registered or not.[167] A "community" is any group of persons whose rights in land are derived from shared rules determining access to land held in common by such a group. Included in this definition is a part of any such group.[168]

The Act also provides for claims against nominees[169] where a claimant proves that the registered owner of the land holds title on behalf of the claimant because a racially discriminatory law at that time prevented title from passing to the claimant.

Any person or a representative or a community may lodge a claim on a prescribed form provided by the Commission.[170] The form includes information, *inter alia,* on the nature of the right claimed and the description of the claimed land. When a representative lodges a claim on behalf of a community, a document to prove the contention of representation must accompany the form at the time of the lodgement or at a later stage if the regional commissioner allows it.[171]

Procedure after lodgement of claim and its effect

Once the claim is lodged the regional claims commissioner with jurisdiction satisfies himself or herself:

(a) that the claim was lodged in the prescribed manner;
(b) that the claimant is a qualified claimant;[172]
(c) that the claim is not frivolous or vexatious; and
(d) that no prior order in respect of rights relating to that land had been made by the Court.[173]

165 S 2(1)(b). The date has been fixed in *Gazette* 16370 GN 575/1995 of 21 April 1995.
166 S 2(3).See Rule 3 of the Rules Regarding Procedure of Commission in Appendix II.
167 S 1(vii).
168 S 1(iv).
169 S 3.
170 S 10(1).
171 S 10(3).
172 S 11(1)(b) read together with s 2(1).
173 S 11(1)(d) read together with s 35.

The regional land claims commissioner then publishes a notice of the claim in the *Gazette* and advises the owner of the land in question by notice in writing of such publication in the *Gazette*.[174]

The regional land claims commissioner is empowered to condone the fact that a claim has not been lodged in the prescribed manner.[175] He or she can also dismiss a frivolous or a vexatious claim. Where a regional land claims commissioner is not satisfied that a claim has been lodged in the prescribed manner, he or she will have to inform the claimant accordingly, giving reasons for such a decision.[176] Where the court has already made a prior order in respect of rights relating to the land in question, the claimant may apply to the Court for permission to lodge a claim in respect of that land.[177]

Immediately after the publishing notice of a claim in the *Gazette,* the regional land claims commissioner concerned must notify any other party which might have an interest in the claim.[178] In terms of circular No. 2/1995 published by the Chief Registrar of Deeds,[179] registrars will note the claim as an "interdict" against the relevant property in the registers. No act of registration will be effective in respect of the land unless the registrar is satisfied by means of a conveyancer's or notary's certificate that the parties involved are aware of the claim under the Act. The "interdict" will remain in force or be withdrawn by order of the Land Claims Court. Section 11(7)(aA) provides that the test for the act of registration will be whether the requisite notice was given to the regional land claims commissioner, and

174 S 11 as amended. However, in terms of s 16 of the Act, the Chief Land Claims Commissioner may make rules regarding the procedure of the Commission. These have been published in the GN 703 *Gazette* 1640 of 12 May 1995 and include, inter alia, the rules for notice in Rule 13(2) as follows:

(a) Notice in a newspaper or notice in a magazine or on radio or television.
(b) The sending of copies of the notice by registered mail to all possible interested parties, including the registered land owner.
(c) Verbal notice.
(d) The display of a notice in a suitable place on the land concerned.
(e) The display of a notice on a public building.

175 S 11(2).
176 S 11(4).
177 S 11(5).
178 S 11(6).
179 Current Law, Review One 1995 p. 13 paragraph R51. See section 11(7)(aA).

where no such notice was given, whether the act of registration was done in good faith or not.

Once notice of a claim has been published in the *Gazette* the effect is:

(a) no person may in an improper manner obstruct the passage of the claim;
(b) no person may alienate land without one month's written notice to the regional land claims commissioner;
(c) no claimant who was resident on the claimed land at the date of commencement of the Act may be evicted from the land without the written consent of the Chief Land Claims Commissioner;
(d) no improvements on the land may be removed, destroyed or damaged, and
(e) no claimant or other person may enter upon or occupy the land without the permission of the owners or lawful occupier.[180]

Where the regional land claims commissioner concerned believes that any improvement on the land might be removed, destroyed or damaged or that any person resident on such land will be adversely affected as a result of the publication of such notice he or she may authorise an officer of the Commission to enter upon the land and draw up an inventory of any assets on the land, a list of persons employed or resident on the land or report upon the agricultural condition and of any excavations, mining or prospecting on the land.[181] Section 11A of the Act provides for representation to be made to the regional land claims commissioner, by any affected person, for a withdrawal or amendment of notice of claim.

Powers of Investigation

The Land Commission may, in order to carry out its functions, institute an investigation. For this purpose, the Land Commission and the Chief Land Claims Commissioner are granted powers of delegation and appointment of persons to assist them. In addition, the Land Commission is granted extensive investigatory powers, including powers to demand documents and information from government departments and persons.[182] However, such persons have the protection of the rule against self-incrimination.[183]

180 S 11(7). See also s 17 of the Act for Offences and Penalties.
181 S 11(8). See also s 17 of the Act for Offences and Penalties.
182 S 12(1)(a), (b), (c). See also Rules 5 and 6 of the Rules Regarding Procedure of Commission in Appendix II.
183 S 12(3). See also s 17 of the Act for Offences and Penalties.

The regional land claims commissioner is also empowered to assist a claimant who is unable to provide the necessary information to document an adequate submission or investigation of a claim.[184] If the Chief Land Claims Commissioner believes that the most effective use of the resources of the Commission or Court in all claims for restitution in respect of a particular area or township is best served if they were to be investigated at the same time, he or she may publish a notice in the *Gazette* to that effect. In such a notice the Chief Land Claims Commissioner may specify the period in which the claims may be lodged.[185] The Chief Land Claims Commissioner has the discretion to permit a late lodgement, upon good cause shown, provided that it is not later than 30 April 1998.[186]

Mediation

If the Land Commission's investigations reveal that:

(a) there are two or more competing claims to a particular right in land;
(b) there are competing groups within a claimant community which will make resolution of the claim difficult;
(c) the owner or holder of rights in the claimed land is not the State, and such owner or holder is opposed to the claim; or
(d) there are issues which might be resolved through mediation and negotiation,

the Chief Land Claims Commissioner may direct the parties to resort to mediation and negotiation in order to settle their dispute.[187]

The direction to mediate and negotiate is made in a written notice containing the time and place where the process is to start.[188] The Chief Land Claims Commissioner appoints a mediator to chair the first meeting and the parties are free thereafter to appoint another mediator if they so agree.[189] A suitably qualified administrative officer of the Commission or an independent mediator may be appointed to chair the first meeting.[190] All

184 S 5 12(3).
185 S 12(4).
186 S 12(5). See also s 2(1)(c) of the Act.
187 S 13(1).
188 S 13(2)(a).
189 S 13(2)(b).
190 S 13(3).

discussions, disclosures and submissions at the mediation and negotiation process are privileged, unless the parties agree to the contrary.[191]

Certificate of Feasibility

Before the report on the claim is ready for referral to the Land Court for resolution, the Chief Land Claims Commissioner has to consult the Minister of Land Affairs on the question of feasibility of restoration or acquisition of the right in land. Where the claim relates to land in the possession of the State, the question is whether the *restoration* of the right in land is feasible.[192] Where the claim relates to land in the possession of a private owner, the question is whether the *acquisition* of the right in land is feasible.[193] Where the claimant prefers alternative relief or where restoration or acquisition is not feasible, the question is whether it is feasible to *designate alternative state-owned land.*[194]

On questions of feasibility the Chief Land Claims Commissioner acts in an advisory capacity to the Minister of Land Affairs[195] and all interested parties may make submissions to the Minister of Land Affairs.[196] When considering whether restoration or acquisition of the right is feasible the Minister of Land Affairs takes into account:

(a) whether the zoning of the land has since the dispossession been changed, or the land has been transformed to such an extent that restoration is not practicable;
(b) any relevant urban plan;
(c) any other matter which makes the restoration or acquisition unfeasible; and
(d) any physical or inherent defect in the land which may cause it to be hazardous for human habitation.[197]

In addition, the Minister takes into account what land, situated in the area in which the dispossession took place, is owned by the State and the

191 S 13(4).
192 S 15(1)(a), as amended.
193 S 15(1)(b), as amended.
194 S 15(2) and (3) read together with s 123 of the Interim Constitution of South Africa, 1993.
195 S 15(4).
196 S 15.
197 S 15(6).

suitability of such land for the claimant's needs.[198] The Minister is not required or entitled to exercise his or her mind on whether restoration, acquisition or designation is just or desirable.[199] The relevant certificate of feasibility or unfeasibility is issued within 30 days of the receipt of the request and the land claims commissioner concerned informs all affected parties of the Minister's decision.[200] The Land Court is empowered to review the decision of the Minister at the hearing of the claim in question.[201] The decision of the Minister with regard to the issue of the certificate of feasibility, and the reasons for such decision, are public documents.[202] Where the Minister certifies that it is feasible to designate alternative state-owned land, such designation may be made at the same time or any time thereafter.[203]

Seat and Hearings of the Court

The Minister of Justice in consultation with the President of the Court determine the seats of the Court.[204] The Court may however conduct hearings at other venues which are more accessible.[205] A single judge presides together with at least one participating assessor in most disputed cases.[206] An assessor usually has an equal vote to that of a judge, except in relation to questions of law.[207] The factors to be taken into account by the Court in considering its decision[208] and the determination of public interest or prejudice[209] are not deemed to be questions of law. In the event of an equality of votes, in terms of section 28(7)(b), the vote of the judge or the majority of judges shall prevail. In other instances, the hearing will be adjourned and commenced before a newly constituted court, in terms of section 28(7)(b).

Section 28(8) makes provision for the continuation of the hearing,

198 S 15(7).
199 S 15(8). One can hardly fail to include considerations of justice and desirability in determining whether something is feasible. Suppose, for instance, a piece of land is occupied by fifty people who will starve if I take the land away from them. Is not my decision that taking the land is not feasible dependent on my belief that it is unjust or undesirable to let them starve?
200 S 15(9).
201 S 15(10).
202 S 15(11).
203 S 15(12).
204 S 28(1).
205 S 28(2).
206 Ss 28(3) and (4). An assessor does not sit in a hearing where there is a dispute on questions of law, nor in any interlocutory or preliminary hearing or pre-trial proceedings.
207 S 28(5).
208 S 33.
209 S 34(6).

where two or more judges are presiding and a judge dies, retires or is incapable of acting or is absent, before the remaining members of the Court. Where an assessor dies, or becomes unable to act as an assessor the hearing may either proceed before the remaining members of the Court or the hearing shall commence afresh unless all the parties to the proceedings agree unconditionally in writing to be bound by the decision of the remaining members of the Court, according to section 28(9).

Locus standi and legal representation

Any party who is listed in the Commission's report to the Court,[210] or any interested party who is of the opinion that the public interest would not be best served if the land in question was restored to the claimant[211] may appear before the Court in person or be legally represented. The State has a right to be heard in all cases. Any other person may apply for permission to appear before the Court.[212] The Chief Land Claims Commissioner can arrange legal representation for an indigent claimant either through the State legal aid system or at the expense of the Commission.[213]

Admissibility of Evidence

The Court is empowered to listen to any evidence which it considers relevant and cogent to the matter being heard.[214] This includes oral evidence, hearsay evidence regarding the circumstances surrounding the matter being heard and expert evidence regarding relevant historical and anthropological facts,[215] whether or not such evidence would be admissible in any other court of law.[216] The Court will be the final arbiter of the weight to be given to such evidence.[217]

Referral of Claims to Court

Once the Land Commission completes its investigation, it may conclude:

(a) the parties agree in writing that it is not possible to settle the claim by mediation and negotiation;

---

210 S 14(2).
211 S 34.
212 S 29(1).
213 S 29(2).
214 S 30(1).
215 S 30(2).
216 Because of the unique circumstances – the political, legislative and legal history – surrounding most of the cases before the Land Court, some of the usual rules of evidence may be dispensed with. Very little documentary proof may exist with regard to title. The Court may therefore permit hearsay evidence on the dispossession, allocation and occupation of land within the communities.

Given the long tradition of oral history in African societies, this may well prove to be a useful source of evidence. The potential for abuse, however, exists and the Court will be the final arbiter of the weight of such evidence.

217 S 30(3).

(b) the regional Land Claims Commissioner certifies that it is not feasible to resolve any dispute arising form the claim through mediation and negotiation;
(c) the parties reach agreement as to how the claim is to be finalised and the regional land claims commissioner is satisfied that such agreement is appropriate; and
(d) the regional land claims commissioner is satisfied that the claim is ready for hearing by the court.

The Chief Land Claims Commissioner then certifies the conclusion and refers the matter to the Land Claims Court.[218]

Where the parties have reached agreement, a document, setting out the results of the Commission's investigation into the merits of the claim, a copy of the relevant deed of settlement and a request signed by the parties concerned and endorsed by the Chief Land Claims Commission requesting that the agreement be made an order of Court, accompanies the referral to Court.[219] All other referrals to Court must be accompanied by a document that:

(a) sets out the results of the Commission's investigation into the merits of the claim;
(b) reports on the failure of any party to agree to mediation;
(c) contains a list of the parties who have an interest in the claim; and
(d) sets out the Commission's recommendation as to the most appropriate manner in which the claim can be resolved.[220]

Where the parties have reached a settlement and the Chief Land Claims Commissioner finds such settlement inappropriate he or she will refer the matter to court for resolution.[221] Upon the payment of the prescribed fee, any interested party may receive copies of the documents referred for hearing to the Court.[222] In terms of section 14(5A) a claim may not be referred to Court until the Minister has issued or refused to issue the relevant certificate of feasability.

218 S 14(1).
219 S 14(3).
220 S 14(2). See also Rule 15 of the Rules Regarding Procedure of the Commission in Appendix II.
221 S 14(4).
222 S 14(5).

The claim is not justiciable if the Commission has not performed its duties in the precurial stage in terms of this section.[223]

Factors to be Taken in Account by Court

UNDER THE ACT

In a hearing for a claim, some of the guidelines that the Court may consider include:

(a) The desirability of providing for restitution of rights in land or compensation to people who were dispossessed of their rights as a result of or in pursuance of racially based discriminatory laws;
(b) the desirability of remedying past violations of human rights;
(c) the requirements of equity or justice;
(d) the desirability of avoiding major social disruptions;
(e) the existence of any programme of affirmative action[224] that might have been designated for that piece of land;
(f) any other factor which the Court considers relevant.[225]

UNDER THE FINAL CONSTITUTION, 1996

The Constitution of the Republic of South Africa, 1996 provides that no one may be deprived of property except in terms of a law of general application

223 S 14(6).

224 This would include Reconstruction and Development Programmes.

225 S 33.

Some indication of the legislative intent behind these guidelines may be found in the earlier research conducted at the Centre for Applied Legal Studies, University of Witwatersrand when they considered defining precisely how the Court would weigh a claim. Swanson, *supra* note 103, at 337, states that they realised the enormity of the task at hand

> but felt that there must be a commitment, built into the process, to restoring land to people who had been forcibly removed. Challenging title and taking land away from present possessors will be very difficult tasks, and unless there is a firm commitment to restitution of land wherever it is both just and practicable, the court may simply be engaged in a process of confirming title of present possessors. Therefore, the court must be instructed to keep in mind when analysing the strengths of the various claims to land that its purpose and reason for being are to provide restitution to people removed or evicted as a result of apartheid laws or policies.

which is intended to eliminate arbitrariness.[226] In addition the expropriation must be in the public interest or for public purposes.[227] All expropriation must be subject to the payment of compensation which must be agreed, decided or approved by a court. The determination of compensation is regulated by section 25(3) of the Final Constitution of 1996[228] which reads:

> The amount, timing, and manner of payment of compensation must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant factors, including –
>
> (a) the current use of the property;[229]
> (b) the history of the acquisition and use of the property;[230]

226 S 25(1) of the Final Constitution of 1996.

227 S 25(2) of the Final Constitution of 1996.

228 Compare the Final constitutional provisions of 1996 with those contained in the Interim Constitution of 1993:

28. (1) Every person shall have the right to acquire and hold rights in property and, to the extent that the nature of the right permits, to dispose of such rights.

(2) No deprivation of any rights in property shall be permitted otherwise than in accordance with a law.

(3) Where any rights in property are expropriated pursuant to a law referred to in (2), such expropriation shall be permissible for public purposes only and shall be subject to the payment of agreed compensation, or failing agreement to the payment of such compensation and within such period as may be determined by a court of law as just and equitable, taking into account all relevant factors, including in the case of determination of compensation, the use to which the property is being put, the history of its acquisition, its market value, the value of the investments in it by those affected and the interests of those affected.

229 Depending upon the facts of the case before it, the Land Court may have to consider whether the land is being used or is under absentee ownership or whether the land is developed or not.

230 Here the Court may enquire into the facts surrounding the acquisition such as the method of acquisition, dates of acquisition and, perhaps, the length of the possession. The history may reveal that the forcible removal was particularly harsh. The history of the use of the property may prove useful to determine its future use especially with regard to expropriation.

(c) the market value of the property;[231]
(d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property;[232] and
(e) the purpose of the expropriation.

Ruling by Court on pre-emptive non-restitution applications[233]

The Land Court need not restore any rights in land to any claimant, present or future, where a governmental agency[234] has made a pre-emptive application to the Court not to restore rights in the claimed land in terms of section 34 of the Act. If the Court is satisfied that it is in the public interest to do so,

231 This has been defined in section 12(1)(a)(i) of the Expropriation Act, No. 63 of 1975 as "the amount which the property would have realised if sold on the date of notice in the open market by a willing seller to a willing buyer". Given the fact that the open market was so skewed by the apartheid laws, this clause must be viewed with circumspection if invoked to determine quantum of compensation where there had been expropriation. However, it is likely that in anticipation of the consequences of the Restitution of Land Rights Act, even before the notice of the claims is Gazetted, there would be a drop in land prices in that area.

232 This relates to the method of finance which historically assisted white farmers to acquire land and to farm it. Examples of these include assistance from the Land Bank which permitted deferred payment and attracted very low interest rates. "Beneficial capital improvements" refers to the investments put into the property which enhance the value of the property for the purpose it is used. Various schemes designed to increase the quantum of compensation rather than benefit the property have been devised. See Clement Ng'ong'ola, *supra* note 127 for the experience in this and other related issues.

233 A description taken from *De Rebus*, November 1994, p. 328.

234 Any national, provincial or local government body.

or that the public will suffer substantial prejudice if it does not,[235] it will grant the application.[236]

Court Orders

Where a claimant has applied for alternative relief, he or she can within 30 days of the order being made apply to the Minister of Land Affairs to register as a preferential claimant in any State programme for housing and the allocation and development of rural land.[237]

The Court also has the power to:

(a) determine conditions which must be fulfilled before a right in land can be restored to a claimant;
(b) determine the amount to be paid, if the claimant is required to, before the right in question is restored;

---

235 S 34(6).

236 An important question, in this instance, may be whether the governmental agency (that is, national, provincial or local government body) can be compelled to pay compensation to the claimant in what may amount to a claim for property in the possession of the State. In a way, this procedure may be seen as a kind of expropriation of claims if no compensation is due to the claimant. Should mediation not be necessary before the Court hearing?

Will this constitute a deprivation or an expropriation in terms of section 25(1) of the Final Constitution of 1996? If it is expropriation, presumably for public purposes, then compensation must be paid to the claimant. Otherwise the deprivation may be unconstitutional, even though it may be treated as a type of "inverse condemnation" which entitles the claimant to compensation even though there is no formal expropriation. See Matthew Chaskalson, *supra* note 107, at 396.

The Mail & Guardian of 6 to 12 September 1996 reported the plight of some of the owners of land in the former District Six who view the application under section 34 as "expropriation of a different kind" because the Cape Town Community Land Trust wishes to rebuild the community of District Six. In the process the rights of former owners are ousted by the rights of former tenants in the area. When the then-government expropriated 2 375 properties in 1966, 66% of that was owned by white absentee landlords. If the section 34 application is unsuccessful then the land might be restored to only a small minority of previously disadvantaged people.

Another question is: Why can the governmental agency not act under section 15 of the Act on the question of feasibility of restoration of the land? The answer lies in the fact that only a claimant can initiate proceedings.

Professor Murphy, *supra* note 79 at 128 points out that this provision may be invoked by a local authority under pressure from the owners and residents on land neighbouring the land to be restored on the grounds that restoration may result in a decline in standards or market values.

237 S 35(1).

(c) determine the manner in which rights are to be held, or the compensation is to be paid, where the claimant is a community. Conditions necessary to ensure that all the dispossessed members of the community,[238] including women[239] and tenants, can have access to the land or compensation on an equitable basis may be included. The representative of the community may also be held accountable to the members of such community.[240]

(d) recommend to the Minister that a claimant be given priority access to State programmes on the allocation and development of land;

(e) direct as to how its orders are to be carried out;

(f) make an order in respect of any compensatory land where dispossession took place;

(g) make orders for costs as it deems just, including such an order against the State or the Commission.[241]

---

238 The meaning of the phrase "all the dispossessed members of the community" needs clarification. Does it refer to:

(i) Persons still surviving who were members of the community when it was dispossessed?

(ii) Those in (i) above plus heirs of such persons including someone who is no longer a member of the community?

(iii) Those who are *now* members of the community?

When it comes to enjoying the right to restitution it is apparent that the persons who are *now* members of the community in (iii) above must also be *dispossessed members of the community* in question. Therefore only categories (i) and (ii) above qualify as possible claimants while category (iii) may include individuals who joined the community subsequent to the dispossession and do not qualify. They may themselves have been dispossessed of a right in land, but not in respect of the claimed land.

239 Roger Plant, *supra* note 80, at 29 observes that

> formalization of land rights systems has almost invariably involved discrimination against women, vesting title in male heads of households. In terms of numbers, women must constitute the largest group of vulnerable persons whose land and income security are threatened by prevailing policy trends.

Can a woman ineligible for a piece of tribal land proceed under this Act? While it is apparent that the Act provides for the restitution of rights in land for the person dispossessed under apartheid laws, what about the argument that African customary law is inherently sexist and has aided and abetted with apartheid laws to discriminate against African women? The answer to the first question may lie in the fact that this Act provides rights for persons discriminated against on the grounds of race, not gender. The answer to the second may lie in a challenge, in terms of section 9(3) of the Final Constitition of 1996, that the customary law bias is unconstitutional.

See Thomas Bennett, *supra* note 53, at 9.

240 S 35(3).

241 S 35(2) as amended.

The Court also has the power to adjust the nature of the right previously held by the claimant, and to determine the form of title under which the right be held in future.[242] Where the Court orders expropriation of land in respect of a claim, it is carried out in terms of the Expropriation Act, No. 63 of 1975. The proviso to such expropriation is that the owner of such land is entitled to the payment of just and equitable compensation determined by agreement or by the Court.[243]

242 S 35(4).

Although the Act does not provide for it, should the Court not be granted a general power to remedy instances of unjust enrichment (or what Visser and Roux, *supra* note 7, at 151 refer to as "enrichment by wrongdoing". The authors state that in cases of land restitution, as in the cases involving the reclamation of wrongfully exacted taxes, it may be necessary for the creation of special rules of liability) that arise from an order it may grant?

For example, should there be any liability on the successful party who gets to keep the land under a section 34 order where the current market value is inordinately high? An answer may be found in section 33(c) of the Act which provides guidelines to the Court in reaching its decision, namely, the requirements of equity and justice.

In keeping with the maxim "he or she who seeks equity must do equity" it may be argued that the Court should have the power to order the necessary adjustment to the unjust enrichment by requiring the holders of the land, for example, to pass a mortgage over that land to pay for the alternative land required to fulfil the claimant's rights in land (See *Van Scoten v Albright, Court of Chancery, New Jersey* 1846 1 Hals. Ch. 467). The Court may also respond in a similar way against the holder where it grants alternative State-owned land. See Appendix III.

243 S 34(5) read together with s 25 of the Final Constitution of 1996, especially s 25(3).

Any state-owned land which is held under a lease or similar arrangement is treated as land in possession of the State. Where the court orders restitution of rights in such land, the lawful occupier is entitled to just and equitable compensation according to the rules established in the Property Clause of the Final Constitution of 1996.[244] An interested party who believes that the order of the Court has not been fully or timeously complied with may apply to Court for further directions or orders.

The Court is also empowered to rescind or vary an order granted by it in certain instances.[245] The Court will act similarly where there has been withdrawal or amendment of notice and it may correct any patent errors in any order or judgment granted by it in terms of section 35(12).

Review and appeals

Any party aggrieved by an act or decision of the Minister, Commission or any functionary may apply to have such act or decision reviewed by the Court.[246]

Appeals against the decisions of the Court lie either to the Constitutional Court or to the Appellate Division of the Supreme Court and are determined by the Court. The Act lays down the rules under which such appeals will be granted. It also provides for the powers of the Court on hearing of appeals.[247]

The decisions of the Court are a matter of public record and the hearings are public.[248]

244 S 35(9).
245 S 35(11).
246 S 36(1)
247 S 37, as amended. See also s 28N.
248 S 38.

PART II
THE REMAINING PROVISIONS

THE COMMISSION ON RESTITUTION OF LAND RIGHTS

Establishment of Commission on Restitution of Land Rights

The Act establishes a Commission on Restitution of Land Rights under the Chief Land Claims Commissioner, a Deputy Land Claims Commissioner and as many regional land claims commissioners as the Minister of Land Affairs determines.[249] Four regional land claims commissioners have been appointed and are situated in: (1) East London (East Cape and Free State claims); (2) Cape Town (Western and Northern Cape claims); (3) Pietermaritzburg (KwaZuluNatal claims) and (4) Pretoria (Gauteng, North-West, Northern Province and Mpumalanga claims). The Commission meets at least three times a year.

The legislative history reveals that under section 122 of the Interim Constitution of 1993 the Commission was empowered to: (a) investigate the merits of any claims; (b) mediate and settle disputes arising from such claims; (c) draw up reports on unsettled claims for submission as evidence to a court of law, and present any other relevant evidence to the court, and (d) exercise and perform such other powers and functions as provided for in the Restitution of Land Rights Act.

In summary the Act permits the Commission to function as an administrative centre, with consultative and advisory duties including public information.[250] It also monitors related activities and polices the decisions of the Court.[251] In its investigative functions, it has wide discretionary powers.[252] It may direct the parties to voluntary mediation and negotiation.[253] In addition, it submits reports and suggestions to the Land Court on decision making[254] and acts in an advisory capacity to the Minister of Land Affairs on the questions of feasibility of restitution, acquisition or designation of land.[255]

249 S 4(1), (2), (3).
250 S 6(1).
251 S 6(2).
252 S 12.
253 S 13.
254 S 14.
255 S 15.

Section 6(3) of the Act permits the Commission to apply for an interdict to prohibit alienation of property where such alienation will defeat the achievement of the objects of the Act.

The Act empowers the Commission to delegate some of its powers and performance of functions.[256] The performance of the administrative work of the Commission[257] and the appointment of persons to assist the Commission on an *ad hoc* basis[258] are also regulated in the Act.

Rules regarding procedure of the Commission

The Chief Lands Commissioner, in consultation with the Minister, makes rules regarding:

(a) any matter which is required to be prescribed;
(b) the filing of claims;
(c) the procedure to give public notice of claims and notice to persons with an interest in any matter under investigation;
(d) the giving of notice to parties to attend meetings for the purpose of mediating or negotiating the settlement of disputes;
(e) the giving of notice to parties and the public that the Commission will consider any related claims in respect of specified land, a neighbourhood or township within a stated period;
(f) the order of preference to be given to claims which affect a substantial number of persons, or person who have suffered substantial losses or persons with urgent needs;
(g) any other matter considered necessary or expedient to prescribe in order to promote the objects of the Act.[259].

Such rules have been published in *Gazette* 1640 GN R703/1995 of 12 May 1995.[260]

Offences and Penalties

Any person who

(a) contravenes the provisions established after notice has been published.[261]

256 S 7.
257 S 8.
258 S 9.
259 S 16(1) of the Act
260 S 16(3). See Appendix II.
261 S 11(7)(a), (aA), (b), (c) or (d).

(b) fails to appear or to produce documents at the specified time and place after having been directed to do so;
(c) hinders or obstructs the Commission in the performance of its functions;
(d) prevents a duly authorised officer from performing a function in terms of the Act,[262]

shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding three months.

Liability, expenditure and annual report

The Commission, its members and personnel are not liable for any act or omission in good faith while performing their duty under the Act.[263]

All expenditure in relation to the performance of the Commission's function will be made from moneys voted by Parliament for such purpose.[264] A part-time appointee to the offices of Chief Land Claims Commissioner or Deputy Land Claims Commissioner may be paid such remuneration and allowances as determined by the Minister in consultation with the Minister of Finance.[265]

The estimates of expenditure of each financial year are submitted by 1 August of the preceding financial year to the accounting officer, the Director-General of Land Affairs. The estimates are prepared by the Chief Land Claims Commissioner or an administrative officer designated by the Chief Land Claims Commissioner.[266]

The Commission submits its annual report to Parliament by 1 June on all its activities during the previous year up to 31 March.[267]

262 S 17.
263 S 18.
264 S 19(1).
265 S 19(2).
266 S 20.
267 S 21.

THE LAND CLAIMS COURT

Establishment and Powers

Section 123 of the Interim Constitution established a Land Claims Court which is empowered to determine:

(a) restitution of any right in land;
(b) compensation;
(c) the person entitled to ownership in claims against nominees;[268]
(d) all other matters required in terms of the Interim Constitution.[269]

The Court has jurisdiction throughout the Republic and has all the ancillary powers necessary or reasonably incidental to the performance of its functions including the power to grant interlocutory orders and interdicts.[270] A President of the Court is appointed by the President, acting on the advice of the Judicial Service Commission.[271] Additional judges of the Court may be appointed by the President after consultation with the President of the Court and the Judicial Service Commission.[272] The appointment of the President of the Court and other judges may be for a fixed term[273] and a judge of a provincial or local division of the Supreme Court may be seconded to the Land Court.[274] The Act also provides for the appointment of an acting judge for not more than one month. All incomplete proceedings before a judge, after his or her term of office has elapsed, are to be re-opened and disposed of by that judge in terms of section 22(9).

Qualifications of Judges

A person may not be appointed President of the Court or a judge of the Court unless he or she is:

(a) a South African citizen;

---

268 S 3.
269 Ss 121, 122 and 123 of the Interim Constitution, 1993 read together with s 22(1) of the Act.
270 S 22(2).
271 S 22(3).
272 S 22(4).
273 S 22(5).
274 S 22(6).

(b) a fit and proper person to be a judge and is a judge of the Supreme Court or is qualified and has practised as an attorney or advocate or law lecturer for a cumulative period of ten years, or has the necessary training and experience and expertise in the fields of law and land matters.[275]

Law of Procedure and Rules

The rules of procedure applicable in civil action and applications in provincial divisions of the Supreme Court[276] apply with regard to proceedings,[277] until the rules of Court are made by the President of the Court.[278]

Holding of office and remuneration

The provisions with regard to making of an oath or solemn affirmation[279] and the removal or suspension of judges[280] apply to judges and assessors of the court.

The remuneration and conditions of employment are determined by the President of the Republic in consultation with the Judicial Service Commission. GN R. 111 of 2 February 1996 provides for notice of determination of the remuneration and conditions of employment of judges of the Land Claims Court established in terms of section 22 of the Restitution of Land Rights Act, 1994. During his or her term of office, the salaries, allowances and benefits may not be reduced.[281] The Act also provides for the appointment of officers of the Court[282] and for the finances and accountability of funds.

275 S 23.
276 Referred to as a High Court in Schedule 6, s 166(c) of the Final Constitution of 1996.
277 S 24.
278 In terms of S 32.
279 S 174(8) of the Final Constitution of 1996.
280 S 177 of the Final Constitution of 1996.
281 S 26 of the Act read together with S 176(3) of the Final Constitution of 1996.
282 S 28(I).

Appointment of Assessors

Assessors, appointed by the Minister after inviting nominations from the general public, may assist the Court.[283] Such assessors must have skills and knowledge – not necessarily legal qualifications – relevant to the work of the Court.[284] The remuneration of assessors is determined by the Minister of Justice in consultation with the Minister of Finance and the President of the Court.[285]

Pre-trial Conference

The Court can, on its own or at the request of any party, convene a pre-trial conference in order to clarify the issues in dispute, identify issues requiring evidence, and expedite a decision.[286] After such a pre-trial conference the Court can issue orders and directions as to the procedures to be followed before and during the hearing.[287]

Rules Governing Procedure

The President of the Court is empowered to make rules governing procedures, including rules aimed at an expeditious hearing[288], and may direct under which circumstances oral evidence may be submitted to the Court.[289] The Court can, at any stage, after a claim has been referred to it, refer it back to the Commission with directives on matters to be investigated and reported on. In addition, the Court can conduct any part of any proceedings on an informal or inquisitorial basis.[290]

283 S 27(1).
284 S 27(2).
285 S 27(3).
286 S 31(1).
287 S 31(2).
288 See Appendix II.
289 S 32(1) .
290 S 32(3).

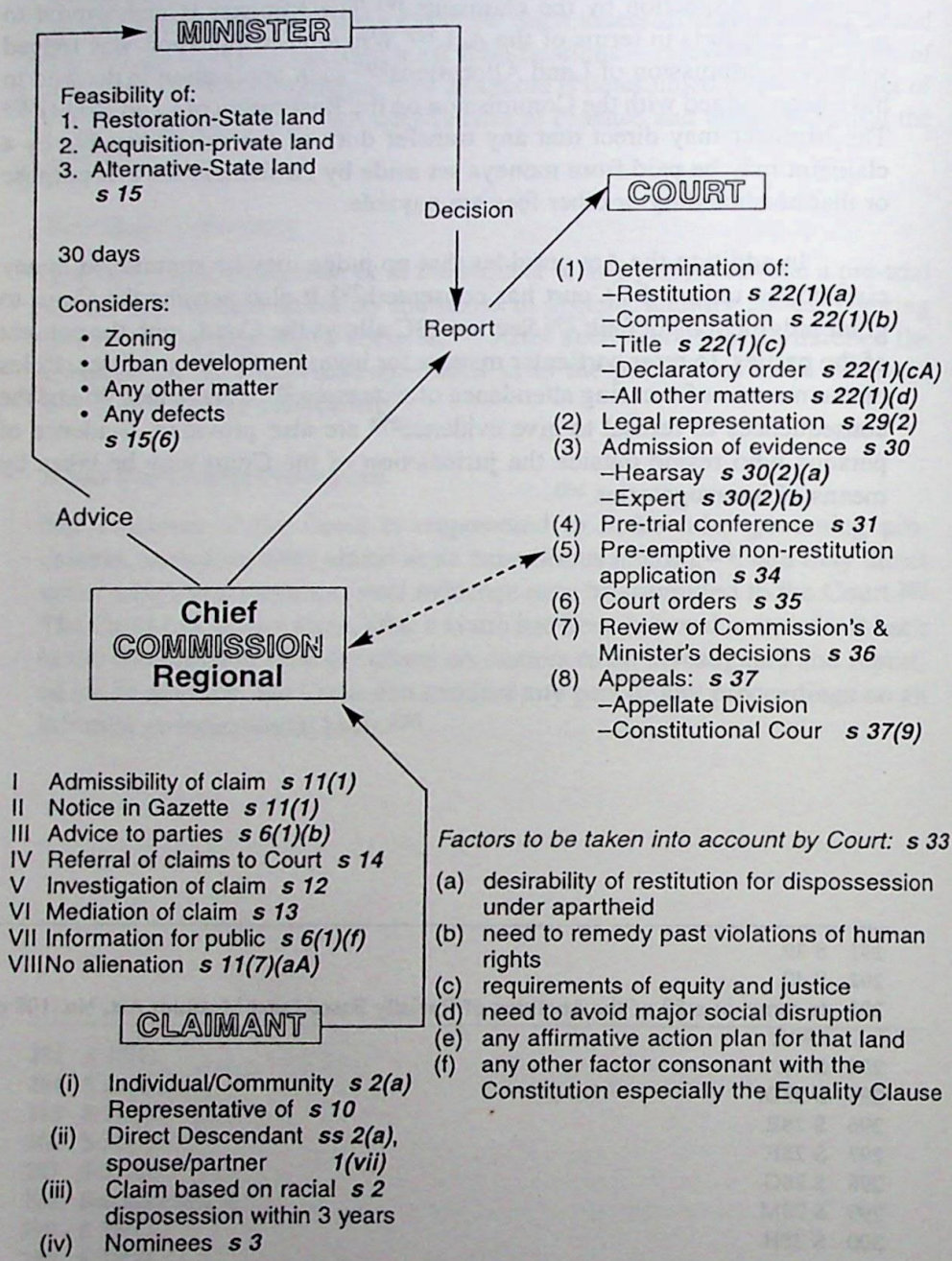
Miscellaneous provisions

A register of public land will be compiled by the Minister. Such register will be open to inspection by the claimants.[291] The Minister is empowered to make regulations in terms of the Act.[292] Where an application was lodged with the Commission of Land Allocations[293] such application is deemed to have been lodged with the Commission on the Restitution of Land Rights.[294] The Minister may direct that any transfer duty or other fees payable by a claimant may be paid from moneys set aside by Parliament for that purpose or that no such duty or other fees are payable.

In addition the Act provides that no judge may be summoned in any civil action unless the Court has consented.[295] It also permits the Court to grant judgment by default.[296] Section 28C allows the Court, with the consent of the parties, to refer particular matters for investigation by a referee. Rules on the manner of securing attendance of witnesses,[297] witness fees,[298] and the consequences of refusal to give evidence[293] are also provided. Evidence of persons who reside outside the jurisdiction of the Court may be taken by means of interrogatories.[300]

291 S 39.
292 S 40.
293 In terms of s 89 of the Abolition of Racially Based Land Measures Act, No. 108 of 1991.
294 S 41.
295 S 28D.
296 S 28E.
297 S 28F.
298 S 28G.
299 S 28M.
300 S 28H.

FLOW CHART


MINISTER
Feasibility of:
1. Restoration-State land
2. Acquisition-private land
3. Alternative-State land
s 15
30 days
Considers:
• Zoning
• Urban development
• Any other matter
• Any defects
s 15(6)
Advice
Decision
Report
COURT
(1) Determination of:
–Restitution s 22(1)(a)
–Compensation s 22(1)(b)
–Title s 22(1)(c)
–Declaratory order s 22(1)(cA)
–All other matters s 22(1)(d)
(2) Legal representation s 29(2)
(3) Admission of evidence s 30
–Hearsay s 30(2)(a)
–Expert s 30(2)(b)
(4) Pre-trial conference s 31
(5) Pre-emptive non-restitution application s 34
(6) Court orders s 35
(7) Review of Commission's & Minister's decisions s 36
(8) Appeals: s 37
–Appellate Division
–Constitutional Cour s 37(9)
Chief
COMMISSION
Regional
I Admissibility of claim s 11(1)
II Notice in Gazette s 11(1)
III Advice to parties s 6(1)(b)
IV Referral of claims to Court s 14
V Investigation of claim s 12
VI Mediation of claim s 13
VII Information for public s 6(1)(f)
VIII No alienation s 11(7)(aA)
CLAIMANT
(i) Individual/Community s 2(a)
Representative of s 10
(ii) Direct Descendant ss 2(a), spouse/partner 1(vii)
(iii) Claim based on racial s 2 disposession within 3 years
(iv) Nominees s 3
Factors to be taken into account by Court: s 33
(a) desirability of restitution for dispossession under apartheid
(b) need to remedy past violations of human rights
(c) requirements of equity and justice
(d) need to avoid major social disruption
(e) any affirmative action plan for that land
(f) any other factor consonant with the Constitution especially the Equality Clause

CHAPTER VI

Some Questions in Looking for Answers

In order to predict the possible outcome of claims under the Restitution of Land Rights Act, Number 22 of 1994, what follows is a number of hypotheticals with some speculation on their possible solutions. The solutions provided here are not the only possible ones and the reader is encouraged to find others, keeping in mind any additional facts or law that might be assumed.

One.

Five hundred acres had been occupied for generations by the Gaba community. Chief Elias Gaba had been the head of the community since 1935. In 1957 the area was expropriated in terms of the Black (Urban Areas) Act, Number 25 of 1945, in order to clear out Africans from mixed residential areas near the city of Pretoria. It is alleged that compensation was promised but there is no proof of payment. Elias passed away in 1968, when Petros, his son, was ten years old. Many of the other Gabas moved further away in fear of a similar event taking over their lives again and because, after Elias' death, there was no effective leadership. It is estimated that one hundred and fifty families were dispossessed of their communal land. The land is now claimed by some of the descendants of the displaced Gabas who settled in the adjoining locations at that time.

In 1980 the land was purchased from the Department of Community Development by a developer, Grow Corporation for R500 per acre. Grow Corporation completed the first phase of a five-phase exclusive residential area of eighty-five houses in 1985 in what has turned out to be Pretoria's newest exclusive suburb. All the houses, situated on one acre of ground each, are now in private ownership. The rest of the land had been surveyed and serviced with new roads, sewage system, water supply, electricity and telephone lines. There are plans, already approved by the local authority, for another four hundred exclusive houses.

Petros Gaba, the late Elias' son, institutes a claim on behalf of the fifty Gaba families that he has been able to trace.

The Gaba community is entitled to enforce their claim for restitution of a right in land because they are a "community" which is a group, or a part of the group, of "persons whose rights in land are derived from shared rules determining access to land held in common by such a group".[301]

Questions arise from the capacity of Petros Gaba to represent the group. Does he do so because he is the son of Elias, that is, he is the new chief of the Gabas or because he is the representative of the traceable group of the Gaba community? If it is in the former capacity, he might claim 100% of the dispossessed land or compensation and be accountable for its reallocation.[302] If he acts in the latter capacity, that is, as a representative, then he will be required to lodge "any appropriate resolution or document supporting such contention" that he is the representative when lodging the claim, or at a later stage.[303] Let us assume that Petros is a representative of the group, and that the claim would be for one-third of the dispossessed land or compensation because the representatives of only fifty families sign the document appointing Petros their representative.

301 S 1(iv).

302 In terms of s 35(3) where the Court makes an order to a community the order shall be subject to such conditions as the Court considers necessary to ensure that all the dispossessed members of the community concerned shall have access to the land or the compensation in question, on a basis which is fair and non-discriminatory towards any person, including a woman and a tenant, and which ensures the accountability of the person who holds the land or compensation on behalf of the community to the members of such community.

303 S 10.

In this hypothetical, it is debatable whether the form of notice provided for in section 11(1)[304] constitutes effective notice. The literacy level of the average South African person in this class is not high enough to be able to comprehend notices in the *Gazette*, a government publication filled with specialised jargon. To the extent that this constitutes general notice, its actual efficacy may in fact be limited.[305] For those who have moved far away from the site of dispossession, publication in the district in which the land in question is situated does not assist. Government *Gazette* 16407 of 12 May 1995 provides that notice may take one of the following forms:

i) Notice in the newspaper or notice in a magazine or on a radio or on television;
ii) Copies of notice sent by registered mail to all interested parties including the registered owner;
iii) Verbal notice; and
iv) The display of a notice in a suitable place on the land concerned.

Section 11(6) provides for notice in writing to be provided to the owner of the land in question and to any other party with an interest in the claim.

Once a notice has been published, and a note has been made in the Deeds Office records, any person tampering with the claimed property by

304 The regional land claims commissioner

> . . . 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.

Compare with the notice provisions of the Zimbabwe Land Acquisitions Act, Number 21 of 1985 which were so onerous that the land acquisitions procedure was handicapped. A constitutional provision stated that there could be no valid expropriation except under the authority of a law which gave the expropriatee reasonable notice of the intention to acquire the property. This was one of the reasons for the constitutional reforms passed in December 1990, according to Ng'ong'ola, *supra* note 127, at 132–133.

On the question of possible constitutional implications in terms of notice, the Final Constitution of 1996 provides in s 25(7) for restitution or equitable redress "to the extent provided by an Act of Parliament". That Act refers to the Restitution of Land Rights Act of 1994. Similarly the Interim Constitution, section 121, authorised an Act of Parliament to "provide for matters relating to the restitution of land rights".

305 S 16 empowers the Chief Land Claims Commissioner, in consultation with the Minister, to make rules regarding the procedure of the Commission. These include, in terms of subsection (1)(c),

> any steps which may be taken to give public notice of claims and notice to persons who have an interest in any matter under investigation by the Commission.

obstructing the passage of the claim, removing any improvements or prematurely occupying the claimed land is criminally liable.[306] This will protect the rights of the first phase private owners of the eighty-five houses until the claim is settled by the Land Court.

The Land Commission's power of investigation will be vital in determining whether the allegations of compensation, promised or paid, to the Gabas are well-founded.[307] The powers of the Commission, in this respect, are wide and range from demanding documents from government departments to compelling individuals to appear before a Commission member to assist with the investigation. If, during an investigation there is a suspicion, for example, that the compensation due was pocketed by an official of the then Department of Community Development, such an individual may rely upon the rule against self-incrimination provided for in section 12(2).[308]

It is at this stage that the Chief Land Claims Commissioner may rule that it would be more expeditious if "all claims for restitution in respect of the land, or area or township in question, were to be investigated at the same time". Then he or she will give notice in the *Gazette* for all other affected parties to lodge their claims within a specified period.[309] It is possible that other descendants of the Gaba clan will lodge their claims, perhaps individually or together as a group.

The parties who have an interest in the claim[310] would include: Petros and his group; Grow Corporation; the eighty-five first-phase private owners; and any other descendants of the Gabas who previously occupied the disputed land, who may wish to form another group.

---

306 S 17. The prohibitions are first set out in s 11(7)(a), (b), (c) and (d).

307 S 12.

308 It reads:

> Any person directed to produce documents or objects in terms of subsection (1)(c) shall not be compelled to produce any document or object which could be used in evidence against him or her in a criminal trial.

It is not clear whether the Commission has the power to grant immunity from prosecution to such an individual. If it does not, that would prevent the truth from surfacing. In the interest of the Commission making informed decisions, it is imperative that it be granted such powers. The exercise of such power will, in any event, be regulated by the Court's review process under section 36 of the Act.

309 S 12(4).

310 S 14(2)(c), as amended.

Section 13 will, in these circumstances, be applicable. It provides:

> (1) If at any stage during the course of the Commission's investigation it becomes evident that –
>
> (a) there are two or more competing claims to a particular right in land;
> (b) in the case of a community claim, there are competing groups within the claimant community making resolution of the claim difficult;
> (c) where the land which is subject to the claim is not State-owned land, the owner or holder of rights in such land is opposed to the claim; or
> (d) there is any other issue which might usefully be resolved through mediation and negotiation,
>
> the Chief Land Claims Commissioner may direct the parties concerned to attempt to settle their dispute through a process of mediation and negotiation.

Is it the intention of the legislature that private owners of land which is subject to a claim enter into negotiations with the claimants of the designated land, or with the State in terms of section 13(c) of the Act?[311] More often than not, since the claims for restitution are lodged against the State, the private owners may opt for the waiting game and hope that the Minister of Land Affairs certifies that the acquisition through expropriation of the designated land is not feasible, for example, since the zoning of the land has changed and the urban plans reveal it to be a residential area, in terms of sections 15(a) and 15(b). Amongst the factors the court takes into account, includes "the desirability of avoiding major social disruption" in terms of section 33(d). Should the Minister certify that the expropriation is feasible, just and equitable compensation has to be paid to the owner, who may not have been paying attention to the mediation process and therefore is unaware

311 Such mediation can yield creative results if the parties are determined to reach a solution. Clearly, Grow Corporation has invested a great deal of money into its residential project. It has also reaped substantial profit from the first phase of the venture, especially since it bought the land at a bargain price. More gain is predictable in the future provided it can secure undisturbed ownership for the first-phase owners and guarantee the same for future buyers.
There is no certainty that if the Court were to find expropriation to be feasible and set a price in terms of section 25(3), Grow Corporation would recover as much profit if the project proceeded unhindered.

of the needs of the claimant. Such a private owner is therefore reliant on the State's assessment of just and equitable compensation for his property. One of the fundamentals of the mediation process is to ascertain the "bottom line" needs of the other party. It is not always clear who the other party is, or the other party emerges later in the process. As a result the private owner can be caught off-guard.

On the other hand, why should those, who are currently the owners of property, contribute to correct the imbalance created by the social engineering of the National Party Government? What about those who profited also before the current owners? It appears that in this restitution process notions of unjust enrichment surface. Unjust enrichment exists where someone has been enriched at the expense of another and the enrichment is unjustified. Visser and Roux argue that:

> . . . in order to avoid the difficulty of having to decide whether to take an "overall net gain or loss" approach or an approach which aims to restore the object unjustifiably retained, it would probably contribute most to a clear understanding to see these cases as "enrichment by wrongdoing" . . .[312]

The first-phase owners realise that if the Court orders that the remaining sites be allocated to the Gabas, the exclusivity of the residential area, and therefore the value of their property, will be threatened. Can they not pressurise the local authority to make a pre-emptive non-restitution application to the Land Court on their behalf in terms of section 34 of the Act, for a ruling that it is not in the public interest for rights in the claim land to be restored to any claimant? If they are successful the Gabas would have to settle for alternative relief in the form of alternative state land or compensation. At the initial stage of the mediation it may be agreed between the claimants that Petros Gaba act as a representative of all the traceable Gabas.[313]

Suppose that some seventy-five descendant families of the Gabas in total are the only claimants, and all they seek is a plot of ground each to build a house for their families with a playground for their children, as has

312 Visser and Roux *supra* note 7, at 103–4.

313 The absent Gabas will be bound by this agreement because an order of the Court will be made. However, that in itself will not bar them from making a claim because section 11(5) allows them to apply to Court for permission to lodge a claim.

been suggested by a member of Petros' group. She reasoned that none of them continues to farm land since most work in the urban area in various other jobs.

Grow Corporation may agree to build seventy-five low cost houses at their expense if the Gabas are allocated alternative State-owned land,[314] not because they are obliged to, but because they wish to publicise their expertise in low-cost housing, a market they had planned to enter shortly. In addition, the first-phase owners may agree to build, at their collective cost, a day care centre and playground for the Gaba community as an act of goodwill arising out of no legal obligation.[315] The Gaba community, in terms of the Communal Property Associations Act, Number 28 of 1996, forms a juristic person to acquire, hold and manage the property on a basis agreed to by members of their community under a written constitution.[316] This agreement will be referred to the Land Court in terms of section 14(1)(c) and the Court will make an order in terms of section 35.

Two.

Jane Mthembu, the surviving partner in a customary union with Alpheus Ndlovu, claims the ten acres of quitrent land on which her husband's family lived from 1969 to 1979. The land was designated by the South African Development Trust in a proclamation for the purpose of inclusion into the scheduled lands for the proposed KwaZulu "independent state".

Alpheus Ndlovu publicly objected to his and his family's inclusion in a homeland against their consent and called for "an end to apartheid on our back door". Jane Mthembu pleaded with him to

314 The State is now the owner of most of the previous Trust-owned land and the former bantustans and it is envisaged that this land is to be reallocated through this process.

315 The Gabas might just as well have taken a cash settlement. The solution provided for in this hypothetical, and in the others, is only one of several possible.

316 To provide for other claimants that may appear in the next five years, Grow Corporation agrees to set aside R200 000 in an escrow account. They are under no legal obligation to do so because the claim is against the State.
An escrow account in the United States is generally a bank account, held in the name of the depositor and an escrow agent, the money from which is returnable to the depositor and paid to the third person on the fulfillment of an escrow condition, for example, funds for payment of real estate taxes are commonly paid into such an account of the bank of the mortgagor by the mortgagee. This is similar to Rule 58 of the Uniform Rules of Court. See Erasmus, Superior Court Practice, B1 – 397 where the escrow agent is the Registrar and the third person is the stakeholder.

be careful with his words, to no avail. Shortly thereafter because of the death threats he received he was forced to flee with his only child, Mary, to Swaziland. He promised to send for Jane.

In fear, Jane returned to live with her parents, waiting to hear of her imminent travel plans which never materialised. Alpheus became a successful businessman and owned a hundred-acre maize farm at his death in 1988. He never married, grieving after the death in 1981 of Mary, who yearned to see her mother again, it was said. His entire estate was bequeathed to Jane Mthembu.

The proclaimed land was never included in the KwaZulu territory, and the Trust leased the land to Acme Cement Corporation on a ninety-nine year lease in 1980. It is the only cement factory in the area and is a highly profitable venture. The other claimant to the disputed land is one Alfred Ndlovu who alleges that he is Alpheus's long-lost uncle.

One of the preliminary questions to be answered in this hypothetical is: Was the dispossession "as a result of past racially discriminatory laws or practices" which would have been inconsistent with the prohibition of racial discrimination contained in the Final Constitution,[317] had that section been in operation at the time of such dispossession?[318] It may be alleged by other claimants (besides Jane) that Alpheus abandoned his land because his freedom of speech rights were threatened, and that he was not dispossessed of his land by any racially based discriminatory law.[319]

Clearly the identification of Alpheus Ndlovu's land was done under the provisions of the Natives Trust and Land Act of 1936 whose origins can be traced directly to the Native Land Act of 1913. The objectives of these acts, namely, to prevent ownership of land outside the scheduled areas by Africans, was to create an apartheid state which would be inconsistent with

317 S 9(3).

318 The history of the Act is located in section 121(2)(b) of the Interim Constitution. The preamble of the Restitution of Land Rights Act, Number 22 of 1994 states the purpose of the Act as follows:

> To provide for the restitution of rights in land in respect of which persons or communities were dispossessed under or for the purpose of furthering the objects of any racially based discriminatory law . . .

319 If a white man left South Africa under the same circumstances, he would still own his home.

the prohibition of racial discrimination contained in section 9(3) of the Final Constitution of 1996 (section 8(2) of the Interim Constitution). Alpheus Ndlovu's flight to Swaziland must be seen as an act of a reasonable person responding to the threats of the day. Many who failed to respond in time have paid a heavy price. The Court should treat Jane's actions in a similar light.

I turn now to assess the merits of each affected party's claim. Under the Black Areas Land Regulations of 1969,[320] quitrent land holders had the right to hold the land in perpetuity but the succession was governed by customary law. The identity of the heir was based on male primogeniture according to the "Tables of Succession" contained in an annexure of the regulations. Based on this, Alfred may argue that his claim is stronger than Jane's (in fact, she is barred from qualifying[321]) especially since Constitutional Principle XIII states that

> [i]ndigenous law, like common law, shall be recognised and applied by the courts, subject to the fundamental rights contained in the Constitution and to legislation dealing specifically therewith.

Section 8(1) of the Final Constitution of 1996 states:

> The Bill of Rights applies to all law and binds the legislature, the executive, the judiciary, and all organs of state.

The Restitution of Land Rights Act of 1994 defines "rights 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.

Alfred may be a competing claimant for the disputed land as he appears to have a *prima facie* customary law interest.

320 Proclamation R188 of 1969.

321 Recognition of the customary law may run afoul of the constitutional provisions against gender discrimination in terms of s 9(3) of the Final Constitution of 1996. See note 239.

However, the same Act defines a "direct descendant" of a person as including "the spouse or partner in a customary union of such person whether or not such customary union has been registered".[322] Therefore Jane qualifies as a claimant. A claimant is defined as a "person or community" or "a direct descendant of such a person".[323] Alfred is not a direct descendant as an uncle. Therefore he does not qualify as a claimant in terms of section 2(1)(a) of the Act, notwithstanding his customary law interest.

Acme Cement Corporation, actually occupies "public land" which is defined as

> all land owned by any organ of state as defined in section 233 of the [Interim] Constitution,[324] and includes land owned by a local authority, the Land Bank and any institution in which the State is the majority or controlling shareholder[325]

because it has leased it from the South African Development Trust. Only sixteen years of the ninety-nine year lease have expired, and should there be restoration of the rights to this land, Acme Cement Corporation has a lot to lose because of the set-up capital already invested in the Corporation. Section 35(9) of the Act appears to have anticipated this eventuality:

> Any state-owned land which is held under a lease or similar arrangement shall be in the possession of the State for the purposes of section 123(1)(a) of the [Interim] Constitution: Provided that, if the Court orders the restitution of a right in such land, the lawful occupier thereof shall be entitled to just and equitable compensa-

322 S 1(vii). S 2(1)(a) provides that a direct descendant shall be entitled to enforce restitution of a right in land.

323 S 2(1)(a).

324 Which is defined as including "any statutory body or functionary" in s 233(ix) of the Interim Constitution.

325 S 1(xiii).

tion determined either by agreement or by the Court according to the principles laid down in section 28(3) of the [Interim] Constitution.[326]

At the same time Acme Cement Corporation is fully aware of the history of its acquisition of the lease.

---

326 The relevant part of section 28(3) of the Interim Constitution permits the taking of the property in question

> . . . subject to the payment of agreed compensation or failing agreement, to the payment of such compensation and within such period as may be determined by a court of law as just and equitable, taking into account all relevant factors, including, in the case of compensation, the use to which the property is being put, the history of its acquisition, its market value, the value of the investments in it by those affected and the interests of those affected.

S 25(2) and subsection (3) of the Final Constitution permit the taking of property subject to the following rules:

25. (2) Property may be expropriated only in terms of law of general application–
   (a) for public purposes or in the public interest; and
   (b) subject to compensation, the amount, timing, and manner of payment, of which must be agreed, decided or approved by a court.

(3) The amount, timing, and manner of payment, of compensation must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all the relevant factors, including–
   (a) the current use of the property;
   (b) the history of the acquisition and use of the property;
   (c) the market value of the property;
   (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
   (e) the purpose of the expropriation.

The power of the Chief Land Claims Commissioner to direct that the affected parties enter into mediation and negotiation[327] may prove to be more effective than a decision by the Court. If in this process so directed, it is revealed that Jane Mthembu does want the memory of her late daughter and husband to live on,[328] more than land or money as compensation[329] (because she has inherited a large sum of money and wishes to continue farming in Swaziland), a negotiated solution may prove to be the best. If Acme Cement Corporation offers Jane Mthembu stock in its company, for example ten per cent, in return for the lease to run its full term, agreement may be reached. The property will continue to be held by the State. In return, all rental collected by the State, in respect of this property, will be earmarked for the development of houses under the Reconstruction and Development Programme, one such development, identified as being in the vicinity of the claimed property, will be named after Alpheus and Mary Ndlovu. In addition, Jane Mthembu will contribute her first ten year's dividends from Acme to the proposed housing development while Acme Cement Corporation will donate the cement required for the project.

If the regional land claims commissioner is satisfied that this agreement is appropriate,[330] and the Chief Land Claims Commissioner endorses it, he or she may request that the agreement be made an order of Court.[331] A document setting out the results of the Commission's investigation into the merits of the claim and a copy of the relevant deed of settlement must accompany the request.

327 S 13.

328 Or it may be revealed that she wants the monetary value as compensation.

329 See Margaret Jane Radin, *Property and Personhood* 34 STANF. L REV. 957, 959 where she argues that some property may become so related to one's personhood (like one's favourite armchair) that its loss causes pain that cannot be relieved by the replacement of the object.

330 S 14(1)(c).

331 S 14(3).

It is doubtful that the Court would have ordered a result like this if the parties had not agreed to it, for many reasons. Courts of equity are a new feature of South African law and have been introduced so that they can smooth out the rigid wrinkles of South African property law.[332] Unless the report of the Land Commission brings various optional solutions to the attention of the Court, it is unlikely to have reached this result. Therefore the work of the Commission is going to be pivotal to creative solutions. In addition, if it is envisaged that the work of the Court will be completed in five years, the roll is likely to be filled to the maximum, leaving the Court little time to be sensitive to all the needs of the parties.

Three.

In 1970, the Lewett family acquired two hundred and fifty acres of land in Tongaat, Natal after it was expropriated in terms of the Group Areas Act of 1966. Except for the land in paragraph (b), it is revealed that the previous owner was a Mr Bobby Naidoo who emigrated to Canada in 1970 with his wife. It is believed that he was compensated with the sum of R35 000. In 1994 both were killed in a motor accident in Toronto. Since they had no children they bequeathed all their possessions to their favourite nephew, Namo Naidoo, in South Africa. The Lewetts purchased the land from the Department of Community Development at R200 per acre. The land is currently a productive sugar cane farm and is subject to the following claims:

(a) John Radebe, his sister Jessie Maake and her family of six, are the direct descendants of one Comfort Radebe, a labourer who worked for the Lewetts from 1970 to 1981 as a labour tenant. His wages included free usage of one acre of land for his house, for cultivation and use of the common ground for grazing the family cow. The common ground was used to graze the Lewett cattle also. After the death of Comfort

332 A J van der Walt, *Tradition on Trial: A Critical Analysis of the Civil-Law Tradition in South African Property Law* 11 SOUTH AFRICAN JOURNAL OF HUMAN RIGHTS 169, 169 (1995).

Radebe in January 1982, his family was forcibly removed[333] and all the land, including the common ground, was used for sugar farming. His descendants lodge a claim with the Land Commission.

(b) Morgan Moodley, Sam Moodley and Saras Govender are descendants of Sathie Moodley who owned a twenty-five acre strip of land along the banks of the Tongaat River used to cultivate fresh produce. Only after the expropriation of Sathie's land, for which he had receive the total sum of R5 000 in compensation, and its subsequent acquisition by the Lewetts, was sugar cane farming a viable proposition because of the easy access to water.

(a) Section 1(xiv) defines a "right in land" as including the interest of a labour tenant. As the direct descendants of Comfort Radebe, John and Jessie qualify to have their right in the claimed land restored. The investigations of the Commission support their contention of having occupied the described land.[334]

The Lewetts rely upon the advice of their attorney, Mr Holden Tight. He maintains a tough negotiating stance from the beginning. He observes that the descendants of Comfort Radebe, who actually number twice the original family, would today require a larger piece of land on which they could be accommodated. If they wish to cultivate the land, more than one acre will be necessary. If they entertain the thought of grazing stock, that would be potentially dangerous to the sugar farming if the fences were not properly maintained.

---

333 The original intention of the ANC was to provide restitution rights in land for victims of forced removal. See page 21, especially section (7)(a). Because of the brutal and dehumanising nature of forced removal, and the frequency with which it was utilised both by the government and white private owners acting under innocuously named acts, such as the Slums Act, to bulldoze the shacks, a forced removal became synonymous with a deprivation of a right in land. The legislators, therefore, defined a "right in land" in section 1(xiv) of the Act widely and included, *inter alia,* the interest of a labour tenant.

334 John Radebe and Jessie Maake could have acted in terms of the Land Reform (Labour Tenants) Act, Number 3 of 1996 which was enacted to provide security of tenure for labour tenants but chose instead to proceed in terms of the Restitution of Land Rights Act, Number 22 of 1994. See *Mahlangu v De Jager* 1996 (3) SA 235.

Mr Holden Tight maintains that if the Lewetts were asked to restore all the previous rights in the described land on two acres of ground, his clients will in fact be subsidising the State's welfare programme on Reconstruction and Development – not cooperating in the restitution of rights in land. Who is going to be the labourer in order to restore the lost right of the labour tenant? Will the allocation of freehold land be an adequate substitute for their previous rights in the land?[335]

John and Jessie are frustrated in their attempts to put forward their case. They have been informed that the land their father worked on will be their land if they verify that fact. Although the opposing lawyer accepts the verification, he maintains that they cannot get the land back. They find the process befuddling and unhelpful. When they request legal representation, they are informed that they would have to pay for such an attorney or advocate.[336] Only before the Court is legal assistance provided,[337] is the explanation.

One of the general functions of the Commission is to take reasonable steps to ensure that claimants are assisted in the preparation and submission of claims[338] – not during the negotiation and mediation stages.

At this stage, the regional land claims commissioner ought to represent the best interests of the claimants, especially where the lawful occupier is armed with the advantage of expensive legal counsel. One needs to keep in mind that the regional claims commissioner has limited time in which to refer the matter to Court, the possible length of the investigations, and the difficulties of notice. He or she will, therefore, have to rely heavily on the mediators and negotiators to keep the balance of power even

335 Clearly Mr Holden Tight's objective is to raise as many arguments as possible, even if some of them are specious. Most labour tenancy agreements were not reduced to writing but by verbal agreement, the terms of which will be difficult to verify so many years later. Now that labour tenants have been granted statutory rights, the Court would have to ascertain whether these rights are enforceable against the respondent.
The ANC's Draft Bill of Rights of 1993 states in Article 12(5):
No-one shall be removed from his or her home except by order of a Court, which shall take into account the existence of reasonable alternative accommodation.

336 See Vinodh Jaichand, *Random Thoughts on the Restitution of Land Rights Act of 1994* 1 THE HUMAN RIGHTS AND CONSTITUTIONAL LAW JOURNAL OF SOUTHERN AFRICA (1996) 3.

337 S 29(2).

338 S 6(1)(b).

between the disputing parties because of the commissioner's heavy workload. Any overt attempt by the mediator or negotiator to address the imbalance could severely undermine his or her credibility and place in jeopardy any negotiated or mediated result.[339]

Mr Tight is of the opinion that the state must provide the Radebes with alternative state-owned land or compensation. Further, there was a high degree of possibility that the Minister will certify that the acquisition of land will not be feasible. Because of the protracted nature of negotiation and mediation and the frustration it has caused, the regional claims commissioner certifies "that it is not feasible to resolve any dispute arising from such claim by mediation and negotiation".[340] A report setting out the results of the commission's investigation into the merits of the claim,[341] on the failure of any party to accede to mediation[342] and on the Commission's recommendation as to the most appropriate manner in which the claim can be settled[343] is referred to Court.

Suppose that the Minister certifies that the acquisition of the land is feasible through expropriation.[344] The only condition attached to the certificate is that the one acre of land must be located on the southern end of the farm with a frontage to the service road.[345] This would ensure that the usage by the residents would not interfere with the farming operations.

Before the Court issues an order to expropriate the land, it will have to consider whether it is "just and equitable" to do so. In making its decision it will have to consider, *inter alia,* the history of its acquisition. This reveals

339 See section 13(2)(b) where the parties may by agreement appoint another person to mediate the dispute. This choice presupposes that both parties are fully *au fait* with the advantages and disadvantages of the negotiation and mediation process. One's faith in a process depends largely on perceived gains and losses.

340 S 14(1)(b).

341 S 14(2)(a).

342 S 14(2)(b).

343 S 14(2)(d).

344 The Minister took into account the factors listed in section 15(6) of the Act before he or she reached a decision.

345 Note that the Court is not compelled to restore the dispossessed original site when it restored their right in land. That right arose pursuant to the labour tenancy and is a right in fact in no specific location. In accordance with Section 35(4) of the Act, it may also be noted that the Court has upgraded labour tenancy to freehold ownership of a specific tract.

that much of the land owned by the Lewetts is not subject to any other claims, except for the claim in paragraph (b).[346] The Court notes that the Naidoos had no direct descendants and that Namo Naidoo does not qualify as a claimant. The price paid for the land is very low. When the Court hears that the land was paid for from a loan from the Land Bank at very low interest rates, it is persuaded to grant the order for expropriation.

Any expropriation under subsection (1)(b) shall be subject to the payment of compensation calculated in terms of section 25(3) of the Final Constitution of 1996. The Court, being mindful of the use to which the property is being put, considers the market value, estimated conservatively at R5 million, and weighs that against the loss of one acre of sugar cane production. The original purchase price of that acre is R200. The Court considers the fact that the land was financed under the Land Bank's special rate and that the investments the Lewetts put into it have already yielded more profit than anticipated, and orders the State to pay the amount of R10 as compensation to the Lewetts.[347]

It also orders the Lewetts to pay the costs of the application.[348] With regard to the expropriated land the Court orders that the land be registered in the names of both John Radebe and Jessie Maake. The condition attached to the restoration of the land is that the keeping of livestock is not permitted unless the perimeter is properly fenced.[349]

(b) Section 13(1)(c) provides that if at any stage during the course of the Commission's investigation it becomes evident that where the land which is claimed is not State-owned, the owner or holder of rights in such land is opposed to the claim, the Chief Land Claims Commissioner may direct the parties to attempt to settle their dispute through a process of mediation and negotiation. In this hypothetical that is in fact directed. Because both the claimants have different claims to different portions of land owned by the Lewetts, counsel for the Lewetts requests separate mediation and negotiation sessions for each. This is granted by the Chief Land Claims Commissioner.[350]

346 What is likely to happen, if after this settlement, more claimants surface?
347 S 35(5).
348 S 35(2)(g).
349 S 35(2)(a).
350 S 16(1)(d).

After the first meeting the Moodley family claimants recognise that they may be at a disadvantage without a lawyer. They engage Mr Sonny Singh to represent them. The negotiation strategy employed by counsel may reveal that the adversarial mindset of lawyers often overtakes a common-sense approach to the Act.

In this hypothetical suppose the Minister determines that the expropriation of the claimed land is not feasible under section 15(6)(c) because without the twenty-five acre strip of land sugar cane production is no longer as viable. In the negotiation Mr Holden Tight continues to maintain his tough negotiating tactic because he is confident that the Minister will not issue the certificate of feasibility.[351] Mr Singh reveals that the Department of Community Development paid his clients R5 000 in full settlement of the expropriation more than twenty-five years ago. Without his client's claimed land, it is doubtful that the rest of the Lewett land would be worth more than R2 million. He therefore directs the Court to determine the compensation due to his clients according to the relevant factors as set out in section 25(3) of the Final Constitution of 1996.

The Court considers the extent of direct state investments in the land, and the history of the acquisition, the market value of the property and the current use of the property. The Court orders that R155 000 in compensation be paid to the Moodley family and that the sum of R5 000 be deducted from the compensation, that being the sum paid by the Department of Community Development in 1970.

Four.

Gamat Mannetjie, whose late father, Adam, was the owner of three houses in Walmer Estate, Cape Town, is a claimant, as the sole direct descendant, for the same property. The houses were expropriated in terms of the Group Areas Act of 1966 which proclaimed it a white area in 1975. Just before the property was expropriated, Adam renovated the two houses that they were not occupying with a view to permitting his church, Bethel Full

351 Mr Tight overlooked the possible effects of section 35(4) of the Act. He was informed by his local National Party Member of Parliament that if the Minister finds the restoration or acquisition of the claimed land unfeasible he or she would designate alternative State land in terms of sections 15(1)(b) and 15(3). And the matter would end there without too much inconvenience to his client.

Gospel, to use one as a day care facility for domestic workers' children and the other as an office for its urban pastoral work.

In 1976 the Mannetjie family was forced to move to Mitchells Plain, about twenty kilometers away, a designated "coloured" area. Adam was paid R2 000 per property expropriated by the Department of Community Development. The building site in Mitchells Plain cost Adam R10 000 and the building of a modest house for a family of four persons R25 000.

All three houses still stand in Walmer Estate after being totally refurbished by the municipality of Cape Town in December 1994. They were transferred from the Department of Community Development to the municipality without any payment and are currently used as offices.[352] A conservative estimate of the current market value of all three houses is R1,5 million although a restaurateur has offered R750 000 for the smallest of them.

Gamat is surprised when he reads a notice in the Daily Cape News that the municipality of Cape Town has made an application "for an order that the land in question or any rights in it shall not be restored to any claimant or prospective claimant" in terms of section 34 of the Restitution of Land Rights Act, Number 22 of 1994. The land in question is the former Mannetjie family property. Gamat had just announced in church the past Sunday his intention to honour his late father's wishes by making an application to have the property restored.

The regional land claims commissioner advises Gamat to oppose the application made by the municipality of Cape Town if he wishes to have the family property restored. He qualifies to receive legal representation from

352 See Claassens, *supra* note 38, at 423–4 where she states:

> In many cases land from which black people were removed was left idle and transferred to the ownership of a state department or local authority. Should such authority be entitled to market value compensation for unused assets which were simply granted to it?

the State legal aid system.[353] Mr I M Smart, the appointed advocate, advises Gamat to invite the superintendant of Bethal Full Gospel Church, Mr Denzil Arendse, to join him in opposing the application because the church has an interest in the matter.[354]

Under section 34 any national, provincial or local government body may, in respect of land which is owned by it, make an application to the Court for an order that the land in question or any rights in it shall not be restored to any claimant or prospective claimant.[355] The reason for the application is that it is in the public interest that the rights in question should not be restored to any claimant, and the public or any substantial part thereof will suffer substantial prejudice unless the order is granted.[356]

The municipality of Cape Town submits that if the property were restored to a claimant, valuable office space would be lost to the public in the surrounding areas who pay their municipal rates and other service charges at these offices monthly. The close proximity of the offices to the city centre ensures that many more people utilise these offices, and that it lowers the cost of travel between it and city hall. To relocate these offices to the city centre would cost R50 000 a month in rental which bill the rate payer would ultimately have to pay.

The Commission's report to the Court[357] accepts the submissions of the municipality as true but adds that the offices serve mainly moneyed upper class whites, with a very few wealthy coloureds among them. Most of these persons conduct their financial affairs through cheques and not usually in person.

Mr Smart then submits to the Court that the municipality of Cape Town actually occupies six other sites in the vicinity, four of which are used

353 S 29(2).
Note that it appears that a lawyer was appointed to Gamat Mannetjie sooner than it was the case in John Radebe's and Jessie Maake's case. The reason is that in terms of section 34, the applicant finds himself or herself in Court sooner than other claimants who have to pass through the Commission stage first.

354 S 34(3) and (4).
Would the solution be the same if the restaurateur was the person with an interest in the matter?

355 S 34(1).

356 S 34(6).

357 S 34(2).

to garage municipal vehicles overnight for municipal officials who live in that area.[358] He adds that the municipality plans to use section 34 of the Act to block any possible future claims for these sites for restoration.[359]

After Mr Smart informs the Court that the domestic servants working in the area, and in the city, have no day care facility for their children and that they stand to be the direct beneficiaries of any successful restitution of rights in land claim, he calls for the dismissal of the application. Before the Court announces its decision, the judge directs its attention to section 33(f) of the Act which requires the Court to consider any other factor "relevant and consistent with the spirit and objects of the [Interim] Constitution and in particular the provisions of section 8 [now section 9 of the Final Constitution]" and dismisses the application in terms of section 34 of the Act.

---

358 If this fact were not revealed, would the solution provided herein be any different?

359 Peter Quint in an unpublished manuscript entitled "The Fate of 'Socialist Property': Restitution, Compensation, and the work of the Treuhand" discusses the "Wall Property" which runs through the centre of Berlin and comments on the reluctance on the part of federal government to return the property that was expropriated:

> Accordingly, some suspect that the administration in Bonn has been particularly adamant on this point in order to retain this valuable property, at essentially no cost, for governmental purposes or lucrative re-sale.

What would the chances be of a similar fate befalling District Six in Cape Town, or Cato Manor in Durban which have been subjected to different tugs from different political directions? See Mail & Guardian September 6–12, 1996 for article entitled "District Six: Restitution or Development?" and Sunday Times Metro September 22, 1996 for article "Displaced Cato Manor residents plan court action: Under Siege".

In the case of *Ex Parte: The Central Transitional Metropolitan Substructure Council for the Metropolitan Area,* case number LCC 15/1996, in an application for a section 34 pre-emptive non-restitution order, evidence was led on the genesis of section 34. The Cato Manor Development Association, a non-profit company created to oversee development in that area and a co-applicant in the case, had expressed their concerns to the Minister about the draft legislation on the restitution of land rights. Based on those suggestions and other deliberations on development, the draft legislation was amended to include the current section 34 into the Restitution of Land Rights Act, Number 22 of 1994.

Can section 34 therefore not be used by a governmental agency to create a clean slate on the history of the land by a developer? After all the duty to compensate or provide alternative state land belongs to the Minister of Land Affairs and not such an applicant.

I assume that when an application under section 34 of the Act is dismissed by the Court, any claim for the restitution of rights in that land must revert to the section 14 procedure, where the disputing parties attempt to find a solution through the Commission's mediation, negotiation and reporting provisions.[360] In this hypothetical, because the parties have already been exposed to an adversarial encounter with one another, the regional claims commissioner is of the opinion that nothing productive is likely to emerge from any attempt to negotiate or mediate, and certifies that the claim is ready for hearing by the Court.

Mr Smart reasons that the land in question qualifies as "public land" because it is "land owned by a local authority".[361] Therefore the Minister needs to certify whether restoration of the land is feasible or not. Mr Denzil Arendse, the superintendant of Bethel Full Gospel Church, makes a submission to the Minister to the effect that he ought to consider that the restoration of the land in question is feasible.[362]

In the submission he includes a letter from a domestic servant who was recently dismissed from her job because she attended to her two children for a week while their grandmother, who usually took care of them, was hospitalised. He also includes the Church's plan to feed homeless children in the city in their urban pastoral care programme. Mr Arendse concludes his submission by averring that the designation of alternative State-owned land would mean that his church will have to abandon these programmes.[363]

The Minister issues the relevant certificate of feasibility within 30 days[364] but, in a letter directed to Gamat Mannetjie and Denzil Arendse, reminds them that the Minister "is not required or entitled to consider whether restoration, acquisition or designation is just or desirable."[365]

---

360 Section 14(6) of the Act. I also rely on the power of the President of the Court to provide for rules governing the procedure (section 32(4) of the Act) for an application in terms of section 34 of the Act.

361 Section 1(xii).

362 Section 15(5).

363 What impact, if any, do these facts have on the solution provided?

364 Section 15(9).

365 Section 15(8).

At the hearing the Court orders that the right to the land in question be restored to Gamat Mannetjie subject to the following conditions:

(a) that a written agreement between Bethel Full Gospel Church and the claimant be entered into in which the claimant grants the Church use of two houses for a period of not less than ten years rent-free. Necessary expenses for maintenance and upkeep are, however, to be paid by the Church.[366]

(b) that Gamat Mannetjie occupy the other house only after the sum of R6 000 is paid to the Department of Land Affairs[367] by means of a mortgage bond passed on the restored land in question at a financial lending institution. The payment has to be made within 90 days of the Court granting the order.[368]

The Court explains that the sum of the money required to be paid by Gamat Mannetjie is not due because of expropriation. There can be no expropriation ordered where the land was in possession of the State – only an order for restoration may be granted. Nor must it be seen as a penalty. It is a calculation based upon the compensation that was paid to the claimant upon the dispossession of the right in 1976.[369]

What is apparent here is that Gamat Mannetjie is the beneficiary of a windfall. The injustice of the apartheid land laws may yield skewed results of this sort. Is it the duty of the Court to straighten out this imbalance?[370] The Court may order a claimant to make any payment before the right is restored or granted, determine the amount to be paid and the time and manner of payment under section 35(2)(b) of the Act. Or, the Court may adjust the nature of the right previously held by the claimant to less than full ownership under section 35(4).

366 S 35(2)(a).

367 Should the Court have required the R6 000 to be paid to the Cape Town Municipality, is it just that it be compensated for property it never paid for originally? Perhaps the Court ought to have considered reasonable payment to the Municipality for the expenditure for renovations on that property.

368 S 35(2)(b).

369 S 123(4)(b) of the Interim Constitution.

370 See Appendix III for a proposed amendment in this regard.

Five.

Mark James approaches the Commission with a view to lodging a claim. His former house, situated on ten acres of land at 123 Dartnell Road, Mountain Rise, Pietermaritzburg, was expropriated in terms of the Group Areas Act in 1970. Mountain Rise was declared an "Indian" area and the Department of Community Development paid him R20 000 as compensation.

Mark James presently owns a house in Wembley, Pietermaritzburg – an exclusive former white area which currently retains its original racial character – valued at R350 000, which he originally bought for R27 000 in 1970. The property on 123 Dartnell Road currently serves as a clubhouse for an eighteen-hole, privately-owned golf and bowling club – the first such facility for black persons[371] in the days of apartheid.

It is clear that Mark James qualifies for restitution of rights in land because he is a person who was dispossessed under or for the purposes of furthering the objects of a racially based discriminatory law. Once his claim has been lodged the regional land claims commissioner must be satisfied that his claim is not frivolous or vexatious.[372] Mark James disputes, under section 2(1A), that just and equitable compensation was paid. Therefore he is entitled to enforce his right to restitution.

He makes it clear that he does not intend to claim restoration of the dispossessed land. Neither does he intend to claim for alternative state-owned land. But he and his family were deeply offended at the time of dispossession and felt that their dignity was impaired when they were required to vacate the home where his three children were raised.[373] No amount of money could compensate for that.[374] His claim is for any alternative relief.

---

371 "Black" here is used in the political sense and includes all persons who are not white, that is, Africans, Coloureds and Indians.

372 S 11(1)(c).

373 Radin, *supra* note 329 at 992 makes the case for the protection of residential property from takings because "it is the scene of one's history and future, one's life and growth".

374 Is it plausible that Mark James, a white person who benefitted financially from the discriminatory Group Areas Act should now receive any benefits under the Restitution of Land Rights Act?

After the regional claims commissioner is satisfied that this is not a frivolous or vexatious claim, he duly publishes the notice in the *Gazette* and informs the chairman of the club.[375]

The Chief Claims Commissioner directs the parties concerned to enter into mediation and negotiation because there appeared to be issues which might usefully be resolved through that process.[376]

After the initial submissions of Mark James during the mediation process, the chairman of the club, Satish Maharaj, responds by stating that he has great empathy for Mark James because his family were victims of the Group Areas Act also. He offers Mark James life membership to the club which Mark immediately accepts.

However, Mark maintains that the greater blow to the dignity of his family was delivered by the former Department of Community Development who were no longer around to apologise to the people they dispossessed. As the successor to the previous government, the present government has a duty to do so. At this point, the mediator offers to approach the Minister of Land Affairs' office for an apology, with the caveat that the apology be directed to *all* persons who suffered dispossession or who were forcibly removed under the policy of apartheid, not just to the James family.[377] Mark agrees to this proposal as a means of settling his claim.

Both Mark and Satish agree that all the disclosures and submissions made during this mediation be made public[378] because this is the way in which the country can heal itself from the wounds inflicted by apartheid. Individuals in a similar position would be encouraged by this precedent and, perhaps, might wish to emulate its reconciliatory principles.

---

375 S 11(1).

376 S 13(1)(d).

377 The mediator is aware that Mark James, unlike other claimants, had the right to vote during the days of apartheid. Should the mediator ask Mark whether he voted for the National Party? It is unlikely that Mark will admit this. Clearly, should the answer to the question be in the affirmative, no apology from the Minister would have been solicited by the mediator.

378 S 13(4).

The finalised agreement of settlement, which both the regional[379] and Chief Land Claims Commissioners[380] find appropriate, is submitted to the Court for it to grant the order. The Court duly complies.

Six.

The Laphas, an African tribe of some two thousand people under chief Abba Lapha, were moved in 1913 from their traditional land, some one thousand acres in size, which they had occupied at least since the early 1800's. Documentary proof of the occupation is available. The removal of the Laphas was effected in terms of the Native Land Act of 1913. In 1914, however, for some unknown reason, the land was added to the Burger National Park.[381] The addition of this land increased the size of the Park by one-third, making it the largest national park in Africa.

Many of the Laphas threatened to move back to their traditional land and in 1915 some one hundred did. They were forcibly removed in June 1916 after a world-famous botanist discovered a rare variety of orchids in the forests they were occupying. They joined the rest of their tribe in a temporary army-tent village, erected in 1914, some two hundred miles south of the original site. It was announced that that region of the Burger National Park housed flora unique in the world and that human occupation would threaten their survival.

379 S 14(1)(c).

380 S 14(3).

381 Any similarity with this case and the case of the Makulele tribe who was removed from the Kruger National Park is purely co-incidental. See Sunday Times August 18, 1996 article entitled "Ancestral land claim fits in the Kruger" and Sunday Tribune September 8, 1996 article headed "Tribe plans tourism future". According to the latter report, in 1969 the National Party Government expropriated the land in order to extend the Kruger Park. The tribe resisted moving but was ordered to do so by policemen who threatened to shoot. The tribe was dumped outside that area and told to live in tents supplied by the army. Eventually they were relocated to a new place less than 100 kilometres from their previous home. The tribe now wishes to stake its claim and hopes to benefit, not from the restoration of its land, but from a share of the eco-tourism industry.

Later that same year, the then-Minister of Education and Development Aid promised the Laphas an equivalent site, from accumulated Trust land, near the Bey River mainly because of their ethnic affinity with the Beyans. The chief, Abba Lapha, was persuaded to accept the site after considering the plight of his people in the tent village, even though he strongly objected to the reference to alleged ethnic affinity. The Laphas moved to the Bey River site in November 1916. In 1963 Abba Lapha died at the age of eighty-five and was succeeded by his son, Pappa Lapha.

When the Transbey was declared an "independent state" in 1975 the Transbeyan government incorporated the site for the Laphas into the Transbey.[382] Many believe this to be a over-zealous retaliatory measure for the denial by Abba Lapha of any ethnic ties between the two tribes. The land was thereafter ear-marked for an airport which would service the casino in Beybanks and the nearby Burger National Park, the Transbeyan Minister of Trade and Tourism announced.

It is rumoured that the casino rights holders, Greenfields Company, had bribed Pappa Lapha into acquiescing in this arrangement when it learnt that the Transbey government was willing to revoke its "independent" status if the disputed territory was claimed by South Africa.[383]

---

382 Budlender & Latsky, *supra* note 33 at 164–5 explain this phenomenon in the following way:

> [A]s the various 'national states' have acquired self-governing status, they have acquired the power to deal with land matters and in particular to own land within their area of jurisdiction. The ownership of large areas of land has been transferred from the Trust to the 'homeland governments', which have stepped into the shoes of the Trust. However, it seems that this has not been invariable practice. It seems in some instances, Trust-owned land in the area of jurisdiction of a 'homeland government' has not been transferred and remains Trust property. The reason for this, and its implications, are not clear.

383 The well known Moutse case parallels this experience. A rural district of the Transvaal with a 120 000 Pedi population, which is linked to the Sotho ethnic group, was suddenly excised from the Lebowa homeland and united with the KwaNdebele, from the Ndebele ethnic group. The reason was that the South African government had dangled Moutse as the carrot to persuade KwaNdebele to seek "independence". For further details see BINDMAN, *supra* note 59, at 28.

A month after the incorporation was complete, Pappa Lapha protested to the South African government which issued the terse statement that it cannot invervene in the "internal affairs of an independent state". When the protest was voiced to the Transbeyan government, the Minister of Trade and Tourism replied that the Transbey was not a party to any land agreement with South Africa and that "the land had been acquired legally." In December 1977 the Beybanks Airport, the only one in that area, was complete.

After their removal the Laphas were permitted by the Transbey government to build temporary shacks some ten kilometers away from the site of the casino. No permanent buildings have been allowed since 1976.[384] Many of the Laphas have remained in the area because of the promise of work, much of which has never materialised. The rest work, or seek work, in the Transbey and surrounding areas.

The Transbey Constitution Act of 1975 was repealed by the South African Parliament in 1993 and the territory was reabsorbed into the Republic of South Africa. At the funeral of Chief Pappa Lapha in December 1994, his militant son, Rouser Lapha, vowed to: ". . . lead my people home, even if we have to feed on the orchids". He approaches the Land Commission to reclaim the traditional lands, or the Beybanks Airport and surrounds on behalf of this people. When the notice is published in the *Gazette,* some two hundred Laphas return to the forests to reclaim their traditional lands.

384 Access to land was restricted to citizens only. Under section 36(1) of the National States Constitution Act of 1971, the meaning of a 'citizen' may be determined, *inter alia,* by reference to the language spoken. The Laphas under chief Abba denied any link with their language and the language of the Transbeyans, even though it was believed to be a dialect of Transbeyan.

The Lapha tribe, under their representative Rouser Lapha, qualify to enforce their claim for restitution of their right in land because the community was dispossessed under or for the purpose of furthering the objects of a racially discriminatory law. They maintain that their dispossession in the Transbey area is as a direct result of the apartheid control mechanisms that encouraged tin-pot leaders to become dictators who bent or ignored the law to suit their own ends.

Upon the publication of the notice in the *Gazette*[385] by the regional claims commissioner, the National Parks Board and the Beybanks City Council[386] inform the commissioner of their intention to apply to the Court for a pre-emptive non-restitution order.[387] The Chief Land Claims Commissioner has to react to the unauthorised[388] return of the two hundred Laphas to the Burger National Park in terms of section 17 of the Act by effecting their removal from there and prosecuting them.

The applications of the National Parks Board and the Beybanks City Council are heard together[389] and the Commission's report to the Court is handed in. The Court notes that in the application by the National Parks Board the environmental issues constitute the paramount concern. The future of the rare orchids is severely threatened if the Court dismisses the application. In addition, the National Parks Board report that a successful breeding programme for the near-extinct brown eagle was launched in the same area in the last ten years. The site has become a valuable nursery for the planned relocation programme for the birds of Southern Africa.[390] The report of the Commission confirms these concerns.

The Court considers the environmental issues to be a relevant factor in its determination of whether it is in the public interest that the rights in question should not be restored to any claimant.[391] The Court holds that the

385 S 11(1).

386 The municipality acquired the airport on the dissolution of the homeland.

387 S 34. Subsection (2) deals with the notice of such an application being given to the Commission, which investigate the matter and submit a report to the Court on the desirability of making such an order.

388 S 11(7)(d).

389 I assume that this procedure will be catered for in the rules governing procedure made by the President of the Court in terms of section 32.

390 If the environmental issues were not as paramount, what other solutions might the Court have reached?

391 S 34(6)(a) and (b).

public will suffer substantial prejudice, not only immediately but also in the long term if the environmental rights are ignored. It grants the order. At the same time, the Court is mindful of the plight of the Laphas and their dire need to be located in a suitable area.

The Beybanks City Council's application is heard next. The City Council submits that the public would suffer substantial prejudice if the land on which the Beybanks Airport, or the surrounds, were to be restored to any claimant because the airport services tourists from all over the world who visit the Beybanks Casino and the nearby Burger National Park. This activity is the main source of revenue in the area. There are plans for the surrounding areas to be included in the expansion contemplated by Greenfields Company if the land in question is not restored to any claimant. The report of the Commission confirms the value of the airport to the region although the Commission was unaware of any plans by Greenfields Company to expand its operations there.

The Court considers the desirability of avoiding major social disruption if the land in question is restored to the claimants. While it expresses doubt in the ability of the Greenfields Company to generate job opportunities in the area, the Court is mindful of the expense of relocating the airport closer to the Burger National Park – the largest expense being the further disruption of the flora and fauna of the area.

It therefore orders that when any claim in respect of the land in question is finally determined, the rights in the land in question, or in any part of the land, or certain rights in the land, shall not be restored to any claimant. The Court, however, instructs the Commission and the Minister to attend to the needs of the Lapha tribe with some urgency because they were the real victims of apartheid bureaucratic bungling.

When the case of the Lapha tribe is referred to the Commission for its consideration under section 14, the regional land claims commissioner certifies that it is not feasible to resolve any dispute arising from such claim by mediation and negotiation,[392] and the Chief Land Claims Commissioner agrees by referring the matter to court.

392 S 14(1)(b).

The Commission's report reflects that the Laphas' only concern is to relocate as close to their traditional lands as possible and the Chief Land Claims Commissioner advises the Minister accordingly.[393] Based on this advice, the Minister reports to the Chief Land Claims Commissioner that the State possesses eight hundred acres on the border of the Burger National Park which he considers as feasible for restoration. However, that constitutes only eighty per cent of the Lapha claim.

Another two hundred acres adjoining the state land is in the possession of a private owner. The Minister certifies this land as feasible for acquisition.[394] No other alternative State-owned land, other than the 800 acres, is situated in the area where the dispossession took place.[395]

The Court, therefore, has to consider whether it is just and equitable to expropriate the additional two hundred acres required to relocate the Lapha tribe. In doing so it has to consider all relevant factors, including the current use of the property, the history of the acquisition and use of the property, the market value of the property, the extent of direct state investments and subsidy in the acquisition and beneficial capital improvement of the property and the purpose of the expropriation.

The land is registered in the name of Johan du Preez and used to be an active farm before the 1988 drought. It was bought in 1975 with a loan of R100 000 from the Land Bank. The loan is fully paid up.[396] After the drought Mr du Preez started an illfated transportation business which hauled produce to all parts of the country. He mortgaged the farm to the Towncorp Bank, a commercial bank, in a desperate attempt to rescue his business.

Mr du Preez is in debt to the tune of R330 000. He has had the farm up for sale for R400 000 for the last seven years but there have been no offers. In these circumstances, and keeping in mind the requirements of section 25(3) of the Final Constitution of 1996, the Minister makes an offer of

393 S 15(4), while subsection (5) permits all interested parties to make submissions to the Minister on the question of feasibility.

394 If there had been no feasible land for acquisition might the Laphas not have accepted money or shares in the Beybank Airport as compensation or part compensation? See note 381 *supra* for the Makuleke tribe application to the Land Court.

395 S 15(7)(a).

396 If the loan was not fully paid up, the land would qualify as state land. No expropriation would therefore be necessary.

R50 000 nett to Johan du Preez with the loan owed to the Towncorp Bank fully settled. He accepts the offer.

The Court therefore orders the consolidated land to the Lapha tribe with the section 35(3) conditions that it considers necessary in this case. It also directs that the Laphas have access to the sacred burial grounds of their ancestors three times a year under the supervision and control of the National Parks Board rangers. It further directs that the State provide transportation for the displaced persons after their houses are erected under priority access to the State housing plan.[397] In addition, in view of the money the Beybanks tourist business and the Greenfields Company will make out of the land not restored, should the Court not order both to put up the price of the substitute land?[398] Alternatively, should the Court not entertain the argument for the Laphas that they receive a percentage of the ecotourism revenue from the Burger National Park or from the Beybanks Airport?

What is likely to occur if another community lodges a claim, based on having been removed from Mr du Preez's farm in 1919 under a racially discriminatory law? Section 11(5) empowers the person or persons to apply to the Court for permission to lodge a claim in respect of that land.[399] Presumably, the Court can entertain such an application on the proviso that the claimants understand that the Court may grant a successful claimant the restitution of a *right in land* and not the right to have the claimed land restored to them. In this instance, the latter is no longer possible. However, alternative state land, not necessarily in the same vicinity or of the same quality, may be available as a substitute, as is monetary compensation.

---

397 S 35(2)(d) reads:

> . . . recommend to the Minister that a claimant be given priority access to State resources in the allocation and development of housing and land in the appropriate development programme.

398 It might be in the public interest to ensure that the Burger National Park and the Beybanks Airport not be expropriated. However, the respective organisations will profit from the decision and the principle of unjust enrichment requires that they make good the losses incurred as a result of their award.
See footnote 242 also.

399 See also, section 11(1)(d) which functions as a safety-net for cases of this type.

And now for some other shorter hypotheticals:

Seven.
A glib and disreputable fellow sets up his operation in a township and

(a) buys a restitution of rights in land for ready cash, and/or
(b) accepts assignments to look up, pursue and settle restitution claims for half the proceeds awarded by the Court.

With regard to both parts of this hypothetical, it is possible for an individual to act on behalf of a group or part of a group,[400] but only in a representative capacity. The representative must be in possession of a resolution or document that signifies consent on the part of individuals the person claims to represent. No mention is made of assigning a claim over to an individual for a money value. Therefore I assume that that is impermissible.

Further, assuming that the individual passes the threshold of representativity, the Commission has the power to investigate the validity of each claim.[401] Let us assume the Commission overlooks the salient details in the investigation. Then whatever decision is reached, either at the mediation stage, or as finally determined by the Court, the Court is empowered to "determine the manner in which the rights are to be held or the compensation is to be paid or held".[402]

Most importantly, these decisions are subject to such conditions as the Court considers necessary to ensure, *inter alia,* "the accountability of the person who holds the land or compensation on behalf of the community to the members of such community".[403]

Therefore, since restitution rights are not assignable, I do not believe that he will be successful.

There are some loopholes in the second instance.[404] He may be able to persuade the claimants to nominate him as their representative in writing.

400 S 1(1)(iv).
401 S 14(3).
402 S 35(2)(c).
403 S 35(3).
404 Since there is no requirement for legal representation, has the legislature not erred in allowing unregulated non-professionals to attend to claims? See Vinodh Jaichand, *supra,* note 336.

If he has each claimant sign a bogus acknowledgement of debt, at the same time, for an estimated half of the value of the properties, he will be able to collect on his "debt" immediately after the successful award. A member of the unsuspecting public may be gullible enough to believe this ploy. In addition, if he settles for alternative relief in the form of monetary compensation rather than restitution of the rights in state-owned or privately-owned land, it will benefit him. Since only an attorney or advocate can appear before the Court, his assistance thereafter will place him at risk. He would be well-advised to limit his ambition.

To prevent likely abuses of this sort, all awards for the restitution of such property may be accompanied by a no-sale-within-five years clause which is not an uncommon provision in the sale of property. Or it may include a development clause with a certain period of time to dissuade other speculators. In cases of monetary award, the Court will have greater difficulty in setting conditions.

The legislature appears to have been perturbed by such possibilities also. Section 35(11) and (12) provide that the Court may rescind or vary any order or judgment granted by it. It may also correct any patent errors in any order or judgment. These provisions may act as deterrants to get-rich-quick schemes. But those who succeed may do so at the expense of the persons whose position the Act seeks to ameliorate.

Eight.

A Black tribe was displaced in 1916. Coloured people's housing was built on the land in the 1920s. In 1968 the Coloured people were displaced under the Group Areas Act. Now the homes of rich whites stand on the same ground.

The first question is whether the displacement of the Black tribe was effected under a racially discriminatory law or not. If, for example, the tribe moved because a drought struck the area, the Restitution of Land Rights Act of 1994 would not apply. Then the main claimants are the displaced Coloureds and the rich whites.

If the claimants are revealed to include the displaced Black tribe, then the negotiation process in the Commission stage gets complicated. To expect the whites to compensate both displaced groups will place a disproportional burden on them. In this negotiation, the State must be a party[405] who is willing to at least offer alternative sites for the Blacks and Coloureds. The State may also provide for any special loan scheme for the building of the houses.[406]

Nine.

A well-to-do Black professional couple are expecting their first child and need a bigger house. They find a suitable one for sale at a price that suits them. How can they secure good title?

The threat to any land title is not unlimited in terms of time. The Act provides that the claim must be lodged within three years.[407] It is envisaged that the system set up for such restitution will take another three years. Therefore for a total period of six years there is likely to be anxiety and concern over good title.

Section 11(7)(aA) prohibits, *inter alia,* such a sale unless the regional lands claim commissioner has been given one month's notice of such a sale. Where such notice was not given the Court may set aside such a sale if it is of the opinion that it was not done in good faith. In addition section 6(3) of the Act grants the regional claims commissioner the power to apply to Court for an interdict prohibiting such a sale where the sale will defeat the achievement of the objects of the Act.

405 It is not clear whether the State is a party in the mediation stage, or who represents the State in such a mediation. Section 29(1) does provide that the State has a right to be heard in all cases before the Land Claims Court.

406 Should the Court order the following:
In exchange for their continued undisturbed use of their residential sites, the whites agree to a mortgage being passed over their property, the total sum of which is used to finance a part of the housing projects?

407 S 2(1)(a) and (b). The date has been fixed as 2 December 1994. Section 2(2) provides that this date will be a date not earlier than the earliest date as set out in s 43. The latter section states that the Act will come into operation on a date fixed by the President by proclamation in the *Gazette*. It also provides that different dates may be fixed in respect of different Chapters of the Act.

Would another way out be to find the claimant and get that individual to lodge a claim with the Commission? At the mediation stage could the couple make an offer to settle the claim and hope that the Court would approve of their deed of settlement? It is not clear from the statute whether a private individual can intervene in the land restitution procedure in this way. If this is possible, what prevents property speculators from entering the market in the same way?

However, this route has its risks with regard to further delays that might ensue once the Commission investigates a claim. It may decide that there are likely to be other claimants around and may stay the proceedings in order to give notice to other affected parties in terms of section 12(4). Because of the uncertain title, the couple should be advised not to enter into such a sale agreement.

In terms of section 11(7)(aA) the Court may grant any other order it deems fit.[408] Presumably, if the couple do give the necessary notice to the regional land claims commissioner who is of the opinion that an order for the sale ought to be granted, the Court will oblige.

Ten.

(a) A Japanese company wishes to build a factory on a suitable site. How can they secure good title?
(b) A farmer wants to invest a large sum of money in a new irrigation system. How can he be sure he will be safe in doing so?

The effect that the Act may have on the presently cool South African property market will be to chill any further investment and development to the point of making them moribund, if good title is continually threatened or insecure.

408 Could the couple also consider setting aside a sum of money, a percentage of the purchase price, in an escrow account for any later claims as a condition attached to that sale?

The Commission is empowered, in terms of section 6 (2)(c), on notice to interested parties, to apply to the Court for a declaratory order on a question of law relating to the Constitution and the Act. I suppose the interested parties can approach the Commission in this regard. What other provision, if any, is likely to assist the Japanese company or the farmer?

The current section 34 provisions, where the Court can be asked, in the public interest, not to restore the right in property to any claimant, apply to "any national, provincial or local authority" and not private individuals, such as our farmer above, or private companies, such as the Japanese company above. If this section can be amended to include such cases, it will assist in eradicating some of the threats and insecurity surrounding good title. In some instances the Court's power in terms of section 22(1)(cA) is likely to be of assistance.

I suppose that in the case of the Japanese company, the local government body must be aware of the impending investment potential and may, therefore, apply on behalf of it. How will any body know of the farmer's intention and, if it did, will it find it necessary to apply on his behalf, especially if it has to spend moneys from its budget to bring the application to the attention of other persons who may have an interest in that property? Perhaps they can make the farmer pay for the application. Or maybe an amendment is necessary.

CHAPTER VII

Conclusion

One way to evaluate the established legal system with regard to restitution of rights in land is to look at the impact of the initial research, at the Centre for Applied Legal Studies at the University of Witwatersrand in 1992,[409] on the final Restitution of Land Rights Act in order to determine the legislative intent. In doing so, it is important to keep in mind that the Property Clause was negotiated in the last stages of the political settlement.

The National Party became overly concerned about the rights of white farmers and mistakenly believed that the best method to protect these farmers was to insist that the restoration of land rights clause be excised from the property clause, where it was originally located, and attached to the equality clause.[410]

The models, as proposed by the University of Witwatersrand research, for the Land Commission and the Land Court were adopted without much change. But the five broad criteria for the Court to utilise in decision-making, namely:

1. birthright,
2. loss,
3. social benefit,
4. time and
5. investment[411]

were altered somewhat. Only the value of the investments has been retained. Under the Property Clause, section 25(3) of the Final Constitution of 1996 "the extent of direct state investments" (the analogue to "investment" above) is only one of five factors, some of which could be brought under the language listed above.

The reason for this can also be found in the negotiation process where the National Party conceded to the "market value" being listed as one of the many factors in the calculation of just compensation.[412] The

---

409 Swanson, *supra* note 103, at 332.

410 Chaskalson, *supra* note 99, at 231–232.

411 Swanson, *supra* note 103, at 335.

412 Chaskalson, *supra* note 99, at 231–232.
For the interpretation of compensation clauses in other jurisdictions see Eisenberg, *supra* note 159 and Murphy, *supra* note 160.

ANC were aware that if it was the sole determinant, it would hamper their planned land reform programme with high compensation values. The clause underwent some change from the Interim to the Final Constitution and now contains the following factors:

1. the current use of the property,
2. the history of its acquisition and the use of the property,
3. the market value of the property,
4. the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property, and
5. the purpose of the expropriation.

Before great significance is attached to the legislative intent, one needs to recall the way it was arrived at.

The ANC were concerned about the plight of persons affected by forced removals and its legislative land redistribution policy while the National Party concentrated on the rights of white farmers. The original protagonists protected respective constituencies as well as they were able.[413] Clearly the legislative intent, if it can be called that, was a product of negotiation. If gains and losses in the negotiation strategy mean anything, then more of the principles enunciated in the ANC 1993 Draft Bill of Rights find themselves as part of the current legislation to ameliorate the plight of the disadvantaged.[414]

Nevertheless, we are left with a restitution of land rights protection and procedure which may yet prove to be useful if attention is paid to some areas of difficulty. The first of these concerns has already been voiced by the former Chief Justice when he warned that the factors listed in Section 28(3) of the Interim Constitution, and now section 25(3) of the Final Constitution of 1996, will cause serious problems of interpretation and application.[415]

413 The ANC was caught off guard in the Technical Committee on Fundamental Rights because it believed the function of that committee to be the drafting of a temporary Bill of Rights for the transition to democracy and that the final Bill of Rights was to be drafted by Parliament later. See Chaskalson, *supra* note 99, at 226–229.

414 Section 25(5) of the Final Constitution of 1996 addresses access to land issues while section 25(6) is concerned with the security of land tenure of disadvantaged communities. Section 25(8) reiterates the State's commitment to the Reconstruction and Development Programme with accelerated action for the disadvantaged.

415 Chaskalson, *supra* note 99, at 233.

As stated previously, the decisions of the Court have to be aided by efficient and thorough Commission's reports. The Court, when necessary, should not hesitate to refer matters back to the Commission for further clarification or resolution. I therefore predict that the whole restitution of land rights procedure will take longer than the intended five years to complete.

This raises the next issue in this regard, which is the securing of good title for the uncertain period, as illustrated in hypothetical Ten. I would propose an amendment to the existing section 34(1) of the Act with the current section 34(1) now becoming subsection 34(1)(a). The proposed subsection 34(10(b) may read as follows:

> Any person may, in respect of land which is owned by him or her, make an application to the Court for an order that the land in question or any right in it shall not be restored to any claimant or prospective claimant.

The relevant government agency would be able to ascertain the potential "public interest" or "public prejudice" likely to be suffered if the applicant making the approach should be unsuccessful in obtaining good title. This could be verified by the Commission once it is investigated and reported to the Court. The final determination is in the hands of the Court. The Act does not in other circumstances permit holders of land to petition the Court directly. Therefore there is little likelihood of this proposed amendment leading to a clogging of the Court system by wealthy land holders. To what extent does the amended section 29 address these concerns?

Hypotheticals Six and Nine also raise the threats of insecure title. One solution offered in these cases is the creation of escrow accounts where the insecure title holder deposits a sum of money for a fixed period, say five years. If later claims arise and threaten the title holder, such claims are compensated out of the amount in the escrow account until there are no further claims or the five year period has run its course. Should the amount in the escrow account be totally exhausted within the designated period, the title holder is assured good title nevertheless. The other solution is found in section 11(7)(aA) of the Act.

Another area of concern is the possibility of windfalls, now, for the claimant for property expropriated under a racially discriminatory act then and for which compensation, inadequate though it might have been, was paid at the time of dispossession, for example in terms of the Group Areas

Act. Hypothetical Four illustrates this well. Should the issue today be addressed only in terms of the adequacy or inadequacy of the original amount of compensation? Or should it be accepted that an unjust law could never yield a just result and therefore, to let the benefit fall where it may?

The primary aim of the Commission should be to settle as many matters as possible, including section 34 applications, through negotiation or mediation. This can best be undertaken once the policy is established that all claimants under the Group Areas Act would receive an adjustment in compensation. How will this policy impact on the negotiation strategies of the current recalcitrant owner and the claimant? If the current owner is insulated from loss of the property under a stated policy, such an owner may refuse to mediate and look to the state for just and equitable compensation. If the matter is heard by the Court, after no settlement has been reached at the Commission stage, the threat of loss of the property through expropriation may become a real possibility. But compensation can always be anticipated.

Where claims under the Group Areas Act are in respect of unused or undeveloped state-owned land, the policy of an adjustment in compensation would also work well. The adjustment in compensation may be negotiated between the State and the claimant through the Commission. That would amount to "equitable redress" in terms of section 25(7) of the Final Constitution of 1996. Upon settlement, title would vest in a state agency such as the Land Bank.

Another suggestion is that the difference between just compensation to the current owner and just compensation to the former holder be appropriated to the State. The land restitution budget will not be limitless, given the other competing programmes of the State. Before this programme is reduced to another politically symbolic act,[416] it would not be out of place to speculate on other ways and means of making it financially more self-sufficient. For example, the Restitution of Land Rights Act may have to be amended to expressly provide for the skimming of excess value in such instances.[417]

416 Visser & Roux, *supra* note 7 at 96 summarise the position as follows:

> Because of such constraints, the gesture is almost inevitably bound to be more politically symbolic than developmentally efficient (although the resolution of political demands may well have indirect developmental benefits). The key policy challenge is nevertheless to design a restitution framework which will adequately satisfy the demand for social justice whilst minimising new grievances.

417 See Appendix III for the suggested amendment and Vinodh Jaichand, supra, note 336 at 7.

In dealing with the administrative functions of the Commission, it may be necessary to enact an amendment as a new section between sections 16 and 17 to deal with the problem of coping with the volume of business before the Commission. It would provide for broader powers to deal with classes of cases by regulation:

Substantive Rules

The Commission, on application of the Minister, and with the approval of the Court, may make regulations applicable to classes of cases regarding:

(1) The circumstances under which certificates of feasibility will or will not be issued in terms of Section 15;
(2) The circumstances under which orders of non-restitution will or will not be issued in terms of Section 34;
(3) The manner of determining the compensation payable under Section 123(4) of the Interim Constitution to a claimant to whom land or a right in land cannot be restored; and
(4) The manner of determining the compensation payable under Section 123(2) of the Interim Constitution to a person whose land or right in land is expropriated for purposes of restitution.

Such regulations shall be published in the *Gazette,* and the Minister, the Commission, and the Court shall exercise their respective powers in accordance therewith except when it is made to appear in a particular case that doing so would be inconsistent with the Constitution or with the Act.

This brings me to my final point: If the law has been given an opportunity to redeem itself through the provisions of the restitution of land rights procedure, then it is imperative that it succeed. The largest threat to that not occurring, apart from quick and just delivery, is a lack of finance. Admittedly, compensation for expropriated land has been established to cost less than the anticipated market value. But the number of claimants is going to be large, estimated in excess of three million people.[418]

418 According to the First Annual Report 1996 of the Commission on Restitution of Land Rights (p. 14) 7 095 claims have been received as at 31 March 1996 with the urban claims numbering more than twice the number of claims from the rural areas. As of January 1997, 13 171 claims for land restitution were registered with the Land Commission, made up of 10 511 urban and 2 660 rural claims, according to *Land Info,* Volume 4, No. 1, p.6

Clearly, state-owned land from the former homelands will not suffice to meet the claims. The Land Bank may be compelled to call in all the loans in order to add to state holdings. There is no doubt that the State is going to have to expropriate more land in order to meet the claims.

It is for these reasons that I have suggested that in cases of Group Areas dispossession, as a result of which the State now holds valuable urban land, the State engage in the selling of the property to the highest available offer subject to the approval of the relevant civic associations. The moneys accumulated from these sales will, firstly, finance the expropriation for restitution of rights in land and any balance, after the projected five-year period, could, secondly, be added to the budget of the Reconstruction and Development Programme.

Other means of financing this project may include that corporate property be taxed with the corporation issuing additional stock to finance a once-off payment. The rateable value of all other property may be reassessed and the additional rates go into the State coffers for use by the Reconstruction and Development Programme. The taxes on inherited or donated property may also be raised. These are all additional means of financing the project, and although not a part of the current restitution of rights in land process, may be considered at a political level rather than the legal.

While the suggestions I have made, admittedly, smack of utilitarianism, my motive is the common good. A lack of finance may lead not only to the frustration of the common good, but to an erosion of any confidence in the legal system of the new State.

BIBLIOGRAPHY

BOOKS

LAWRENCE C BECKER, *The Moral Basis of Property,* in NOMOS XXII PROPERTY 187 (J Roland Pennock & John W Chapman eds., New York, New York University Press, 1980)

CHRISTOPHER J BERRY, *Property and Possession: Two Replies to Locke – Hume and Hegel,* in NOMOS XXII PROPERTY 89 (J Roland Pennock & John W Chapman eds., New York, New York University Press, 1980)

GEOFFREY BINDMAN ed., SOUTH AFRICA: HUMAN RIGHTS AND THE RULE OF LAW (Commission of Jurists, London, Pinter Publishers, 1988)

COLIN BUNDY, *Land and Liberation: Popular Rural Protest and the National Liberation Movements in South Africa,* in THE POLITICS OF RACE, CLASS AND NATIONALISM IN TWENTIETH-CENTURY SOUTH AFRICA (Shula Marks & Stanley Trapido eds., London, Longman Group, 1987)

AZHAR CACHALIA, HALTON CHEADLE, PENUELL MADUNA & GILBERT MARCUS, FUNDAMENTAL RIGHTS IN THE NEW CONSTITUTION (Kenwyn, Juta and Company, 1994)

GILBERT W DOLD & C P JOUBERT, THE UNION OF SOUTH AFRICA (London, Stevens & Sons, 1955)

JOHN DUGARD, HUMAN RIGHTS AND THE SOUTH AFRICAN LEGAL ORDER (Princeton, Princeton University Press, 1978)

H J ERASMUS & A M BREITENBACH, SUPERIOR COURT PRACTICE (Kenwyn, Juta & Co 1996)

EDWARD J ERLER, *The Great Fence to Liberty: The Right to Property in the American Founding,* in LIBERTY, PROPERTY & THE FOUNDATIONS OF THE AMERICAN CONSTITUTION (Ellen Frankel Paul & Howard Dickman eds., Albany, State University of New York Press, 1989)

H GILIOMEE & L SCHLEMMER, FROM APARTHEID TO NATION BUILDING (Cape Town, Oxford University Press, 1989)

S B O GUTTO, PROPERTY AND LAND REFORM. CONSTITUTIONAL AND JURISPRUDENTIAL PERSPECTIVES (Durban, Butterworths Publishers Limited, 1995)

INTERNATIONAL COMMISSION OF JURISTS, SOUTH AFRICA AND THE RULE OF LAW (1960)

MARCUS JACOBS & ANTONIE GILDENHUYS, *Expropriation in South Africa,* in 1 COMPENSATION FOR EXPROPRIATION: A COMPARATIVE SURVEY 373 (Gavin M Erasmus ed., Oxford, Jason Reese Publishers, 1990)

VINODH JAICHAND, *The Right to Restitution of Land,* in BILL OF RIGHTS COMPENDIUM (Durban, Butterworths, 1996)

ANTHONY LEMON, APARTHEID IN TRANSITION (Boulder, Westview Press, 1987)

SHULA MARKS & STANLEY TRAPIDO, *The Politics of Race, Class and Nationalism in Twentieth Century South Africa,* in THE POLITICS OF RACE, CLASS AND NATIONALISM IN TWENTIETH-CENTURY SOUTH AFRICA (Shula Marks & Stanley Trapido eds., London, Longman Group, 1987)

KEITH R MCCALL, *The Use of Expropriation to Bring About a Redistribution of Land in South Africa,* in 2 COMPENSATION FOR EXPROPRIATION: A COMPARATIVE STUDY 245 (Gavin M Erasmus ed. Oxford, John Reese Publishers, 1990)

JOHN MURPHY, *The Restitution of Land After Apartheid: The Constitutional and Legislative Framework,* in CONFRONTING PAST INJUSTICES. APPROACHES TO AMNESTY, REPARATION, AND RESTITUTION IN SOUTH AFRICA AND GERMANY (M R Rwelmira and G Werle eds.) Durban, Butterworths Publishers, 1996)

N J J OLIVIER, *Indigenous Land Law in South Africa,* in SOUTHERN AFRICA IN NEED OF LAND REFORM (Sanders AJGM ed. Durban, Butterworths, 1981)

LAURINE PLATZKY & CHERRYL WALKER (eds), THE SURPLUS PEOPLE: FORCED REMOVAL IN SOUTH AFRICA (Johannesburg, Raven, 1985)

MICHAEL H ROBERTSON, *Segregation Land Law: A Socio-Legal Analysis,* in ESSAYS ON LAW AND SOCIAL PRACTICE IN SOUTH AFRICA 285 (Hugh Corder ed., Kenwyn, Juta and Company, 1988)

ALBIE SACHS, JUSTICE IN SOUTH AFRICA (Berkeley, University of California Press, 1973)

TIMOTHY D SISK, DEMOCRATIZATION IN SOUTH AFRICA, (Princeton, Princeton University Press, 1995)

A J VAN DER WALT, *The Future of Common Law Landowership,* in LAND REFORM AND THE FUTURE OF LANDOWNERSHIP IN SOUTH AFRICA (A J v an der Walt (ed.), Kenwyn, Juta & Company, 1991)

A J VAN DER WALT, *Property Rights, Land Rights and Environmental Rights,* in RIGHTS AND CONSTITUTIONALISM: THE NEW SOUTH AFRICAN LEGAL ORDER (Dawid van Wyk, John Dugard, Bertus de Villiers and Dennis Davis, Kenwyn, Juta and Company, 1994)

DAWID VAN WYK, *Introduction to the South African Constitution,* in RIGHTS AND CONSTITUTIONALISM: THE NEW SOUTH AFRICAN LEGAL ORDER (Dawid van Wyk, John Dugard, Bertus de Villiers and Dennis Davis, Kenwyn, Juta and Company, 1994)

E W VIERDAG, THE CONCEPT OF DISCRIMINATION IN INTERNATIONAL LAW (The Hague, Martinus Nijhoff, 1973)

DANIEL VISSER & THEUNIS ROUX, *Giving Back the Country: South Africa's Restitution of Land Rights Act, 1994 in context,* in CONFRONTING PAST INJUSTICES. APPROACHES TO AMNESTY, PUNISHMENT, REPARATION, AND RESTITUTION IN SOUTH AFRICA AND GERMANY (M R Rwelamira & G Werle eds.), Durban, Butterworths Publishers, 1996)

PETER WALSHE, THE RISE OF AFRICAN NATIONALISM IN SOUTH AFRICA (Berkeley, University of California Press, 1971)

JOURNAL ARTICLES

Catherine Albertyn & Janet Kenridge, *Introducing the Right to Equality in the Interim Constitution,* 10 SOUTH AFRICAN JOURNAL OF HUMAN RIGHTS, 149 (1994)

T W Bennett, *Redistribution of Land and the Doctrine of Aboriginal Title in South Africa,* 9 SOUTH AFRICAN JOURNAL OF HUMAN RIGHTS, 443 (1993)

Thomas Bennett, *Constitutional Protections of Customary-Law Interests in Land,* 1 THE HUMAN RIGHTS AND CONSTITUTIONAL LAW JOURNAL OF SOUTHERN AFRICA 8, (1996).

Geoffrey Budlender, *The Right to Equitable Access to Land,* 8 SOUTH AFRICAN JOURNAL OF HUMAN RIGHTS, 295 (1992)

Geoffrey Budlender & Johan Latsky, *Unravelling Rights to Land and to Agricultural Activity in Rural Zones,* 6 SOUTH AFRICAN JOURNAL OF HUMAN RIGHTS, 155 (1990)

Guido Calibresi & A Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral,* 85 HARVARD LAW REVIEW 1089 (1972)

Matthew Chaskalson, *The Problem with Property: Protection of Property in The United States and the Commonwealth,* 9 SOUTH AFRICAN JOURNAL OF HUMAN RIGHTS, 338 (1993)

Matthew Chaskalson, *The Property Clause: Section 28 of the Constitution,* 10 SOUTH AFRICAN JOURNAL OF HUMAN RIGHTS, 131 (1994)

Matthew Chaskalson, *Stumbling Towards Section 28: Negotiations over the Protection of Property Rights in the Interim Constitution,* 11 SOUTH AFRICAN JOURNAL OF HUMAN RIGHTS, 222 (1995)

Aninka Claassens, *Compensation for Expropriation: The Political and Economic Parameters of Market Value Compensation,* 9 SOUTH AFRICAN JOURNAL OF HUMAN RIGHTS, 442 (1993)

Hugh Corder, *Towards a South African Constitution,* 57 MODERN LAW REVIEW 491 (1994)

Andra Eisenberg, *Different Constitutional Formulations of Compensation Clauses,* 9 SOUTH AFRICAN JOURNAL OF HUMAN RIGHTS, 412 (1993)

Andra Eisenberg, *'Public Purpose' and Expropriation: Some Comparative Insights and the South African Bill of Rights,* 11 SOUTH AFRICAN JOURNAL OF HUMAN RIGHTS, 207 (1995)

Antonie Gildenhuys, *Editorial,* 1 THE HUMAN RIGHTS AND CONSTITUTIONAL LAW JOURNAL OF SOUTHERN AFRICA 2 (1996)

Erwin N Griswold, *The 'Coloured Vote Case' in South Africa,* 65 HARVARD LAW REVIEW, 136 (1952)

Vinodh Jaichand, *Random Thoughts on the Restitution of Land Rights Act of 1994,* 1 THE HUMAN RIGHTS AND CONSTITUTIONAL LAW JOURNAL OF SOUTHERN AFRICA 7 (1996)

Vinodh Jaichand, *The Promise in the Right to Vote*, 26 THE COMPARATIVE AND INTERNATIONAL LAW JOURNAL OF SOUTHERN AFRICA 1 (1993).

Leonard W Levy, *Property as a Human Right,* 5 CONSTITUTIONAL COMMENTARY, 169 (1988)

John Murphy, *Insulating Land Reform from Constitutional Impugnment: an Indian Case Study,* 8 SOUTH AFRICAN JOURNAL OF HUMAN RIGHTS, 362 (1992)

Clement Ng'ong'ola, *The Post-Colonial Era in Relation to Land Expropriation Laws in Botswana, Malawi, Zambia and Zimbabwe,* 41 INTERNATIONAL & COMPARATIVE LAW QUARTERLY, 117 (1992)

Roger Plant, *Land Rights in Human Rights and Development,* 51 INTERNATIONAL COMMISSION OF JURISTS, THE REVIEW, 24 (1993)

Margaret Jane Radin, *Property and Personhood,* 34 STANFORD LAW REVIEW, 957 (1982)

Edward Swanson, *A Land Claims Court for South Africa: Report on Work in Progress,* 8 SOUTH AFRICAN JOURNAL OF HUMAN RIGHTS, 332 (1992)

A J van der Walt, *Notes on the Interpretation of the Property Clause in the New Constitution,* 57 THRHR, 181 (1994)

A J van der Walt, *Tradition on Trial: A Critical Analysis of the Civil-Law Tradition in South African Property Law*, 11 SOUTH AFRICAN JOURNAL OF HUMAN RIGHTS, 169 (1995)

APPENDIX I

Restitution of Land Rights Act, 1994 – Act No. 22, 1994

[As amended by Act No. 84, 1995]
[As further amended by Act No. 78, 1996]

ACT

To provide for the restitution of rights in land in respect of which persons or communities were dispossessed under or for the purpose of furthering the objects of any racially based discriminatory law; to establish a Commission on Restitution of Land Rights and a Land Claims Court; and to provide for matters connected therewith.

Land Restitution and Reform Laws Amendment Act, 1966 – Act No. 78, 1966

ACT

To amend the Restitution of Land Rights Act, 1994, so as to insert certain definitions: to effect certain textual improvements: to provide that no person shall be entitled to enforce restitution of a right in land dispossessed if just and equitable compensation was paid: to provide for the appointment of certain organisations to advise the Commission on Restitution of Land Rights, to facilitate meetings of interested parties and to mediate and settle disputes: to require the leave of the Land Claims Court for the lodging of a claim in respect of land in certain circumstances: to alter the powers and duties of a regional land claims commissioner: to prohibit a person from selling, exchanging, donating, leasing, subdividing or rezoning land in respect of which a notice in terms of section 11(1) has been published without having given the regional land claims commissioner notice of his or her intention to do so; to provide that certain claims

referred to the Court shall be accompanied by a document containing a list of the parties who have an interest in the claim; to prohibit the referral of claims to the Court in terms of section 14 until the Minister has issued certificates in terms of section 15 or has refused to do so; to extend the powers of the Court; to amend the provisions relating to assessors; to provide that gratuities and certain allowances of the President and judges of the Court shall not be taxable; to empower the Minister of Justice with the concurrence of the Minister of Finance to determine allowances for travelling and subsistence expenses incurred by the President and judges of the Court; to clarify the provisions relating to the manner of arriving at decisions of the Court; to provide for the seals of the Court; to provide that the proceedings of the Court shall be conducted in open court; to empower the Court to refer particular matters for investigation by a referee; to prohibit the issue of process against a judge of the Court without the consent of the Court; to provide for judgment by default; to provide for the manner of securing attendance of witnesses or the production of any document or thing in proceedings before the Court; to make special provision for the manner in which witnesses may be dealt with on refusal to give evidence or produce any document or thing; to provide for the examination by interrogatories of persons whose evidence is required in proceedings before the Court; to empower the Minister of Justice to appoint officers of the Court; to make special provision for finances and accountability in respect of the administration and functioning of the Court; to provide for the scope and execution of process of the Court; to provide for offences relating to execution; to provide for witness fees; to provide for the powers of the Court on the hearing of appeals; to provide for the application of Chapter III in respect of the performance by the Court of its functions in terms of other legislation; to express more clearly the provisions relating to the intervention of parties and legal representation; to pro-

vide that certified copies of records of the Court shall be admissible as evidence; to express more clearly the provisions relating to the power of the President of the Court to make rules in respect of the procedure of the Court; to empower the Court to make an order for costs against the State or the Commission; to empower the Court to rescind, vary or correct orders and judgments granted by the Court; to clarify the Court's power to review any act or decision of the Minister; to provide for the procedure pertaining to appeals from the Court; to require registrars of deeds to remove certain notes from their records; and to provide that references to judges of the Supreme Court in laws shall be construed so as to include judges of the Court; to amend the Land Reform (Labour Tenants) Act, 1966, so as to include references to inserted sections and to effect certain textual improvements; and to provide for matters connected therewith.

WHEREAS the Constitution of the Republic of South Africa, 1993 (Act No. 200 of 1993), provides for the restitution of a right in land to a person or community under or for the purpose of furthering the objects of any racially based discriminatory law;

AND WHEREAS legislation for this purpose is to be designed to promote the protection and advancement of persons, groups or categories of persons disadvantaged by unfair discrimination, in order to promote their full and equal enjoyment of rights in land:

NOW THEREFORE BE ENACTED by the Parliament of the Republic of South Africa, as follows –

CHAPTER I

Definitions

1 In this Act, unless the context indicates otherwise –

(i) **"claim"** means any application lodged with the Commission in terms of this Act; (iii)

(ii) **"claimant"** includes a community; (iv)

(iii) **"Commission"** means the Commission on Restitution of Land Rights established by section 4; (ix)

(iv) **"community"** means any group of persons whose rights in land are derived from shared rules determining access to land held in common by such group, and includes part of any such group;

(v) **"Court"** means the Land Claims Court established by section 22;

(vi) **"day"** in the computation of any period of time expressed in days, means any day which is not a Saturday, Sunday or public holiday and which does not fall within the period 24 December to 2 January;

[Inserted by s. 1(*a*) of Act 78, 1996]

(vii) **"direct descendant"** of a person includes the spouse or partner in a customary union of such person whether or not such customary union has been registered; (ii)

(viii) **"Minister"** means the Minister of Land Affairs or an officer in his or her department designated by him or her; (x)

(ix) **"organisation"** means any association of persons, incorporated or unincorporated, registered in terms of a law or unregistered and also any branch, section or committee of such association or any local, regional or subsidiary body which forms part of such association;

[Inserted by s. 1(*b*) of Act 78, 1996]

(x) **"person"** includes a community or part thereof; (xii)

(xi) **"prescribed"** means prescribed by or under this Act; (xiv)

(xii) **"presiding judge"** in relation to a hearing before more than one judge, means the judge designated as such by the President of the Court.

[Inserted by s. 1(*c*) of Act 78, 1996]

(xiii) **"public land"** means all land owned by any organ of state as defined in section 233 of the Constitution, and includes land owned by a local authority, the Land Bank and any institution in which the State is the majority or controlling shareholder; (xi)

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

(xv) **"Supreme Court"** means the Supreme Court of South Africa referred to in section 101 of the Constitution; (viii)

(xvi) **"the rules"** means the rules made under sections 16 and 32; (i)

(xvii) **"this Act"** includes the rules and the regulations made under section 40. (vi)

Enforcement of claim for restitution

2 (1) A person shall be entitled to enforce restitution of a right in land if –

(*a*) he or she is a person or community contemplated in section 121(2) of the Constitution or a direct descendant of such a person;

(*b*) the claim is not precluded by section 121(4) of the Constitution; and

(*c*) the claim for such restitution is lodged within three years after a date fixed by the Minister by notice in the *Gazette*.

[Subs. (1) substituted by s. 2(1)(*a*) of Act 78, 1996]

(Subsection (1) shall be deemed to have come into operation on 2 December 1994.)

(1A) No person shall be entitled to enforce restitution of a right in land if just and equitable compensation as contemplated in section 123(4) of the Constitution, calculated at the time of any dispossession of such right, was paid in respect of such dispossession.

[Subs. (1A) added by s. 2(1)(*b*) of Act 78, 1996]

(2) The date contemplated in subsection (1), shall be a date not earlier than the earliest of the dates contemplated in section 43.

(3) The date contemplated in section 121(2)(*a*) of the Constitution is 19 June 1913.

Claims against nominees

3 Subject to the provisions of this Act a person shall be entitled to claim title in land if such claimant or his, her or its antecedant –

(*a*) was prevented from obtaining or retaining title to the claimed land because of a law which would have been inconsistent with the prohibition of racial discrimination contained in section 8(2) of the Constitution had that subsection been in operation at the relevant time; and

(*b*) proves that the registered owner of the land holds title as a result of a transaction between such registered owner or his, her or its antecedents and the claimant or his, her or its antecedents, in terms of which such registered owner or his, her or its antecedents held the land on behalf of the claimant or his, her or its antecedents.

CHAPTER II

Commission on Restitution of Land Rights

Establishment of Commission on Restitution of Land Rights

4 (1) There is hereby established a commission to be known as the Commission on Restitution of Land Rights.

(2) The Commission shall have a head office and such other office with such areas of jurisdiction, as the Minister may determine.

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

(4) The Chief Land Claims Commissioner, the Deputy Land Claims Commissioner and a regional land claims commissioner, shall –

(*a*) be fit and proper persons to hold such offices;

(*b*) be South African citizens; and

(*c*) have skills and knowledge relevant to the work of the Commission or legal knowledge or qualifications as the Minister may deem necessary.

(5) The Minister may terminate any appointment made under subsection (3) –

(*a*) if he or she is satisfied that such appointed person no longer complies with the requirement of subsection (4); or

(*b*) if the appointed person requests the Minister in writing to terminate the appointment.

Meetings of Commission

5 (1) The Commission shall meet at least three times each year.

(2) Meetings of the Commission shall be held at the time and place determined by the Chief Land Claims Commissioner.

(3) The majority of the members of the Commission form a quorum for a meeting of the Commission.

(4) The decision of the majority of the members of the Commission present at any meeting thereof shall be a decision of the Commission: Provided that, in the event of an equality of votes, the Chief Land Claims Commissioner shall have a casting vote in addition to his or her deliberative vote.

General functions of Commission

6 (1) The Commission shall, at a meeting or through the Chief Land Claims Commissioner, a regional land claims commissioner or a person designated by any such commissioner –

(*a*) subject to the provisions of section 2, receive and acknowledge receipt of all claims for the restitution of rights in land lodged with it in terms of this Act;

(*b*) take reasonable steps to ensure that claimants are assisted in the preparation and submission of claims;

(*c*) advise claimants of the progress of their claims at regular intervals and upon reasonable request;

(*d*) subject to the provisions of section 14, report to the Court on the terms of settlement in respect of successfully mediated claims;

(*e*) define any issues which may still be in dispute between the claimants and other interested parties with a view to expediting the hearing of claims by the Court;

(*f*) at regular intervals, take appropriate steps to make public information regarding the persons entitled to claim restitution of rights in land in terms of section 121 of the constitution, the limitations imposed by section 2, and the manner in which claims may be lodged with the Commission.

(2) The Commission may, at a meeting or through the Chief Land Claims Commissioner, a regional land claims commissioner or a person designated by any such commissioner –

(*a*) monitor and make recommendations concerning the implementation of orders made by the Court under section 35;

(*b*) make recommendations or 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;

(*c*) on notice to interested parties, apply to the Court for a declaratory order on a question of law as contemplated in section 22(1)(cA);

[Substituted by s. 3(*a*) of Act 78, 1996]

(*d*) ensure that priority is given to claims which affect a substantial numbers of persons, or persons who have suffered substantial losses as a result of dispossession or persons with particularly pressing needs;

(*e*) generally, do anything necessarily connected with or reasonably incidental to the expeditious finalisation of claims.

(3) Where the regional land claims commissioner having jurisdiction has reason to believe that the sale, exchange, donation, lease, subdivision or rezoning of land which may be the subject of any order of the Court, or in respect of which a person or community is entitled to claim restitution of a right in land, will defeat the achievement of the objects of this Act, he or she may–

(*a*) after a claim has been lodged in respect of such land;

(*b*) after the owner of the land has been notified of such claim and referred to the provisions of this subsection; and

(*c*) with the approval of the Chief Land Claims Commissioner, which approval may be granted either in general or in particular,

on reasonable notice to interested parties, apply to the Court for an interdict prohibiting the sale, exchange, donation, lease, subdivision or rezoning of the land, and the Court may, subject to such terms and conditions and for such period as it may determine, grant such an interdict or make any other order it deems fit.

[Subs. 3 added by s. 3(*b*) of Act 78, 1996]

Delegation of powers and performance of functions

7 (1) The Commission may delegate any power conferred upon it by or under this Act to a subcommittee of the Commission or to a member of the Commission or to a person contemplated in section 8 or 9 subject to such directions or conditions as the Commission may give or determine from time to time: Provided that the powers referred to in section 6(2)(b), (c) and (d) may not be delegated.

(2) The Chief Land Claims Commissioner may delegate any power conferred upon him or her by or under this Act except the power of delegation to the Deputy Land Claims Commissioner or any regional land claims commissioner, either generally or with regard to a specific claim.

(3) If the Chief Land Claims Commissioner is absent or unable to perform any or all of his or her functions, the Deputy Land Claims Commissioner shall act in his or her stead and whilst the Deputy Land Claims Commissioner so acts, he or she shall perform all the functions of the Chief Land Claims Commissioner.

(4) A regional land claims commissioner may, instead of performing any function in any particular case, refer the matter to the Commission for

the Commission to perform such function at a meeting contemplated in section 5.

Performance of administrative work of Commission

8 (1) The administrative work incidental to the performance of the functions of the Commission shall be performed by officers appointed in terms of the provisions of section 15(3)(a) of the Public Service Act, 1994 (Proclamation No. 103 of 1994), and designated in general or for a specific purpose by the Minister after consultation with the Commission.

(2) In making a designation in terms of subsection (1), the Minister and the Commission shall seek to ensure that the staff of the Commission shall be broadly representative of the South African population.

(3) Designated officers shall perform their functions under the control and supervision of the Chief Land Claims Commissioner or regional land claims commissioner, as the case may be.

Appointment of persons or organisations to assist Commission on *ad hoc* basis

9 (1) The Chief Land Claims Commissioner may from time to time –

(*a*) appoint one or more persons or organisations with particular knowledge or specific expertise relative to the achievement of the Commission's objects to advise the Commission regarding any matter connected with the performance of its functions;

(*b*) appoint one or more persons or organisations with specific expertise in relation to dispute resolution to facilitate meetings of interested parties, mediate and settle disputes, and report to the Commission in writing on the outcome of such negotiations;

(*c*) request any government department, provincial administration, local authority or person in the service of the State, a provincial administration or local authority who has particular knowledge or specific expertise to advise the Commission regarding any matter connected with the performance of its functions.

(2) Payment for the services rendered by a person appointed in terms of subsection (1) who is not in the full-time service of the State or an organisation appointed in terms of subsection (1) in which the State has no mate-

rial financial interest shall be made from moneys appropriated by Parliament for this purpose and shall be determined by the Minister in consultation with the Minister of Finance.

[S 9 substituted by s. 4 of Act 78, 1996]

Lodgement of claims

10 (1) Any person or the representative of any community who is of the opinion that he or she or the community which he or she represents is entitled to claim restitution of a right in land as contemplated in section 121 of the Constitution, may lodge such claim, which shall include a description of the land in question and the nature of the right being claimed, on the form prescribed for this purpose by the Chief Land Claims Commissioner under section 16.

(2) The Commission shall make claim forms available at all its offices.

(3) If a claim is lodged on behalf of a community the basis on which it is contended that the person submitting the form represents such community, shall be declared in full and any appropriate resolution or document supporting such contention shall accompany the form at the time of lodgement: Provided that the regional land claims commissioner having jurisdiction in respect of the land in question may permit such resolution or document to be lodged at a later stage.

Procedure after lodgement of claim

11 (1) 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(1) or (1A);

[Par. (*b*) amended by s. 5(*a*) of Act 78, 1996]

(*c*) the claim is not frivolous or vexatious; and

(*d*) no order has been made by the Court in terms of section 35 in respect of rights relating to that land,

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.

(2) The regional land claims commissioner concerned may, on such conditions as he or she may determine, condone the fact that a claim has not been lodged in the prescribed manner.

(3) A frivolous or vexatious claim may be dismissed by the regional land claims commissioner concerned.

(4) If the regional land claims commissioner decides that the criteria set out in paragraphs (*a*), (*b*), (*c*) and (*d*) of subsection (1) have not been met, he or she shall advise the claimant accordingly, and of the reasons for such decision.

(5) If an order has been made by the Court as contemplated in section 123 of the Constitution in respect of a right or rights in land, no person may lodge a claim in respect of that land without the leave of the Court.

[Subs. (5) substituted by s. 5(*b*) of Act 78, 1996]

(6) Immediately after publishing the notice referred to in subsection (1), the regional land claims commissioner shall by notice in writing–

(*a*) advise the owner of the land in question and any other party which, in his or her opinion, might have an interest in the claim or the publication of the notice; and

(*b*) refer the owner and such other party to the provisions of subsection (7).

[Subs. (6) substituted by s. 5(*c*) of Act 78, 1996]

(7) Once a notice has been published in respect of any land–

(*a*) no person may in an improper manner obstruct the passage of the claim;

(*aA*) no person may sell, exchange, donate, lease, subdivide or rezone the land in question without having given the regional land claims commissioner one month's written notice of his or her intention to do so, and any sale, exchange, donation, lease, subdivision or rezoning of land in respect of which such notice was not given, may be set aside by the Court if it is satisfied that such sale, exchange, donation, lease, subdivision or rezoning was not done in good faith, or the Court may grant any other order it deems fit;

[Par. (*aA*) inserted by s. 5(*d*) of Act 78, 1996]

(*b*) no claimant who was resident on the land in question at the date of commencement of this Act may be evicted from the said land without the written authority of the Chief Land Claims Commissioner;

(*c*) no person shall in any manner whatsoever remove or cause to be removed, destroy or cause to be destroyed or damage or cause to be damaged, any improvements upon the land without the written authority of the Chief Land Claims Commissioner;

(*d*) no claimant or other person may enter upon and occupy the land without the permission of the owner or lawful occupier.

(8) The regional land claims commissioner may, at any time after the publication of a notice contemplated in subsection (1), if he or she has reason to believe that any improvement on the land is likely to be removed, damaged or destroyed or that any person resident on such land may be adversely affected as a result of the publication of such notice, authorise any person contemplated in section 8 or 9 to enter upon such land for the purpose of drawing up an inventory of any assets on the land, a list of persons employed or resident on the land, or a report on the agricultural condition of the land and of any excavations, mining or prospecting thereon.

Withdrawal or amendment of notice of claim

11A (1) Any person affected by the publication of the notice of a claim in terms of section 11(1) may make representations to the regional land claims commissioner having jurisdiction for the withdrawal or amendment of that notice.

(2) Where during the investigation of a claim by the Commission the regional land claims commissioner having jurisdiction has reason to believe that any of the criteria set out in paragraphs (*a*), (*b*), (*c*) and (*d*) of section 11(1) have not been met, he or she shall publish in the *Gazette* and send by registered post to –

(*a*) the claimant;

(*b*) the owner; and

(*c*) where applicable, a person who has made representations in terms of subsection (1) and any other party, who to his or her knowledge, may have an interest in the claim,

a notice stating that at the expiry of the period mentioned in the notice, the notice of the claim published in terms of that section will be withdrawn unless cause to the contrary has been shown to his or her satisfaction.

(3) At the expiry of the period contemplated in subsection (2), the regional land claims commissioner shall, unless cause to the contrary has been shown to his or her satisfaction, withdraw the notice of claim and –

(*a*) advise the persons mentioned in that subsection by notice sent by registered post;

(*b*) cause notice of his or her decision to be published in the *Gazette*; and

(*c*) take other steps to make his or her decision known in the district in which the land in question is situated.

(4) The regional land claims commissioner having jurisdiction may, during the investigation of a claim by the Commission and after following the procedure set out in subsection (2), unless cause to the contrary has been shown to his or her satisfaction, amend the notice published in terms of section 11(1), whereafter the provisions of paragraphs (*a*), (*b*) and (*c*) of subsection (3) shall apply *mutatis mutandis*: Provided that the regional land claims commissioner may, without following the procedure set out in subsection (2), amend the notice to correct any obvious error in it, and cause notice of his or her decision to be published in the *Gazette*.

[S 11A inserted by s. 6 of Act 78, 1996]

Commission's power of investigation

12 (1) The Commission may, through a member of the Commission or any person authorised thereto in writing, in order to carry out its functions –

(*a*) conduct an investigation;

(*b*) demand from any person including any government department such particulars, documents and information as may be necessary in connection with any investigation;

(*c*) by notice in writing, addressed and delivered by a member of the staff of the Commission or a sheriff to any person, direct such person, in relation to an investigation, to appear before a member of the Commission at a time and place mentioned in such notice and to produce to such member all documents or objects in the possession or custody or under the control of such person and which are relevant to that investigation.

(2) Any person directed to produce documents or objects in terms of subsection (1)(c) shall not be compelled to produce any document or object which could be used in evidence against him or her in a criminal trial.

(3) If a claimant is not able to provide all the information necessary for the adequate submission or investigation of a claim, the regional land claims commissioner concerned shall direct an officer contemplated in section 8 to take all reasonable steps to have this information made available.

(4) If at any stage during the course of an investigation by the Commission, the Chief Land Claims Commissioner is of the opinion that the resources of the Commission or the Court would be more effectively utilised if all claims for restitution in respect of the land, or area or township in question, were to be investigated at the same time, he or she shall cause to be published in the *Gazette* and in such other manner as he or she deems appropriate, a notice advising potential claimants of his or her decision and inviting them, subject to the provisions of section 2(1), to lodge claims within a period specified in such notice.

(5) No claim in respect of a matter contemplated in subsection (4) shall be lodged after the expiry of the period specified in the said notice: Provided that the Commission may allow a claimant on good cause shown, to lodge a claim after the expiry of such period, but not later than three years after the date fixed in terms of section 2(1)(*b*).

Mediation

13 (1) If at any stage during the course of the Commission's investigation it becomes evident that –

(*a*) there are two or more competing claims to a particular right in land;

(*b*) in the case of a community claim, there are competing groups within the claimant community making resolution of the claim difficult;

(*c*) where the land which is subject to the claim is not state-owned land, the owner or holder of rights in such land is opposed to the claim; or

(*d*) there is any other issue which might usefully be resolved through mediation and negotiation,

the Chief Land Claims Commissioner may direct the parties concerned to attempt to settle their dispute through a process of mediation and negotiation.

(2) (*a*) A direction contemplated in subsection (1) shall be made in a written notice specifying the time when and the place where such process is to start.

(*b*) The Chief Land Claims Commissioner shall appoint a mediator to chair the first meeting between the parties: Provided that the parties may at any time during the course of mediation or negotiation by agreement appoint another person to mediate the dispute.

(3) A person appointed by the Chief Land Claims Commissioner in terms of subsection (2)(*b*) shall either be an officer contemplated in section 8 who is a fit and proper person to conduct such a process of mediation and negotiation or an independent mediator contemplated in section 9(1)(*b*).

(4) All discussions taking place and all disclosures and submissions made during the mediation process shall be privileged, unless the parties agree to the contrary.

Referral of claims to Court

14 (1) If upon completion of an investigation by the Commission –

(*a*) the parties to any dispute arising from the claim agree in writing that it is not possible to settle the claim by mediation and negotiation;

(*b*) the regional land claims commissioner certifies that it is not feasible to resolve any dispute arising from such claim by mediation and negotiation;

(*c*) the parties to any dispute arising from such claim reach agreement as to how the claim should be finalised and the regional land claims commissioner is satisfied that such agreement is appropriate; or

(*d*) the regional land claims commissioner is of the opinion that the claim is ready for hearing by the Court,

the Chief Land Claims Commissioner shall certify accordingly and refer the matter to the Court.

(2) Any claim referred to the Court as a result of a situation contemplated in subsection (1)(*a*), (*b*) or (*d*) shall be accompanied by a document –

(*a*) setting out the results of the Commission's investigation into the merits of the claim;

(*b*) reporting on the failure of any party to accede to mediation;

(*c*) containing a list of the parties who have an interest in the claim; and

[Par (*c*) substituted by s. 7(*a*) of Act 78, 1996]

(*d*) setting out the Commission's recommendation as to the most appropriate manner in which the claim can be resolved.

(3) A referral made as a result of an agreement contemplated in subsection (1)(*c*) shall be accompanied by a document setting out the results of the Commission's investigation into the merits of the claim and a copy of the relevant deed of settlement together with a request signed by the parties con-

cerned and endorsed by the Chief Land Claim Commissioner requesting that such agreement be made an order of Court.

(4) If the Chief Land Claims Commissioner is not satisfied that a settlement referred to in subsection (1)(*c*) is appropriate, he or she shall refer the matter to the Court for a hearing in accordance with subsection (1)(*d*).

(5) Any interested party shall be entitled, upon payment of the prescribed fee, to copies of the documents contemplated in this section, including the submissions of other interested parties in relation to any matter contemplated in this section.

(5A) No claim shall be referred to the Court in terms of this section until–

(*a*) in the case of land contemplated in section 123(1)(*a*) or (*b*) of the Constitution, the Minister has issued or refused to issue a certificate in terms of subsections (1) and (3) of section 15;

(*b*) in the case of an order contemplated in section 123(3)(*a*) of the Constitution, the Minister has issued or refused to issue a certificate in terms of section 15(2).

[Subs. (5A) inserted by s. 7(*b*) of Act 78, 1996]

(6) The Court shall not make any order in terms of section 35 unless the Commission has, in respect of the claim in question, acted in accordance with the provisions of this section.

(7) . . .

[Subs. (7) deleted by s. 7(*c*) of Act 78, 1996]

Certificate of feasibility

15 (1) Prior to referral of a claim contemplated in section 121(2) of the Constitution to the Court in terms of section 14, the Chief Land Claims Commissioner shall request the Minister to certify whether –

(*a*) in the case of land contemplated in section 123(1)(*a*) of the Constitution, restitution of the right in question is feasible;

(*b*) in the case of land contemplated in section 123(1)(*b*) of the Constitution, acquisition of the right in question is feasible.

[Subs. (1) amended by s. 8(*a*) of Act 78, 1996]

(2) Prior to referral of a claim for an order contemplated in section 123(3)(*a*) of the Constitution to the Court in terms of section 14, the Chief Land Claims Commissioner shall request the Minister to certify whether it is feasible to designate alternative state-owned land.

[Subs. (2) amended by s. 8(*b*) of Act 78, 1996]

(3) If the Minister certifies under subsection (1) that restoration or acquisition is not feasible, the Chief Land Claims Commissioner shall forthwith request the Minister to certify whether it is feasible to designate alternative state-owned land.

(4) When submitting a request contemplated in subsections (1), (2) or (3), the Chief Land Claims Commissioner shall advise the Minister as to whether or not restoration, acquisition or designation is feasible in the case in question.

(5) All interested parties shall be given the opportunity to make submissions to the Minister on the question of feasibility.

(6) In considering whether restoration or acquisition by the State is feasible in terms of subsection (1), the Minister shall, in addition to any other factor, take into account –

(*a*) whether the zoning of the land in question has since the dispossession been altered and whether the land has been transformed to such an extent that it is not practicable to restore the right in question;
(*b*) any relevant urban development plan;
(*c*) any other matter which makes the restoration or acquisition of the right in question unfeasible; and
(*d*) any physical or inherent defect in the land which may cause it to be hazardous for human habitation.

(7) In considering whether designation of alternative state-owned land is feasible in terms of subsections (2) and (3), the Minister shall, in addition to any other factor, take into account –

(*a*) what land is owned by the State, in particular land which is situated in the area in which the dispossession took place; and
(*b*) the suitability of such land to meet the needs of the claimant.

(8) Nothing in this section shall be construed to mean that the Minister shall be required or entitled to consider whether restoration, acquisition or designation is just or desirable.

(9) The Minister shall issue the relevant certificate of feasibility, or refuse to do so, within 30 days of receipt of a request, and the Chief Land Claims Commissioner or the regional land claims commissioner concerned shall communicate the Minister's decision to every person affected by it.

(10) Any decision of the Minister in terms of this section shall be subject to review by the Court, the hearing of which review may, at the discre-

tion of the Court, be conducted at the same time as the hearing of the claim in question.

[Subs. (10) amended by s. 8(*c*) of Act 78, 1996]

(11) The decision of the Minister in respect of the issue of a certificate of feasibility, and the reasons for the decision, shall be public documents.

(12) If the Minister certifies in terms of subsection (2) or (3) that it is feasible to designate alternative state-owned land he or she may make such designation at the same time or at any time thereafter.

Rules regarding procedure of Commission

16 (1) After consultation with the Minister, the Chief Land Claims Commissioner may make rules regarding –

(*a*) any matter which, in terms of this Chapter, is required or permitted to be prescribed;

(*b*) the filing of claims;

(*c*) any steps which may be taken to give public notice of claims and notice to persons who have an interest in any matter under investigation by the Commission;

(*d*) the giving of notice to parties to attend a meeting for the purpose of mediating or negotiating the settlement of disputes;

(*e*) the giving of notice to parties and public notices giving notice that the Commission will consider any related claim in respect of specific land, a neighbourhood or township within a stipulated period;

(*f*) the order of preference to be given to claims or categories of claims in order to achieve the result contemplated in section 6(2)(*d*); and

(*g*) generally, with regard to any other matter which he or she considers it necessary or expedient to prescribe in order to achieve or promote the objects of this Act.

(2) The generality of subsection (1) shall not be limited by the preceding sections of this Chapter.

(3) Rules made under the provisions of subsection (1) shall be published in the *Gazette*.

Offences and penalties

17 Any person who –

(*a*) contravenes the provisions of section 11(7)(*a*), (*b*), (*c*), or (*d*);

(*b*) having been directed to appear before a member of the Commission and to produce documents or objects in terms of section 12(1)(*c*), fails to appear at the specified time and place or to produce such documents or objects;

(*c*) hinders or obstructs the Commission in the performance of its functions;

(*d*) prevents or attempts to prevent a duly authorised officer contemplated in section 8, or a person appointed in terms of section 9, from performing a function in terms of this Act,

shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding three months.

Limitation of liability

18 The Commission, members of the Commission, any person or organisation appointed under section 9 or any officer contemplated in section 8, shall not be liable in respect of any act or omission in good faith while performing a function in terms of any provision of this Act.

[S. 18 amended by s. 9 of Act 78, 1996]

Expenditure of Commission

19 (1) All expenditure in connection with the performance of the Commission's functions shall be defrayed from moneys appropriated by Parliament for such purpose.

(2) A person appointed in terms of section 4(3) who is not in the full-time service of the State may, from moneys appropriated by Parliament for such purpose, be paid such remuneration and allowances in respect of services performed in connection with the functions of the Commission, as may be determined by the Minister in consultation with the Minister of Finance.

Annual estimate of expenditure

20 The estimates of expenditure in respect of each financial year shall, after being prepared by the Chief Land Claims Commissioner or an official contemplated in section 8(1) and designated by the Chief Land Claims Commissioner, be submitted, not later than the first day of August of the preceding financial year to the Director-General of Land Affairs, who shall be the accounting officer.

Annual report

21 The Commission shall annually not later than the first day of June submit to Parliament a report on all its activities during the previous year, up to 31 March.

CHAPTER III

The Land Claims Court

Land Claims Court

22 (1) There shall be a court of law to be known as the Land Claims Court which, in addition to the powers contemplated in section 123 of the Constitution, shall have the power –

(*a*) to determine restitution of any right in land in accordance with this Act;

(*b*) to determine compensation in terms of this Act;

(*c*) in respect of a claim in terms of section 3, to determine the person entitled to ownership;

(*cA*) at the instance of any interested person and in its discretion, to grant a declaratory order on a question of law relating to section 121, 122 or 123 of the Constitution or to this Act or to any other law or matter in respect of which the Court has jurisdiction, notwithstanding that such person might not be able to claim any relief consequential upon the granting of such order;

[Par. (*cA*) inserted by s. 10(*a*) of Act 78, 1996]

(*d*) to determine all other matters which require to be determined in terms of sections 121, 122 and 123 of the Constitution.

(2) Subject to Chapter 7 of the Constitution, the Court shall have jurisdiction throughout the Republic and shall have –

(*a*) all such powers in relation to matters falling within its jurisdiction as are possessed by a provincial division of the Supreme Court having jurisdiction in civil proceedings at the place where the land in question is situated, including the powers of such a division in relation to any contempt of the Court;

(*b*) all the ancillary powers necessary or reasonably incidental to the performance of its functions, including the power to grant interlocutory orders and interdicts.

[Subs. (2) substituted by s. 10(*b*) of Act 78, 1996]

(3) There shall be a President of the Court, who shall be appointed by the President of the Republic, acting on the advice of the Judicial Service Commission.

(4) The President of the Republic may, after consultation with the President of the Court and the Judicial Service Commission, appoint additional judges of the court.

(5) The President of the Court and the additional judges of the Court may be appointed for a fixed term.

(6) A judge of a provincial or local division of the Supreme Court may be a judge of the Court.

(7) The President of the Republic shall designate a judge of the Court to act as President of the Court during the absence of the President of the Court.

(8) If there is sufficient reason the President of the Republic may, after consultation with the President of the Court, appoint an acting judge of the Court for such term as the President of the Republic shall determine: Provided that the Minister of Justice, after consultation with the President of the Court, may make such an appointment in respect of a term not exceeding one month.

(9) (*a*) Proceedings in which a judge of the Court has participated and which have not been disposed of at the termination of his or her term of service or, having been disposed of before or after such termination, are reopened, shall be disposed of by that judge.

(*b*) For the purposes of paragraph (*a*) any appointment made under this section shall be deemed also to have been made for the time in which the proceedings referred to in paragraph (*a*) are being disposed of.

[Subs. (7), (8) and (9) added by s. 1 of Act 84, 1995 and subs. 8 amended by s. 10(*c*) of Act 78, 1996]

Qualifications of judges of Court

23 No person shall be qualified to be appointed President of the Court or a judge of the Court unless he or she

(*a*) is a South African citizen;

(*b*) is a fit and proper person to be a judge of the Court; and

(*c*) (i) is a judge of the Supreme Court or is qualified to be admitted as an advocate or attorney and has, for a cumulative period of at least ten years, practised as an advocate or an attorney or lectured in law at a university, or

(ii) by reason of his or her training and experience, has expertise in the fields of law and land matters relevant to the application of this Act and the law of the Republic.

Law or procedure and rules

24 Until such time as rules of Court are made in terms of section 32, the rules of procedure applicable in civil actions and applications in a provincial division of the Supreme Court shall apply *mutatis mutandis* in respect of any proceedings in the Court.

Holding of office

25 (1) The provisions of section 104 of the Constitution with regard to making of an oath or a solemn affirmation and the removal or suspension of judges shall apply *mutatis mutandis* to judges of the Court.

(2) An assessor shall take an oath or make a solemn affirmation that he or she will, on the evidence placed before him or her, give a true verdict or considered opinion upon the issues to be tried.

(3) An assessor's oath or affirmation shall be administered by the presiding judge at the commencement of the hearing of every matter, before any evidence is led.

[S. 25 substituted by s. 11 of Act 78, 1996]

Remuneration and conditions of employment of judges

26 (1) The President and a judge of the Court not being a judge of the Supreme Court of South Africa, shall receive such remuneration and shall, subject to section 22(5), be appointed subject to such conditions of employment as determined by the President of the Republic in consultation with the Judicial Service Commission, and his or her remuneration shall not be reduced during his or her term of service.

(2) Notwithstanding anything to the contrary contained in any other law, a gratuity included in the remuneration determined in terms of subsection (1) and payable after vacation of office, shall not be taxable.

(3) An allowance included in the remuneration determined in terms of subsection (1) shall not be taxable, unless Parliament expressly provides otherwise.

(4) The President and a judge of the Court may be paid such allowances for travelling and subsistence expenses incurred by him or her in the performance of his or her functions in terms of this Act as the Minister of Justice may determine with the concurrence of the Minister of Finance.

(5) The provisions of subsections (1), (3) and (4) shall apply also to a person appointed under section 22(7) and (8).

[S. 26 substituted by s. 2 of Act 84, 1995 and amended by s. 12 of Act 78, 1996]

Appointment of assessors

27 (1) The assessors contemplated in section 28(4) shall be appointed by the presiding judge from a list compiled from time to time by the Minister after–

(*a*) inviting nominations from the general public; and

(*b*) consultation with the President of the Court.

(2) An assessor of the Court shall be a person who, in the opinion of the Minister, has skills and knowledge relevant to the work of the Court: Provided that it shall not be a requirement that an assessor shall have any legal qualifications.

(3) An assessor shall receive such remuneration and be entitled to such benefits as may be determined by the Minister of Justice in consultation with the Minister of Finance and the President of the Court.

[S. 27 substituted by s. 13 of Act 78, 1996]

Seat and hearings of Court

28 (1) The seat or seats of the Court shall be determined by the Minister of Justice in consultation with the President of the Court.

(2) The Court may notwithstanding the provisions of subsection (1) conduct hearings at any other place in the Republic with a view to making the Court accessible to claimants.

(3) Hearings of the Court shall be presided over by a single judge unless the President of the Court or in his or her absence the most senior available judge decides to the contrary.

(4) At least one assessor shall assist the Court at a contested hearing of–

(*a*) any claim contemplated in section 121 of the Constitution which has been referred to the Court; and

(*b*) any application in terms of section 34:

Provided that this requirement shall not apply in respect of–

(i) any hearing where the only matters in dispute are questions of law; or

(ii) any interlocutory or preliminary hearing or pre-trial proceedings.

[Subs. (4) substituted by s. 14(*a*) of Act 78, 1996]

(5) An assessor, other than an assessor contemplated in subsection (6), shall be a member of the Court and the decision or finding of the majority of the members of the Court shall be the decision or finding of the Court:

Provided that an assessor shall not decide upon a question of law or upon a question whether or not any matter constitutes a question of law: Provided further that a decision in respect of a matter referred to in section 33 or 34(6) shall be deemed not to be a question of law.

[Subs. (5) substituted by s. 14(*b*) of Act 78, 1996]

(6) In any proceedings, other than those contemplated in paragraphs (*a*) and (*b*) of subsection (4), the Court may summon to its assistance no more than two assessors to act in an advisory capacity.

(7) Subject to the provisos to subsection (5), in the event of an equality of votes –

(*a*) at a hearing where one or more members of the Court are assessors, the vote of the judge, or, if there is more than one judge, the vote of the majority of the judges, shall prevail;

(*b*) at any other hearing, the hearing shall be adjourned and commenced before a new court constituted in such manner as the President of the Court or, in his or her absence, the most senior available judge may determine.

(8) If at any stage during the hearing of any matter where two or more judges are members of the Court, any judge of such Court dies or retires or is otherwise incapable of acting or is absent, the hearing shall proceed before the remaining members of such Court: Provided that such members shall include at least one judge.

(9) If at any stage during the hearing of any matter an assessor who is a member of the Court dies or, in the opinion of the presiding judge, becomes unable to act as assessor or is absent, the presiding judge may direct –

(*a*) that the hearing proceed before the remaining member or members of the Court; or

(*b*) that the hearing shall commence *de novo,* unless all the parties to the proceedings agree unconditionally in writing to accept the decision of the remaining member or members as the decision of the Court.

(10) Subsections (5) and (7) shall apply *mutatis mutandis* when a hearing proceeds before the remaining member or members of the Court in the circumstances set out in subsection (8) or (9).

[Subsections 6, 7, 8, 9 and 10 added by s. 14(*c*) of Act 78, 1996]

Seals of Court

28A The Court shall have for use as occasion may require, a seal of such design as may be prescribed by the President of the Republic by proclamation in the *Gazette* and such seal shall be kept in the custody of the registrar of the Court.

Proceedings to be conducted in open court

28B All hearings in the Court shall, except in so far as the Court may in special cases direct otherwise, be conducted in open court.

Reference of particular matters for investigation by referee

28C (1) In any proceedings the Court may, with the consent of the parties, refer –

(*a*) any matter which requires extensive examination of documents or scientific, technical or local investigation which cannot be conveniently conducted by the Court;

(*b*) any matter which relates wholly or in part to accounts; or

(*c*) any other matter arising in such proceedings,

for enquiry and report to a referee, and the Court may, after hearing such evidence or arguments as may be adduced or presented by the parties –

(i) adopt the report of any such referee, either wholly or in part, and either with or without modifications;

(ii) remit such report for further enquiry or report or consideration by such referee; or

(iii) make any other order in regard thereto.

(2) Any finding in such report or any part thereof which is adopted by the Court, whether with or without modifications, shall have effect as if it were a finding by the Court in the proceedings in question.

(3) Any such referee shall for the purpose of such enquiry have such powers and shall conduct the enquiry in such manner as may be prescribed by a special order of court or by the rules.

(4) For the purpose of procuring the attendance of any witness, including any witness detained in custody under any law, and the production of any document or thing before a referee, an enquiry under this section shall be deemed to be proceedings before the Court: Provided that the referee shall not have jurisdiction in respect of the criminal offences created by this section.

(5) Any person summoned to appear and give evidence or produce any document or thing before a referee, and who, without sufficient cause –

(*a*) fails to attend at the time and place specified or to remain in attendance until the conclusion of the enquiry or until he or she is excused by the referee from further attendance;

(*b*) refuses to be sworn or to make affirmation as a witness;

(*c*) having been sworn or having made affirmation as a witness, fails, without just excuse, to answer fully and satisfactorily any question put to him or her;

(*d*) fails to produce any document or thing in his or her possession or custody or under his or her control which he or she was summoned to produce,

shall be guilty of an offence and liable on conviction either by the Court by way of the procedures set out in section 28F or by a criminal court having jurisdiction, to a fine or to imprisonment for a period not exceeding three months.

(6) Any person who, after having been sworn or having made affirmation, gives false evidence before a referee at any enquiry, knowing such evidence to be false or not knowing or believing it to be true, shall be guilty of an offence and liable on conviction to the pentalties prescribed by law for perjury.

(7) Any referee shall be entitled to such fees as may be prescribed by the rules or, if no such fees have been so prescribed, to such fees as the Court may determine, and to any reasonable expenditure incurred by him or her for the purposes of the enquiry, and any such fees and expenditure shall be taxed by the taxing master of the Court and shall be costs in the cause: Provided that the Court may order the State to pay the said fees and expenditure.

No process to be issued against judge of Court except with consent of court

28D (1) Notwithstanding anything to the contrary contained in any law, no summons or subpoena against the President or any other judge of the Court shall in any civil action be issued out of any court without the consent of such court: Provided that no such summons or subpoena shall be issued out of a lower court unless the provincial division of the Supreme Court which has jurisdiction to hear and determine an appeal in a civil action from such lower court, has consented thereto.

(2) Where the issuing of a summons or subpoena against a judge of

the Court to appear in a civil action has been consented to, the date upon which such judge must attend court shall be determined in consultation with the President of the Court or, in his or her absence, the most senior available judge of the Court.

(3) For the purposes of subsection (1) "lower court" means any court, other than the Constitutional Court or a court of a division of the Supreme Court, which is required to keep a record of its proceedings, and includes a court of a regional division and a magistrate's court established in terms of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944).

Judgment by default

28E A judgment by default may be granted by the Court in the manner and in the circumstances prescribed in the rules: Provided that the Court shall be satisfied that there was proper service of the process by which the case was initiated.

Manner of securing attendance of witnesses or production of any document or thing in proceedings before Court

28F (1) A party to proceedings before the Court may procure the attendance of any witness or the production of any document or thing in the manner provided for in the rules.

(2) Whenever any person subpoenaed to attend any proceedings before the Court as a witness or to produce any document or thing fails without reasonable excuse to obey the subpoena and it appears from the return of the proper officer or from evidence given under oath that the subpoena was served upon the person to whom it is directed and that his or her reasonable expenses calculated in accordance with the tariff referred to in section 28M have been paid or offered to him or her, or that he or she is evading service of the subpoena, or if any person who has attended in obedience to a subpoena fails to remain in attendance until excused, the Court may issue a warrant directing that he or she be arrested and brought before the Court at a time and place stated in the warrant or as soon thereafter as possible.

(3) A person arrested under any such warrant may be detained thereunder before the Court or in any prison or lock-up or other place of detention or in the custody of the person who is in charge of him or her with a view to securing his or her presence as a witness or to produce any document or thing at the said proceedings: Provided that the Court may release him or her on a recognizance with or without sureties for his or her appear-

ance to give evidence or to produce any document or thing as required and for his or her appearance at the enquiry referred to in subsection (4).

(4) The Court may in a summary manner, enquire into such person's evasion of the service of the subpoena or failure to obey the subpoena or to remain in attendance, and may, if it finds such person guilty, sentence him or her to a fine or to imprisonment for a period not exceeding three months.

(5) Any sentence imposed by the Court under subsection (4) shall be enforced and shall be subject to appeal as if it were a sentence imposed in a criminal case.

(6) If a person who has entered into any recognizance for his or her appearance to give evidence at such proceedings or to produce any document or thing or for his or her appearance at any enquiry referred to in subsection (4) fails so to appear, he or she may, apart from the forfeiture of his or her recognizance, be dealt with as if he or she had failed to obey a subpoena to attend such proceedings or appear at such enquiry.

Manner in which witnesses may be dealt with on refusal to give evidence or produce any document or thing

28G (1) Whenever any person who appears either in obedience to a subpoena or by virtue of a warrant issued under section 28F or is present and is verbally required by the Court to give evidence in any proceedings refuses to be sworn or to make an affirmation, or, having been sworn or having made an affirmation, without any just excuse refuses or fails to answer such questions as are put to him or her, or to produce any document or thing which he or she is required to produce the Court may adjourn the proceedings for any period not exceeding eight days and may, in the meantime, by warrant commit the person so refusing or failing to prison unless he or she consents to do what is required of him or her.

(2) If at the resumed hearing of the proceedings, any person referred to in subsection (1) again refuses without just excuse to do what is so required of him or her, the Court may again adjourn the proceedings and commit him or her to prison for a like period and so again from time to time until such person consents to do what is required of him or her.

(3) Nothing contained in this section shall prevent the Court from giving judgment in any case or otherwise disposing of the proceedings according to any other sufficient evidence taken.

(4) No person shall be bound to produce any document or thing not specified or otherwise sufficiently described in the subpoena unless he or she actually has it in court.

(5) When a subpoena is issued to procure the attendance of any person to give evidence or to produce any book, paper, document or thing in any proceedings before the Court, and it appears –

(*a*) that he or she is unable to give any evidence or to produce any book, paper, document or thing which would be relevant to any issue in such proceedings;

(*b*) that to compel him or her to attend would be an abuse of the judicial process;

the Court may, notwithstanding anything contained in this section, after reasonable notice by the registrar of the Court to the party who sued out of the subpoena and after hearing that party in chambers if he or she appears, make an order cancelling such subpoena.

Examination

28H (1) The Court may in connection with any proceedings pending before it, order that the evidence of a person who resides or is for the time being outside the area of jurisdiction of the Court be taken by means of interrogatories.

(2) Whenever an order is made under subsection (1), the registrar of the Court shall certify that fact and transmit a copy of his or her certificate to a commissioner of the Court, together with any interrogatories duly and lawfully framed which it is desired to put to the said person and the fees and the amount of the expenses payable to the said person for his or her appearance as hereinafter provided.

(3) Upon receipt of the aforesaid certificate and of the interrogatories and amounts aforesaid, the commissioner shall summon the said person to appear before him or her, and upon his or her appearance shall take his or her evidence as if he or she were a witness in proceedings before the Court, and shall put to him or her the interrogatories aforesaid with any other questions calculated to obtain full and true answers to the said interrogatories and shall take down or cause to be taken down the evidence so obtained, and shall transmit the same, certified as correct, to the registrar of the Court.

(4) The commissioner shall further transmit to the said registrar a certificate showing the amount paid to the person concerned in respect of the expenses of his or her appearance, and the cost of the issue and service of the process for summoning such person before him or her.

(5) Any person summoned to appear as provided in this section who without reasonable excuse fails to appear at the time and place mentioned in

the summons, shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding three months.

(6) Any interrogatories taken and certified under this section, shall, subject to all lawful exceptions, be received as evidence in the aforesaid proceedings.

Appointment of officers of Court

28I (1) The Minister of Justice may, subject to the laws governing the public service, appoint registrars, assistant registrars and other officers for the Court whenever they may be required for the administration of justice or the execution of the functions of the Court.

(2) Whenever by reason of absence or incapacity a registrar or assistant registrar is unable to carry ot the functions of his or her office, or his or her office becomes vacant, the Minister of Justice may authorise any other competent officer in the public service to act in the place of the absent or incapacitated officer during such absence or incapacity or to act in the vacant office until the vacancy is filled: Provided that when any such vacancy has remained unfilled for a continuous period exceeding six months that fact shall be reported to the Public Service Commission established by section 209 of the Constitution.

(3) Any officer in the public service appointed under subsection (1) may simultaneously hold more than one of the offices mentioned in that subsection.

(4) (*a*) The President of the Court may, in consultation with the Minister of Justice, from time to time, appoint one or more persons to undertake such research or perform such duties for the Court as the President of the Court may determine.

(*b*) The remuneration and other terms and conditions of service of a person appointed in terms of paragraph (*a*) shall be as determined, either generally or in any specific case, by the President of the Court in consultation with the accounting officer refered to in section 28J(3).

(5) The Minister of Justice may delegate to an officer in the Department of Justice any of the powers vested in him or her by this section.

Finances and accountability

28J (1) Expenditure in connection with the administration and functioning of the Court shall be defrayed from monies appropriated by Parliament for such purpose.

(2) Requests for the funds needed for the administration and functioning of the Court, as determined by the President of the Court after consultation with the Minister of Justice, shall be addressed to Parliament by the Minister of Justice in the manner prescribed for the budgetary process of Departments of State.

(3) The Director-General of Justice or an officer of the Department of Justice designated by him or her for such purpose shall, subject to the Exchequer Act, 1975 (Act No. 66 of 1975) –

(*a*) be charged with the responsibility of accounting for money received or paid out for or on account of the administration and functioning of the Court; and

(*b*) cause the necessary accounting and other related records to be kept, which records shall be audited by the Auditor-General appointed in terms of section 191 of the Constitution.

Scope and execution of process of Court

28K (1) The process of the Court shall run throughout the Republic and its sentences, rulings, judgments, writs, summonses, orders, warrants, commands and other processes shall be executed in any area in like manner as if they were processes of the provincial division of the Supreme Court having jurisdiction in such area.

(2) A sheriff or a deputy sheriff of the Supreme Court appointed for the area in which any process is to be served, shall execute all sentences, rulings, judgments, writs, summonses, orders, warrants, commands and other processes of the Court directed to him or her and any reference in this Act to a sheriff or a deputy sheriff shall be deemed to be a reference to a sheriff or deputy sheriff of the Supreme Court acting in terms of this section.

(3) A sheriff or deputy sheriff performing his or her duties in terms of this Act shall have all the powers and rights and be subject to all the obligations and duties applicable to the execution by such sheriff or deputy sheriff of the process of the provincial division of the Supreme Court for which he or she is appointed.

(4) The return of a sheriff or a deputy sheriff of what has been done in connection with any process of the Court, shall be *prima facie* evidence of the matters therein stated.

(5) A refusal by the sheriff or any deputy sheriff to do any act which he or she is, in terms of this Act, empowered or obliged to do, shall be subject to review by the Court on application *ex parte* or on notice as the circumstances may require.

(6) Any warrant or other process for the execution of a judgment given or order issued against any association of persons, corporate or unincorporated, partnership or firm may be executed by attachment of the property or assets of such association, partnership or firm.

Offences relating to execution

28L Any person who is guilty of the conduct referred to in section 40 of the Supreme Court Act, 1959 (Act No. 59 of 1959), in relation to the execution by a sheriff or deputy sheriff of his or her duties in terms of this Act, shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding six months.

Witness fees

28M (1) A witness in any proceedings of the Court and any person who accompanies any such witness on account of the youth or infirmity of such witness, shall be paid such allowances as may be prescribed in terms of section 42 of the Supreme Court Act, 1959.

(2) Notwithstanding anything to the contrary contained in any other law, the Court may order that no allowances or only a portion of the prescribed allowances shall be paid to any witness.

Powers of Court on hearing of appeals

28N The Court shall, at the hearing of any appeal in terms of any law conferring upon it any appellate jurisdiction, have the power –

(*a*) to receive further evidence;

(*b*) to remit the case to the court or other tribunal of first instance or to the arbitrator concerned, for further hearing, with such instructions as regards the taking of further evidence or otherwise as the Court considers necessary; or

(*c*) to confirm, amend or set aside the judgment, order or decision which is the subject matter of the appeal and to give any judgment, order or decision which the circumstances may require,

unless such law provides otherwise.

Application of provisions of this Chapter in respect of performance by Court of its functions under other legislation

28O The provisions of this Chapter regulating the procedures, powers and obligations of the Court shall apply *mutatis mutandis,* to the performance by the Court of its functions in terms of any other law in respect of which it has

jurisdiction, unless such application is excluded expressly or by necessary implication.

[Sections 28A, 28B, 28C, 28D, 28E, 28F, 28G, 28H, 28I, 28J, 28K, 28L, 28M, 28N and 28O inserted by s. 15 of Act 78, 1996]

29 (1) Any interested person, including an organisation, may apply to the Court for leave to intervene as a party to any proceedings before the Court.

(2) The State shall have the right to intervene as a party to all proceedings before the Court.

(3) Any party appearing before the Court may do so in person or may be represented by an advocate or attorney.

(4) Where a party can not 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.

[S. 29 substituted by s. 16 of Act 78, 1996]

Admissibility of evidence

30 (1) The Court may admit any evidence, including oral evidence, which it considers relevant and cogent to the matter being heard by it, whether or not such evidence would be admissible in any other court of law.

(2) Without derogating from the generality of the aforegoing subsection, it shall be competent for any party before the Court to adduce –

(*a*) hearsay evidence regarding the circumstances surrounding the dispossession of the land rights or rights in question and the rules governing the allocation and occupation of land within the claimant community concerned at the time of such dispossession; and

(*b*) expert evidence regarding the historical and anthropological facts relevant to any particular claim.

(3) The Court shall give such weight to any evidence adduced in terms of subsections (1) and (2) as it deems appropriate.

(4) Whenever an order, judgment or other record of the Court is required to be proved or inspected or referred to in any manner, a copy of such order, judgment or other record duly certified as such by the registrar of the Court under its seal shall be *prima facie* evidence thereof without proof of the authenticity of such registrar's signature.

[Subs. (4) added by s. 17 of Act 78, 1996]

Pre-trial conference

31 (1) The Court may, at its own instance or at the request of any party before it, at any stage prior to the hearing of a matter convene a pre-trial conference of the parties with a view to clarifying the issues in dispute, identifying those issues on which evidence will be necessary and, in general, expediting a decision on the claim in question.

(2) The Court may, after the holding of such a pre-trial conference, issue such orders and directions as to the procedure to be followed before and during the trial as it deems appropriate.

Rules governing procedure

32 (1) The President of the Court may make rules to govern the procedure of the Court, including rules providing for –

(*a*) any of the matters listed in paragraphs (*a*) to (*s*) of subsection (1) of section 6 of the Rules Board for Courts of Law Act, 1985 (Act No. 107 of 1985), insofar as they are appropriate to the functions of the Court;

(*b*) the circumstances under which opinion and oral evidence may be submitted to the Court;

(*c*) the suspension or execution of judgments, orders or sentences of the Court pending –

(i) applications or petitions for leave to appeal; and

(ii) the prosecution of appeals; and

(*d*) generally, any matter which may be necessary or useful to be prescribed for the proper despatch and conduct of the functions of the Court.

[Subs. (1) substituted by s. 18 of Act 78, 1996]

(2) The rules contemplated in subsection (1) shall be published in the *Gazette.*

(3) Notwithstanding anything to the contrary in this Act or in the rules contemplated in subsection (1) –

(*a*) the Court may, at any stage after a claim has been referred to it, refer the claim back to the Commission with directives as to matters which are to be investigated and reported on by the Commission; and

(*b*) the Court may conduct any part of any proceedings on an informal or inquisitorial basis.

(4) The rules contemplated in subsection (1) shall make provision for the expeditious hearing of an application in terms of section 34.

Factors to be taken into account by Court

33 In considering its decision in any particular matter, excluding the review of a decision in terms of section 15, the Court shall, in addition to the matters referred to in sections 121, 122 and 123 of the Constitution, have regard to the following factors:

(*a*) The desirability of providing for restitution of rights in land or compensation to people who were dispossessed of their rights in land as a result of or in pursuance of racially based discriminatory laws;
(*b*) the desirability of remedying past violations of human rights;
(*c*) the requirements of equity and justice;
(*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 achieve the goals contemplated in section 8(3)(*a*) of the Constitution;
(*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 8 of the Constitution.

Ruling by Court on restoration before final determination of claim

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

(2) Notice of any such application shall be given to the Commission, which shall investigate and submit a report to the Court on the desirabiliby of making an order referred to in subection (1).

(3) Any party making an application to the Court in terms of subsection (1) shall, at its own expense, take such steps as the relevant regional land claims commissioner may direct in order to bring the application to the attention of other persons who may have an interest therein, in order that they may make submissions to and appear before the Court on the hearing of the application.

(4) The regional land claims commissioner concerned shall take such further steps as he or she deems appropriate to bring the application to the attention of persons who may have an interest.

(5) After hearing an application contemplated in subsection (1), the Court may –

(*a*) dismiss the application; or

(*b*) order that when any claim in respect of the land in question is finally determined, the rights in the land in question, or in part of the land, or certain rights in the land, shall not be restored to any claimants.

(6) The Court shall not make an order in terms of subsection (5)(*b*) unless it is satisfied that –

(*a*) it is in the public interest that the rights in question should not be restored to any claimant; and

(*b*) the public or any substantial part thereof will suffer substantial prejudice unless an order is made in terms of subsection (5)(*b*) before the final determination of any claim.

(7) . . .

[Subs. (7) deleted by s. 19 of Act 78, 1996]

(8) Any order made in terms of subsection (5)(*b*) shall be binding on all claimants to the rights in question, whether such claim is lodged before or after the making of the order.

Court orders

35 (1) A person in whose favour an order contemplated in section 123(3)(*c*) of the Constitution has been made may, instead of accepting such alternative relief, within 30 days after the date on which the order was made, apply in writing to the Minister to be registered as a preferential claimant to benefit from any State support programme for housing and the allocation and development of rural land.

(2) The Court may in addition to the orders contemplated in section 123 of the Constitution –

(*a*) determine conditions which must be fulfilled before a right in land can be restored or granted to a claimant;

(*b*) if a claimant is required to make any payment before the right in question is restored or granted, determine the amount to be paid and the manner of payment, including the time for payment;

(*c*) if the claimant is a community, determine the manner in which the rights are to be held or the compensation is to be paid or held;

(*d*) recommend to the Minister that a claimant be given priority access to State resources in the allocation and development of housing and land in the appropriate development programme;

(*e*) give any other directive as to how its orders are to be carried out, including the setting of time limits for the implementation of its orders;

(*f*) make an order in respect of compensatory land granted at the time of the dispossession of the land in question;

(*g*) make such orders for costs as it deems just, including an order for costs against the State or the Commission.

[Par. (*g*) substituted by s. 20(*a*) of Act 78, 1996]

(3) An order contemplated in subsection (2)(*c*) shall be subject to conditions as the Court considers necessary to ensure that all the dispossessed members of the community concerned shall have access to the land or the compensation in question, on a basis which is fair and non-discriminatory towards any person, including a woman and a tenant, and which ensures the accountability of the person who holds the land or compensation on behalf of the community to the members of such community.

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

(5) If the Court orders the State to expropriate land or a right in land in order to restore it to a claimant, the Minister shall expropriate such land or right in accordance, *mutatis mutandis*, with the provisions of the Expropriation Act, 1975 (Act No. 63 of 1975): Provided that the owner of such land or right shall be entitled to the payment of just and equitable compensation, determined either by agreement or by the Court according to the principles laid down in section 28(3) of the Constitution: Provided further that the procedure to be followed by Court in the determination of such compensation shall be as provided in sections 24 and 32 of this Act.

(6) In making any award of land, the Court may direct that the rights of individuals to that land shall be determined in accordance with the procedures set out in the Distribution and Transfer of Certain State Land Act, 1993 (Act No. 119 of 1993).

(7) An order of the Court shall have the same force as an order of the Supreme Court for the purposes of the Deeds Registries Act, 1937 (Act No. 47 of 1937).

(8) . . .

[Subs. (8) deleted by s. 20(*b*) of Act 78, 1996]

(9) Any state-owned land which is held under a lease or similar arrangement shall be deemed to be in the possession of the state for the purposes of section 123(1)(*a*) of the Constitution: Provided that, if the Court orders the restitution of a right in such land, the lawful occupier thereof shall be entitled to just and equitable compensation determined either by agreement or by the Court according to the principles laid down in section 28(3) of the Constitution.

(10) An interested party which is of the opinion that an order of the Court has been fully or timeously complied with may make application to the Court for further directives or orders in that regard.

(11) The Court may, upon application by any person affected thereby and subject to the rules made under section 32, rescind or vary any order or judgment granted by it –

(*a*) in the absence of the person against whom that order or judgment was granted;
(*b*) which was void from its inception or was obtained by fraud or mistake common to the parties;
(*c*) in respect of which no appeal lies; or
(*d*) in the circumstances contemplated in section 11(5):

Provided that where an appeal is pending in respect of such order, or where such order was made on appeal, the application shall be made to the Constitutional Court or the Appellate Division of the Supreme Court, as the case may be.

(12) The Court may, upon application by any person affected thereby, or of its own accord –

(*a*) if a person is, in the circumstances contemplated in subsection (1), registered as a preferential claimant, rescind or vary the order contemplated in that subsection;
(*b*) correct patent errors in any order or judgment.

[Subs. (11) and (12) added by s. 20(*c*) of Act 78, 1996]

Review of decisions of Commission

36 (1) Any party aggrieved by any act or decision of the Minister, Commission or any functionary acting or purportedly acting in terms of this Act may apply to have such act or decision reviewed by the Court.

[Subs. (1) amended by s. 21 of Act 78, 1996]

(2) The Court shall exercise all of the Supreme Court's powers of review with regard to such matters, to the exclusion of the provincial and local divisions thereof.

Appeals from Court

37 (1) No appeal shall lie against a judgment or order of the Court except with leave of the Court or, where such leave has been refused, with the leave of the Appellate Division of the Supreme Court (hereinafter referred to as the Appellate Division).

(2) An appeal from a judgment or order of the Court shall be heard by the Appellate Division.

(3) The Appellate Division may, in granting leave to appeal, vary any order for costs made by the Court in refusing leave to appeal.

(4) The power to grant leave to appeal as contemplated in subsection (1) –

(*a*) shall not be limited by reason only of the value of the matter in dispute or the amount claimed or awarded in the suit or by reason only of the fact that the matter in dispute is incapable of being valued in money; and

(*b*) shall be subject to the provisions of any other law which specifically limits it or specifically grants, limits or excludes any right of appeal.

(5) Leave to appeal may be granted subject to such conditions as the Court or the Appellate Division, as the case may be, considers appropriate, including a condition that the applicant shall find security for the costs of the appeal.

(6) The Appellate Division may grant leave to appeal on application made to it within 15 days, or such longer period as may on good cause be allowed, after the Court has refused leave to appeal.

(7) (*a*) An application to the Appellate Division in terms of subsection (6) –

(i) shall be brought on notice of motion supported by an affidavit as to the facts upon which the applicant relies for relief;

(ii) shall be addressed to the registrar of the Appellate Division, to the registrar of the Court and to all other parties in the proceedings before the Court.

(*b*) The application shall be considered by two judges of the Appellate Division designated by the Chief Justice, and in the case of a difference of opinion, also by the Chief Justice or any other such judge so designated.

(*c*) The judges considering the application may order that the application be argued before them at a time and place appointed, and may, whether or not they have so ordered –

(i) grant or refuse the application; or

(ii) refer the application to the Appellate Division for consideration, whether upon argument or otherwise,

and where an application has been so referred, the Appellate Division may thereupon grant or refuse the application.

(*d*) The decision of the majority of the judges considering the application, or the decision of the Appellate Division, as the case may be, to grant or refuse the application shall be final.

(*e*) Notice of the date and place fixed for the hearing of the application shall be given to the applicant and the respondent by the registrar of the Appellate Division.

(8) The Appellate Division shall, on the hearing of any appeal from the Court have the power –

(*a*) to receive further evidence;

(*b*) to remit the case to the Court for further hearing, with such instructions as regards the taking of further evidence or otherwise as the Appellate Division considers necessary; or

(*c*) to confirm, amend or set aside the judgment or order which is the subject of the appeal and to give any judgment or make any order which the circumstances may require.

(9) Nothing in this section contained shall be construed as preventing an appeal from a judgment or order of the Court being made directly to the Constitutional Court, if such an appeal is allowed by national legislation and by the rules of the Constitutional Court.

[S. 37 substituted by s. 22 of Act 78, 1996]

Decisions of Court a matter of public record

38 The decisions of the Court shall be a matter of public record on the same basis as decisions of the Supreme Court.

CHAPTER IV

Miscellaneous Provisions

Register of public land

39 In order to facilitate the work of the Commission and the Court, the Minister may take all necessary steps to compile a register of public land, which register shall be open to inspection by claimants and prospective claimants.

Regulations

40 The Minister may make regulations regarding –

(*a*) any matter required or permitted to be prescribed in terms of this Act; and

(*b*) generally, all matters which in his or her opinion are necessary or expedient to be prescribed in order to achieve the objects of this Act.

Repeal of laws, and savings

41 (1) Sections 88A up to and including 96A of the Abolition of Racially Based Land Measures Act, 1991 (Act No. 108 of 1991), and the Abolition of Racially Based Land Measures Amendment Act, 1993 (Act No. 110 of 1993), are hereby repealed.

(2) If an application was, before the commencement of this Act, lodged with the Commission on Land Allocation established in terms of section 89 of the Abolition of Racially Based Land Measures Act, 1991 (Act No. 108 of 1991), and that Commission has, before the commencement of this Act –

(*a*) made a recommendation in respect of such application, such application shall on request of any interested party; or

(*b*) not made any order or recommendation in respect of such application shall,

subject to the provisions of subsection (3) be deemed to have been lodged with the Commission in accordance with the provisions of section 10(1).

(3) The regional land claims commissioner having jurisdiction may –

(*a*) direct any application in respect of an application referred to in subsection (2) to provide the Commission with any further information relevant to the application; and

(*b*) in respect of an application referred to in subsection (2), waive compliance with any or all of the procedures prescribed by or under this Act.

Transfer duty and fees

42 (1) The Minister may direct that any transfer duty or other fees payable by a claimant in respect of any transfer of land or of a right in land in terms of this Act shall be defrayed in full or in part from money appropriated by Parliament for that purpose.

(2) The Minister may, in consultation with the Minister of Finance, direct that no transfer duty, stamp duty or other fees contemplated in subsection (1) shall be paid in respect of a particular transfer under this Act.

Short title and commencement

43 (1) This Act shall be called the Restitution of Land Rights Act, 1994, and shall come into operation on a date fixed by the President by proclamation in the *Gazette*.

(2) Different dates may be fixed in respect of different Chapters of this Act.

APPENDIX II

Restitution of Land Rights Act, 1994 – Act No. 22, 1994

RULES REGARDING PROCEDURE OF COMMISSION
[As amended by R. 1961 DATED 29.11.96.]

Under section 16(1) of the Restitution of Land Rights Act, 1994 (Act No. 22 of 1994), I Wetsho-otsile Joseph Seremane, Chief Land Claims Commissioner, after consultation with the Minister of Land Affairs, hereby make the rules set out in the Schedule.

W. J. SEREMANE,
Chief Land Claims Commissioner.

SCHEDULE

Definitions

1. In these rules any expression to which a meaning has been assigned in the Restitution of Land Rights Act, 1994 (Act No. 22 of 1994), shall have that meaning and, unless the context indicates otherwise –

"Chief Land Claims Commissioner" means the Chief Land Claims Commissioner of the Commission appointed by the Minister in terms of section 4(3) of the Act;

"Commission" means the Commission on Restitution of Land Rights established by section 4 of the Act;

"Land Claims Court" means the Court established by section 22 of the Act;

"mediation" means a process through which disputing parties use the services of an acceptable third person to assist them in arriving or attempting to arrive at an agreed solution through a process of negotiation and facilitation;

"Regional Land Claims Commissioner" means a Regional Land Claims Commissioner of the commission appointed by the Minister in terms of section 4(3) of the Act;

"secretary" means a person in the employ of the Commission who has been designated as secretary by the Chief Land Claims Commissioner;

"the Act" means the Restitution of Land Rights Act, 1994 (Act No. 22 of 1994).

Lodgement of claims

2. (1) *(a)* A claimant shall lodge a claim in writing on a duly completed claim form, as prescribed by the Commission in terms of section 10 of the Act, substantially in the form of Annexure A, together with such additional documents as are relevant to substantiate the claim, with the regional office of the Commission having jurisdiction over the land in respect of which such claim is instituted.

(b) In the case of an informal land right, the documents contemplated in subrule 21(1)*(a)* shall include a sworn statement by the claimant, giving a full description of the land in question and the nature of the right being claimed.

[Par. *(b)* inserted by R. 1961, 1996 while existing subs. (1) becomes par. *(a)*]

(2) Any person appointed by the Regional Land Claims Commissioner of the regional office referred to in subrule (1) shall immediately on receipt of the claim referred to in subrule (1), acknowledge receipt of the claim form and the documents appended to it and inform the claimant that the Commission shall consider the claim for purpose of deciding whether the claim will be accepted for investigation.

(3) If a claim is submitted to the Department of Land Affairs, a regional office of that Department or the Head Office of the Commission, the claim shall be sent without delay to the Regional Land Claims Commissioner concerned and shall be deemed to have been duly lodged when it is received by the Regional Land Clalims Commissioner.

Acceptance criteria

3. The Regional Land Claims Commissioner shall –

(a) decide whether the claim which has been lodged substantially complies with the requirements contained in the prescribed claim form;

(b) consider whether the claimant was dispossessed of a right in land as defined in section 1 (xi) of the Act;

(c) consider whether the dispossession was effected under or for the purpose of furthering the objects of a law as contemplated in section 121(2)*(b)* of the Constitution;

(d) consider whether the dispossession occurred on or after 19 June 1913;

(e) in the event that rights in land were expropriated under the Expropriation Act, 1975 (Act No. 63 of 1975), consider whether just and equitable compensation was paid as contemplated in sections 121(4)*(a)* and 123(4) of the Constitution;

(f) consider whether the claim was lodged within three years of 1 May 1995;

(g) consider whether the claim is frivolous or vexatious; and
(h) consider whether any order has been made by the Land Claims Court in respect of rights relating to the land in question.

Notice that the claim has been accepted for investigation

4. If the Regional Land Claims Commissioner is satisfied that the criteria set out in section 11(1) of the Act have been met, he or she shall advise the claimant that the claim has been accepted for investigation by the Commission.

Investigations by the Regional Land Claims Commissioner

5. On acceptance of a claim for investigation, the Regional Land Claims Commissioner or a person designated by him or her, shall –

(a) ensure that the outstanding information required in respect of the claim is obtained;
(b) establish if the land is State-owned and, if not, obtain particulars of the owner, and the history of the acquisition of the land by the owner;
(c) establish the purpose for which the land is used at that stage and the conditions of such use;
(d) establish the date and circumstances of the dispossession of the right in such land;
(e) establish whether any compensation or compensatory land has been received, the amount of such compensation, the basis on which such amount was calculated, and whether the compensation was properly determined and comparable to the value of the land dispossessed;
(f) establish which Government Department or institution dealt with the dispossession, and under which law or for the purpose of furthering the objects of which law, such dispossession occurred;
(g) investigate the nature of the right in land claimed, and obtained proof thereof;
(h) establish whether or not the claimant is a person or community, as contemplated in section 2(1)*(a)* of the Act, or a direct descendant, or successor or such a person, and obtain particulars and proof thereof;
(i) establish whether there is more than one claim in respect of a specific area or property;
(j) see to it that a topographical or compilation map indicating the location of the land is obtained from the Government Printer or the Surveyor-General;
(k) establish factors which could give rise to priority treatments as contemplated in section 6(2)*(d)* of the Act;

(l) establish the need and appropriateness for dealing with claims as provided for in section 12(4) of the Act;

(m) investigate options and make recommendations to the Minister in terms of section 6(2)*(b)* of the Act for appropriate alternative relief in respect of claimants who do not qualify for the restitution of land rights;

(n) establish in terms of section 13(1)*(c)* of the Act whether the current owner or holder of rights in land claimed is opposed to the claim;

(o) where applicable, investigate, obtain reports and request claimants to supply information relating to the factors mentioned in section 15(6)*(a)* to *(d)* of the Act to facilitate the report of the Chief Land Claims Commissioner to the Minister, with regard to feasibility; and

(p) obtain information regarding any other matter which is deemed to be necessary or desirable to be investigated in order to facilitate the task of the Regional Land Claims Commissioner.

Powers regarding investigation

6. At any stage during the course of an investigation, the Regional Land Claims Commissioner, or a person designated by him or her, may –

(a) recommend to the Chief Land Claims Commissioner to exercise his or her powers in terms of sections 6(2)*(d)*, 12(4) or 13(1) of the Act;

(b) notify claimants of directives and options regarding sections 6(2)(d), 12(4) or 13(1) of the Act and request claimants to reply to questions so that the Commission can take the appropriate steps provided for in the aforementioned subsections;

(c) where rights in land are being claimed by more than one claimant, jointly, or by a community, request the co-claimants to appoint a single person or entity with whom the Commission could deal;

(d) request a claimant to indicate whether he or she intends pursuing a claim for compensation only; and

(e) where rights in land are being claimed by more than one claimant, jointly, or by a community, request such claimants acting jointly, to provide the appropriate resolution or documentation to support their joint claims.

Registration

7. The Regional Land Claims Commissioner or a person assigned by him or her shall keep a register, which shall consist of separate sub-registers for urban and rural claims, and such other sub-registers as the Regional Land

Claims Commissioner may consider appropriate, and he or she shall see to it that the particulars of every claim received each day are immediately recorded.

Allocation of numbers

8. On lodgement of the claim, the Regional Land Claims Commissioner or a person assigned by him or her shall allocate a number to the claim form which will be recorded in the appropriate register, which number will be supplied to the claimant in the acknowledgement of receipt in terms of rule 2(2).

Particulars to be recorded

9. The particulars recorded in the register may include the following:

(a) Name, telephone number and address of the claimant, and in the case of more than one claimant acting jointly, the name, telephone number and address of the appointed representative person or entity of a group of claimants or community as referred to in rule 6*(c)*;

(b) name, telephone number and address of the appointed agent or legal representative of the claimant, if any;

(c) where applicable, the date on which the claim was referred to the regional office of the Department of Land Affairs in terms of rule 12;

(d) whether the claim has been submitted on behalf of an individual or a community, or a group of claimants acting jointly;

(e) number of co-claimants, where the claimants are acting jointly;

(f) full particulars of the land, including the town or city, suburb, district and province, and the current Title Deed description, extent of the land and Title Deed number;

(g) the date on which the claim was lodged;

(h) the date of dispossession;

(i) the date on which the claim was accepted for investigation in terms of rule 4 or not accepted in terms of section 11(4) of the Act;

(j) the date on which the report of the Regional Land Claims Commissioner was sent to the Chief Land Claims Commissioner; and

(k) file number of all relevant files of the head office and the regional office of the Commission as well as the regional office of the Department of Land Affairs.

Documents subsequently delivered

10. Every document subsequently delivered in such a claim or in a subse-

quent claim in pursuance of such a claim shall be numbered with the original claim number.

Filing of documents

11. All documents delivered at the office of the Regional Land Claims Commissioner to be filed and all the documents referred to in section 14 of the Act shall be filed under the number of the claim concerned.

Request for information

12. The Regional Land Claims Commissioner may request the head of the regional office of the Department of Land Affairs to obtain all or any of the information relevant to the investigation as contemplated in rule 5.

Notice of claim in terms of section 11(1) of the Act

13. (1) The notice referred to in section 11(1) of the Act shall contain, in addition to any other particulars, the following particulars:

(a) The Title Deed description of the land, its extent, the Title Deed Number, the name of the current registered owner, and any other detail that would help interested parties in the identification and location of the property that forms the subject of the claim;

[Substituted by R. 1961, 1996 w.e.f. 29.11.96.]

(b) The names by which the land or area is generally known, and where applicable, the street address, and, if the street address of the land has changed, the current street address.

(c) Particulars of claimants or, in the case of a group of co-claimants or community, their appointed representative person or entity.

(d) A request that any person who wishes to comment, object to or lodge a further claim in respect of the same land shall deliver such comment, objection or claim to the Regional Land Claims Commissioner concerned within the period specified in the notice.

(2) The steps referred to in section 11(1) of the Act shall include one or more of the following, in the appropriate languages for the region concerned:

[Amended by R. 1961, 1996.]

(a) Notice in a newspaper or a notice in a magazine or an radio or television.

(b) The sending of copies of the notice by registered mail to all possible interested parties, including the registered land owner.

(c) Verbal notice.

(d) The display of a notice in a suitable place on the land concerned.
(e) The display of a notice on a public building.

Inventory of Assets on Land

14. An inventory referred to in section 11(8) of the Act shall be provided substantially in the form of Annexure B and be noted in the register referred to in rule 7.

Report to Chief Land Claims Commissioner

15. (1) After the claim has been investigated, the Regional Land Claims Commissioner shall provide the Chief Land Claims Commissioner with a full report of the investigation.

(2) The report referred to in subrule (1) shall include –

(a) the original claim form and accompanying documents;
(b) a recommendation concerning further action, namely –
(i) where the parties to any dispute reached agreement as to how the claim should be finalised, the result of the investigation by the Regional Land Claims Commissioner into the merits of the claim as contemplated in section 14(3) of the Act;
(ii) where the parties to any dispute did not reach agreement, reports and recommendations on the issues referred to in section 14(2) of the Act; and
(iii) where applicable, information to assist the Chief Land Claims Commissioner in advising the Minister in terms of section 15(4) of the Act, regarding matters referred to in rule 5*(o)*.

(3) If at any stage during the course of the Commission's investigation the Regional Land Claims Commissioner is of the opinion that a dispute should be settled by way of mediation in terms of section 13 of the Act, he or she shall submit a report to the Chief Land Claims Commissioner.

(4) The report referred to in subrule (3) shall include a recommendation whether the claim should be referred for mediation with a view to resolving the dispute and, if so, what the issues between the parties are, as well as the person to be appointed as mediator.

Meetings

16. (1) The Chief Land Claims Commissioner shall preside at a meeting of the Commission and if he or she is absent or unable to perform his or her functions in terms of these Rules the Deputy Land Claims Commissioner shall act as chairman and while the Deputy Land Claims Commissioner so acts, he or

she shall exercise all the powers and perform all the duties of the chairman.

(2) Meetings of the Commission shall be open to the public and the media: Provided that the Commission may, on good cause shown, decide to exclude the public and the media from a meeting.

(3) A member of the Commission shall at any meeting fully disclose any interest which he or she or his or her spouse or his or her business partner or employer, other than the State, may have in any matter under consideration by the Commission and, where necessary or appropriate, on the direction of the members present at a meeting, a member with an interest may be excluded from the deliberations or he or she may remain in attendance and be required not to participate.

Minutes of meetings

17. (1) The minutes of each meeting shall be recorded by the secretary and, after signature, filed, with reference to, among other things –

(a) the venue and date of the meeting;
(b) the namesof the members present;
(c) the names of the members absent and the reasons for their absence;
(d) the times of commencement and conclusion of the meeting and the date and venue of the next meeting;
(e) the names of other persons in attendance and of witnesses questioned; and
(f) the resolutions of the Commission.

(2) The minutes of each meeting shall be confirmed at the next meeting and signed by the chairman.

(3) Resolutions passed by a casting vote shall be specifically recorded as such and, where the Court is provided with resolutions, it shall also be indicated whether the resolution was passed by meansof a casting vote.

(4) The secretary shall bring all matters that have been held over from a previous meeting to the attention of the chairman.

(5) The public shall have access to the minutes of the Commission.

Transitional provision

18. Where a claim has been received by the Commission before the date of publication of these Rules, it shall be deemed to have been duly and validly lodged in terms of these Rules: Provided that the Regional Land Claims Commissioner having jurisdiction may –

(a) direct the claim to complete the prescribed form; and
(b) direct the claim to provide the Commission with any further information relevant to the application.

ANNEXURE A

COMMISSION ON RESTITUTION OF LAND RIGHTS

REGIONAL LAND CLAIMS COMMISSIONER

.....
.....
.....

LAND CLAIM FORM

The following information is required for the Commission on Restitution of Land Rights to process your claim. Please supply as much information as possible. Please indicate where the information is not available. The mor information you can supply, the more helpful it will be. Please note that the Commission is there to assist you, where needed.

Details of property/lanhd being claimed in terms of the Restitution of Land Rights Act, 1994 (Act No. 22 of 1994):

1. **Property description: Rural/Urban (Delite which is not applicable)**

1.1 If it is rural land, the portion(s), name(s) and number(s) of the farm and district in which it is situated

.....
.....

1.2 If it is urban land, the street address and erf no. which appears on the deeds description

.....
.....

2. **Which department/body acquired the property?** .....

2.1 In what year was it acquired .....

2.2 What was the amount of compensation paid with regard to the –

– property .....

– improvements .....

2.3 Was any land/housing allocated as compensation? .....

Remarks (additional information) .....

.....
.....
.....
.....
.....
.....

3. **Full particulars of person who lost the right in land:**

– Name/Community/Trust .....

– ID Number of individual claimant .....

– Male/Female (delete which is not applicable)

4. **Full particulars of applicant, if not the person who lost the right in land:**

Name/Community/Trust .....

Male/Female (delete which is not applicable)

If you are acting on behalfof a community/trust, please give your:

– Name .....

– ID Number .....

– Male/Female (delete which is not applicable)

– In what capacity are you acting? .....

5. **Do you know about any other family member that might have an interest or claim on the land?)**

5.1 If so, please give details .....
.....
.....
.....
.....
.....
.....

6. **Please give the reason for your claim. (If you need more space please attach a separate page)**
.....
.....
.....
.....
.....
.....

7. **Other evidence to substantiate your claim:**
.....
.....
.....
.....
.....
.....
.....
.....
.....

8. **Please attach the following documents where applicable and available to substantiate your claim(s):**

8.1 If you are the original owner who lost a right in land:

– Certified copy of your identity document.
– Certified copy of the deed which was held by you with regard to the land being claimed.

8.2 If you are a descendant of the person who has lost a right in land:

– Certified copy of your identify document and that of the person who has lost a right in land.

– Power of Attorney to act on his behalf or claim the land if the original person who lost a right in land is still alive.

– Certified copy of the deed which was held by the person who lost a right in the land being claimed.

8.3 Please attach any other document(s) which you wish, in support of your claim.

8.4 In case of inheritance through a will: (TESTATE)

– Certified copy of the will of the person who lost a right in land, or

– Certified copy of the final liquidation and distribution account as submitted to the Master of the Supreme Court

8.5 In case of inheritance without a will: (INTESTATE)

– Final liquidation and distribution account as submitted to the Master of Supreme Court, or

– A sworn statement from the executor stating your relation to the person who lost right in land and his/gher position with regard to any heirs

8.6 The written consent of all heirs with an interest in the claim, or if you are the sole heir a sworn statement stating this fact.

9. **Any information you would like to bring to the Commission's attention**

.....
.....
.....
.....
.....
.....
.....
.....

10. I (full name) .....
certify that the above mentioned information is correct to my knowledge.

Signature ..... Date .....

Place .....

11. Contact address .....
.....
.....
.....
.....

Telephone number .....

ANNEXURE B

RESTITUTION OF LAND RIGHTS ACT, 1994

ASSET SURVEY CERTIFICATE IN ACCORDANCE WITH RULE No. 14 PUBLISHED IN GOVERNMENT NOTICE No. ..... OF 1995

FILE REFERENCE:

A. PURPOSE OF SURVEY:

.....
.....
.....

B. PARTICULARS OF PROPERTY:

1. Owner .....
.....
.....

2. Title description of property:
.....
.....
.....
.....

3. District:
.....

4. Surface area:
.....

5. Topography:
.....
.....
.....

6. Type of farming and other activities:
.....
.....
.....
.....

C. IMPROVEMENTS:
(*When applicable give description, surface area, estimated value and amount)

(a) Residential unit(s):
.....
.....
.....

(b) Garage(s):
.....
.....
.....

(c) Shed(s):
.....
.....
.....

(d) Barn(s):
.....
.....
.....

(e) Milk stable/unit(s):
.....
.....
.....

(f) Engine room:
.....
.....
.....

(g) Working quarters:
.....
.....
.....

D. GENERAL

(a) Grazing
.....
.....
.....

(b) Dry land
.....
.....
.....
.....

(c) Irrigation land
.....
.....

(d) Fruit trees
.....
.....

(e) Plantations
.....
.....
.....
.....

(f) Business facilities
.....
.....
.....

(g) Structures in respect of water-supply
.....
.....

(h) Borehole and borehole equipment
.....
.....
.....

(i) Irrigation equipment
.....
.....
.....

(j) Any other type of improvement
.....
.....
.....

(k) Mining activities

.....

.....

.....

E. PARTICULARS OF PEOPLE WHO OCCUPY THE PROPERTY OR WHO ARE PRESENT ON THE PROPERTY:

E.

Name of person/occupant and members of his family who are dependent on him			Particulars of permission to occupy the property	Terms and conditions of occupation	Remarks
Name	Women	Children			

F. CERTIFICATE

The former is a complete list with regard to the situation on the property, and the particulars as given are to the best of my knowledge true and correct.

Place .....

Date .....

Signature of owner:

.....

Signature of representative of Commission:

.....

APPENDIX III

PROPOSED AMENDMENTS

A While the Court is granted the power to adjust the nature of the rights previously held by claimant, in terms of section 35(4), it may be necessary to amend the Act providing for a new subsection between subsections (6) and (7) of section 35:

(*a*) If the market value of any land or right in land –

(i) restored to a claimant is greater than the compensation that would have been payable to that claimant if the land or right in land had not been restored, or

(ii) retained by a private owner because of an order in terms of subsection 34(5)(*b*) is greater than the compensation that would have been payable to the owner if the land or rights had been expropriated for restitution,

the Court on application of the Commission, may place an incumbrance on the land or right in the amount of the excess or such part thereof as may be just.

(*b*) The order placing such an incumbrance shall include a reasonable rate of interest, and shall provide for amortization through periodic payments within the financial ability of the person becoming or remaining owner of the land or right.

(*c*) The Court may order the payments provided for to be made direct to the person entitled to compensation on account of the expropriation or non-restitution of the land or right as part of such compensation, or may order them made direct to the Commission and added to the funds available for the payment of compensation.

B Amendment to the existing section 34(1) of the Act with the current section 34(1) now becoming subsection 34(1)(*a*). The proposed subsection 34(1)(*b*) reads as follows:

Any person, may in respect of land which is owned by him or her, make an application to the Court for an order that the land in question or any right in it shall not be restored to any claimant or prospective claimant.

C In dealing with the administrative functions of the Commission, it may be necessary to enact an amendment as a new section between sections 16

and 17 to deal with the problem of coping with the volume of business before the Commission. It would provide for broader powers to deal with classes of cases by regulation.

Substantive Rule

The Commission, on application of the Minister, and with the approval of the Court, may make regulations applicable to classes of cases regarding:

(1) the circumstances under which certificates of feasibility will or will not be issued in terms of section 15,
(2) the circumstances under which orders of non-restitution will or will not be issued in terms of section 34,
(3) the manner of determining the compensation payable to a claimant to whom land or right in land cannot be restored, and
(4) the manner of determining the compensation payable to a person whose land or right in land is expropriated for purposes of restitution.

Such regulations shall be published in the *Gazette,* and the Minister, the Commission, and the Court shall exercise their respective powers in accordance therewith except when it is made to appear in a particular case that doing so would be inconsistent with the Final Constitution or with this Act.

APPENDIX IV

Additional Provisions of The Land Restitution and Reform Laws Amendment Act, 1996

Registrar to remove certain notes

23 Every registrar of deeds shall, upon the commencement of this Act, remove any note entered in his or her records in terms of section 11(6)(*b*) of the principal Act.

Interpretation of reference to judges of Supreme Court in laws

24 Unless it would in any particular case be inconsistent with the context or otherwise obviously be inappropriate, having regard to the objects of the principal Act, any reference in a law to a judge of the Supreme Court shall be construed as including a reference to a judge of the Land Claims Court established by section 22 of the principal Act.

Amendment of section 3 of Act 3 of 1996

25 Section 3 of the Land Reform (Labour Tenants) Act, 1996 (Act No. 3 of 1996), is hereby amended by the substitution for subsection (1) of the following subsection:

"(1) Notwithstanding the provisions of any other law, but subject to the provisions of subsection (2), a person who was a labour tenant on 2 June 1995 shall have the right with his or her family members **[to occupy and use that part of the farm in question]** –

(*a*) to occupy and use that part of the farm in question which he or she or his or her associate was using and occupying on that date; **[and]**

(*b*) to occupy and use that part of the farm in question the right to **[the]** occupation and use of which is restored to him or her in terms of this Act or any other law.".

Substitution of section 5 of Act 3 of 1996

26 The following section is hereby substituted for section 5 of the Land Reform (Labour Tenants) Act, 1996:

"Prohibition on eviction

5 Subject to the provisions of section 13 **[A]** a labour tenant or his or her associate may only be evicted in terms of an order of the Court issued under this Act.".

Amendment of section 17 of Act 3 of 1996

27 Section 17 of the Land Reform (Labour Tenants) Act, 1996, is hereby amended by the substitution in subsection (4) for the words preceding paragraph (*a*) of the following words:

"The owner of affected land shall within one calendar month of receipt of the notice referred to in subsection **[2]**(2)(*a*), inform the Director-General in writing –".

Amendment of section 18 of Act 3 of 1996

28 Section 18 of the Land Reform (Labour Tenants) Act, 1996, is hereby amended by the substitution for subsection (9) of the following subsection:

"(9) Any nomination referred to in subsection **[7]**(8) shall be in writing signed by all the parties, and submitted to the President of the Court.".

Amendment of section 19 of Act 3 of 1996

29 Section 19 of the Land Reform (Labour Tenants) Act, 1996, is hereby amended by the substitution in subsection (2) for paragraph (*a*) of the following paragraph:

"(*a*) a person nominated by the parties in terms of section **[18(7)]**18(8); or".

Amendment of section 30 of Act 3 of 1996

30 Section 30 of the Land Reform (Labour Tenants) Act, 1996, is hereby amended by the substitution for subsection (1) of the following subsection:

"(1) The provisions of sections 22, 24, 25, 28, 28B, 28C, 28D, 28E, 28F, 28G, 28H, 28J, 28K, 28L, 28M, 28N, 29, 30, 31, 32, 37 and 38 of the Restitution of Land Rights Act, 1994 (Act No. 22 of 1994), shall apply *mutatis mutandis* to the performance by the Court of its functions in terms of this Act: Provided that the reference to the Commission on Restitution of land Rights in section 32(3) of the said Act shall for the purposes of this Act be deemed to be a reference to the Director-General.".

Substitution of section 35 of Act 3 of 1996

31 The following section is hereby substituted for section 35 of the Land Reform (Labour Tenants) Act, 1996:

> **"Effect of order of Court**
>
> **35** For the purposes of the Deeds Registries Act, 1937 (Act No. 47 of 1937), an order of the Court shall have the same force as an order of the Supreme Court.".

Amendment of section 39 of Act 3 of 1996

32 Section 39 of the Land Reform (Labour Tenants) Act, 1996, is hereby amended by the substitution for the words preceding paragraph (*a*) of the following words:

> "The right of a labour tenant to apply **[to buy]** for an award of land or a right in land in terms of this Act –".

Short title

33 This Act shall be called the Land Restitution and Reform Laws Amendment Act, 1996.

ALPHABETICAL WORD INDEX

Act(s)

Asiatic Land Tenure and Representation of Indians Act 1946
– effects of "Pegging Act made permanent" 6
Black (Urban Areas) Act 1945 – locations set aside 15
– repealed 1986 19
Coloured Persons' Rights Bill 1925 – excised Africans 3
Coloured Persons' Settlement Act 1946 – provided settlement areas 6
Expropriation Act 1975 12
– expropriation, definition of 46
Free Settlement Areas Act 1988 20
Group Areas Act 1950 6
1966 9
– allocated areas for all raced 16
– company, ownership by 18
– compensation paid, inadequacy of 18
– majority moved Coloured, Indian 17
– repealed 1991 20
Land Reform (Labour Tenants) Act 1996
– amendments to 183
Native Land Act 1913 – designated land exclusively for Blacks 10
– introduced colour bar 2
– prohibited land purchase outside areas 10
– repealed 1991 20
– restricted movements 4
Native Trust and Land Act 1936
– land for homelands 5
– principle of "grand apartheid" 9
– "released" more land 11
– repealed 1991 20
Representation of Natives Act 1935 3
Restitution of Land Rights Act, 1994 – see **"Restitution"**
South Africa Act 1909 – franchise qualifications 2
Trading and Occupation of Land Restriction Act 1943
– to freeze Indian holdings 5

Advisory Commission of Land Allocation

established 1991 20
mandate extended 1993 20

Affirmative Action

essential for action of equality 26

African(s)

franchise – not beyond Cape 2

	– qualifications in Cape		2
	– to remain on Cape roll		4
Group Areas Act	– removals		17
land	– freehold	– allocation and administration	14
	– labour tenancy		15
	– limited ownership		4
	– quitrent	– administration by Chief	
		– Commissioner	14
		– could be expropriated	14
		– no females	13
	– rural	– non-Blacks: division	10
	– urban	– non-Blacks: division	15
	– white fears		4
locations set aside			15
movement	– "pass laws" abolished 1986		20
	– restricted by Land Act		4

African National Congress (ANC)

alliance with Indian Congress 1946		6
Congress Alliance	– joined, 1952	6
constitutional guidelines published 1988		8
negotiated with Smuts Government		5
produced "African Claims"		5
unbanned 1990		8
won election 1994		8

Apartheid

dismantling positively advocated in Constitution	31
dispossession of land a prominent feature	31

Assets

inventory to be provided		173
survey certificate	– form	178

Bakubung-Monnakgotla tribe

expropriation, no compensation	18

Bill of Rights

democratic values incorporated into Constitution		23
Draft Bill 1993		20
	– provisions	21, 22

Black(s) – see "African(s)"

Border strips 17

Chief Land Claims Commissioner
– definition 167
– report to 173

Claim(s) – see **"Restitution of Land Rights Act"**

Coloured(s)
franchise – qualifications in Cape 2
– removed from common roll 1956 4
Group Areas Act – removals 17
tricameral dispensation 1983 7

Commission on Restitution of Land Rights
administrative work, performance of 133
annual report to Parliament 71
criteria for acceptance of claims 168
definition 128, 167
establishment of 69, 130
expenditure 71
functions, generally 131
– delegation of 132
liability of members 71
meetings of 130
– decision by majority of members 130
– minutes 174
– quorum, what constitutes 130
– rules 174
powers – administrative 69
– advisory 69
– amendments suggested 119
– delegation 70, 132
– discretionary 69
– investigative 69
procedure – rules, general 70, 167
Regional Land Claims Commissioner
– investigations by 169
– record to be kept 171
– request for information 172
Rules – assets, inventory of 173
– claim form 175
– claims, criteria for acceptance 168
– claims, notice of acceptance 169
– claims, particulars to be recorded 171
– claims received before Rules published 174
– filing of documents 172
– investigations by Land Claims Commissioner 169
– lodgement of claims 167
– meetings 174

– minutes of 174
– notice of s. 11(1) claims 172
– numbers for subsequent documents 172
– numbers to be allocated 171
– powers regarding investigation 170
– record to be kept 171
– report to Chief Land Claims Commissioner 173
secretary – definition 167
see also under **"Restitution of Land Rights Act"**

Constitution, Final, 1996
articulates role of Bill of Rights 23
equality clause 24
equality pivotal 29
interpretation 29
– purposive approach 30
positive action acknowledged 31
product of compromise 29

Constitution, Interim
product of negotiated settlement 28

Controlled Areas 16

Convention for a Democratic South Africa (CODESA)
held in 1991 8

Defined Areas 17

De Klerk
released Mandela 1990 8
unbanned ANC 1990 8

Equality
differentiation in order 30
– not malign 30
principle in Constitution 26
racial, gender 27
redressing of in Interim Constitution 31
through restitution of land rights 30
value foundation 28

Equality, substantial
established in Section 9(2) 25

Equality Clause
Final Constitution: Section 9 24

substantively established 25

Escrow accounts
establishment proposed 117

Evidence
see under **"Land Claims Court – evidence"**
see also under **"Land Claims Court – witnesses"**

Franchise
historically – Africans and Coloureds 2
Natal – Indians 2

Freedom Charter
produced 1955 6

Future border strips 17

Future group areas 17

Hertzog
confirmed segregation 3
excised Africans from Cape roll 3

Indian(s)
first arrivals 1
franchise – Natal 2
freezing of holdings 5
– also in Transvaal 1939 6
Group Areas Act – removals 17
tricameral dispensation 1983 7

Influx Control
abolished 1986 19
introduced by National Party 15

Khoi people 1

Land Claims Court
administration – expenditure in connection with 154
appeals 68
– application for leave to Appellate Division 163, 164
– not without leave 163
– powers of Court on hearing of 156
– to Appellate Division 163
applications, pre-emptive 64

assessors	– absence of	148
	– appointment of	74, 147
	– death of	148
	– member of Court	147
	– qualifications	74, 147
	– questions of law – not empowered	148
	– removal, suspension of	73, 147
	– remuneration of	74, 147
	– two maximum	148
	– when required	147
claims, referral of		60
	– procedures	61
decisions public		68, 165
default judgment	– may grant	75, 151
definition		167
document, thing	– production of	152
establishment of		72, 144
evidence	– admissibility of	60, 157
	– expert competent	157
	– hearsay admissible	157
	– interrogatories	75
	– rules governing	74
examination		153
factors	– to be considered by court	159
guidelines	– under Act	62
	– under constitution	63
instituted by Restitution of Land Rights Act		32
interpretations		41
judges	– absence of	148
	– acting, appointment of	145
	– additional, appointment of	145
	– conditions of employment	73, 146
	– death of	148
	– may not be summoned in civil action	75, 150
	– exception	150
	– oath of office	146
	– qualifications of	72, 145
	– removal, suspension of	73, 146
	– remuneration	73, 146
jurisdiction of		144
land utilised, unutilised, developed, undeveloped		43, 44
legal representation		60
locus standi		60
orders		65
	– binding	160
	– conditions may be set	161
	– patent errors, correction of	162

– variation, rescission 68, 162
powers 65, 66, 67, 72, 144
– may refer back to Commission 74
President of Court – absence, appointment of acting President 145
– appointment of 144
– empowered to make rules 74
pre-trial conference – can be convened 74, 158
principles for compensation – 41
– current use of property 42
– guidelines for undeveloped 44
– history of acquisition and use 45
– method of financing 46
– purchased, inherited, gift 45
– taxation 46
– time in possession 46
– market value 46
– Expropriation Act 46
– guidelines 47, 48
– limited by funds 51
– "willing" parties 47
– purpose of expropriation 50
– Italian, German examples 51
– just and equitable 51
– state investment, extent 49
– assistance to farmers 49
– improvements 49
procedure 73
– rules governing 74, 146, 158
– to be published 158
proceedings – in open Court 149
process – scope and execution of 155
provided for in Interim Constitution 32
referee – effect of accepted report 149
– must enquire and report 149
– powers 149
– referral of certain matters to 149
– remuneration 150
– witnesses, procuring attendance 149
referral – back to Commission 158
registrars, assistants – appointment of 154
researchers – appointment of 154
– remuneration of 154
restoration – to be ruled on before final determination 159
reviews 68
Rules 73
– aimed at expeditious hearing 74
– to be made 146

	Supreme Court Rules in interim		146
seal(s) of			149
seat and hearings			59, 147
sheriff, deputy	– duties, functions, powers		155
	– execution		156
		–offences relating to	156
single judge			59
witnesses	– absence of	–interrogatories	153
	– arrest of		151
	– attendance, securing of		151
	– detention of		151
	– evasion of service		
		–competent sentence	152
		–penalties	152
	– evidence	–refusal to give	152
	– fees		156
	– interrogatories	–evidential value	15
		–failure to appear	153
		–procedure	153

see also **"Restitution of Land Rights Act"**

Land Commission
- instituted by Restitution of Land Rights Act 32
- must deal with claims 33
- provided for the Interim Constitution 32
- settles preliminary questions 33

Land reform
- State's commitment – Section 25 (5) 40

Land Reform Act
- Hawaii 39
- South Africa 40

Land Restoration
- initially in Equality Clause 32
- Property Clause finally 32

Land Acquisition Act
- Malawi 50
- Zambia 42

Legality, priciple of 39

Limitations Clause
- text 38

Malan
election manifesto based on Apartheid 6

Malawi
Lands Acquisition Act, 1971 50

Mandela Nelson
President 1994 8
released 1990 8

Mediation – definition 167
– see also under **"Restitution of Land Rights Act"**

National Party
Free settlement Areas Act enacted 1988 20
influx control 15
land rights to be exercised in homelands 7
negotiation process – white farmers 115
equality clause 115

Native(s) – see **"African(s)"**

Numbers
of claims, to be allocated 171
of subsequent documents 172

Pan-Africanist Congress (P A C)
unbanned 1990 9

Property Clause
contains land restoration principle 32
negotiated during last stages 115
result of compromise 36
text 37

Referee – see **"Land Claims Court"**

Regional Land Claims Commissioner
– definition 167
– investigations by 169
– powers regarding investigation 170
– register, shall keep 170

Register – of claims to be kept 170
– particulars to be recorded 171

Register of public land
claimants may inspect 75

compiled by Minister 75

Restitution of Land Rights Act

Certificate of Feasibility
- procedure and requirements 141
- to be issued byMinister 140

claimant
- definition 127
- qualifications of 53
- transfer duty and fees 166

claim(s)
- amendment of 136
- claim form 175
- criteria for acceptance of 168
- definition 127
- enforcement of 129
- foms for 134
- lodgement of 54, 134
  - –procedure 168
- –nominees, against 54, 129
- –notice of 55, 56
- –notice of acceptance of 169
- notice of s. 11 (1) claims 172
- procedure after 134
- referral of to Court 139
- Rules, received before publication of 174
- withdrawal of 136

commencement 166

Commission
- assistants
  - *ad hoc* appointments 133
  - remuneration 133
- definition 128
- establishment of 130
- expenditure of 143
  - annual estimate 143
- functions, general 131
  - delegation of 132
- –mediation can be ordered 138
- –meetings of 130
- –members
  - limited liability 143
- powers 131
  - delegation of 132
  - of investigation 137
- report annually 143
- rules regarding procedure 142
- see also **"Comission"**

community
- definition 128

Court
- definition 128
- see also **"Land Claims Court"**

cut-off date: 19 June 1913 32

day – definition 128
direct descendant – definition 54, 128
feasibility, certificate of 58
– acquisition, restoration 58
– Minister's decision public document 59
– submissions to Minister 58
Land Commission – powers of investigation 56
land claims commissioner
– may assist claimant 57
– may dismiss frivolous claims 55
– must notify interested parties 55
– powers of condonation 55
Land Claims Court – appeals 68
– applications, pre-emptive 64
– claims, referral of 60
– procedures 61
decisions public 68
– evidence, admissibility of 60
– guidelines – under Act 62
– under constitution 63
– legal representation 60
– *locus standi* 60
– Orders 65
– variation, rescission 68
– powers 65, 66, 67
– reviews 68
– seat and hearings 59
– single judge 59
– see also **"Land Claims Court"**
liability – limitation of members of Commission 143
mediation – available when claims conflict 57, 138
– direction by written notice 57
mediator – appointed by Chief Land Claims Commissioner 57
– to chair first meeting 138
Minister – definition 128
nominee(s) – claims against 129
offences and penalties 142
organisation – definition 128
person – definition 128
person or community may qualify 32
prescribed – definition 128
presiding judge – definition 128
procedure, general 53
– after lodgement 54
public land – definition 128
register of public land – to be compiled by Minister 165
regulations – Minister may make 165

restitution	– enforcement of claim for	129
right in land	– definition	128
short title		168
Supreme Court	– definition	128
the rules	– definition	128
this Act	– definition	128

Restitution of rights
- criteria to be considered 116
- problems of interpretation and application 116

Segregation, racial
- early policy 1

South African Communist Party
- unbanned 1990 9

South African Development Trust
- owner of all land for Blacks 11
- power to expropiate land 12

South African Native National Congress
- became ANC 1923 3
- formed 1912 2

Specified Areas 17

Use Areas 17

Van Riebeeck, Jan 1

War
- Anglo-Boer 1

Witnesses
- see under **"Land Claims Court"**

Zambia
- Lands Acquisition Act 42