



**IN THE LAND CLAIMS COURT OF SOUTH AFRICA
(HELD AT RANDBURG)**

Before: MEER AJP, GILDENHUYS J, BERTELSMANN J and SARDIWALLA AJ

Heard on: 19-23 September 2016

Delivered on: 17 November 2016

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES / ~~NO~~
 (2) OF INTEREST TO OTHER JUDGES: YES / NO
 (3) REVISED: YES / NO

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DATE

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SIGNATURE

Case No: LCC01/2009

In the matter between:

AMAQAMU COMMUNITY CONCERNING:

VARIOUS FARMS IN CAMPERDOWN DISTRICT MUNICIPAL AREA

and in the matter between:

Case No: LCC03/2009

EMAKHASANENI COMMUNITY AND ANOTHER

APPLICANTS

and

THE MINISTER OF RURAL DEVELOPMENT AND LAND

REFORM AND OTHERS

RESPONDENTS

and

Case No: LCC173/2014

In the matter between:

QWABE COMMUNITY

CLAIMANTS/PLAINTIFF

And

REGIONAL LAND CLAIMS COMMISSIONER

FOR KWAZULU.NATAL

1ST DEFENDANT

THE MINISTER OF RURAL DEVELOPMENT

AND LAND REFORM

2ND DEFENDANT

MAIDSTONE PLANTERS PRO-ACTIVE

LANDOWNERS ASSOCIATION

3RD DEFENDANT

TONGAAT HULETT LIMITED

4TH DEFENDANT

and

LAND ACCESS MOVEMENT OF SOUTH AFRICA

ASSOCIATION FOR RURAL ADVANCEMENT

NKUZI DEVELOPMENT ASSOCIATION

MODDERVLEI COMMUNAL PROPERTY ASSOCIATION

MAKULEKE COMMUNAL PROPERTY ASSOCIATION

POPELA COMMUNAL PROPERTY ASSOCIATION

AFRISAKE NPC

as *AMICI CURIAE*

JUDGMENT

1. The Constitution represents a radical break with South Africa's repressive and racist past. Establishing the foundational values of human dignity, equality and the rule of law, it also provides in express terms for the redress of past injustices caused by the dispossession of a large part of the population of land by the privileged minority. This fundamental right to restitution is defined in section 25 (7) of the Constitution. ¹

¹ Section 25 reads:

Property

1. *No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.*
2. *Property may be expropriated only in terms of law of general application*
 - a. *for a public purpose or in the public interest; and*
 - b. *subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.*
3. *The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including*
 - a. *the current use of the property;*
 - b. *the history of the acquisition and use of the property;*
 - c. *the market value of the property;*
 - d. *the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and*
 - e. *the purpose of the expropriation.*
4. *For the purposes of this section :*

2. The Act Parliament had to place on the statute book to achieve the objective of redressing the injustices of the racially driven division of land perpetrated by former regimes is the Restitution of Land Rights Act 22 of 1994 ('RA'). Its preamble declares that it aims:

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

3. Section (2) (1) (e) of the RA determines that persons (or their descendants) and communities who were dispossessed of land after 1913 had to lodge any claims for restitution of land rights on or before the 31st December 1998. Many thousands of claims were filed prior to this cut-off date.

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

b. property is not limited to land.

5. *The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.*
6. *A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.*
7. *A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.*
8. *No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).*
9. *Parliament must enact the legislation referred to in subsection (6).*

4. Delivery in terms of finalising these claims has been and continues to be painfully slow. The inefficiency of the Commission² and its inability to meet the challenges of finalising what are highly emotive and emotional land claims have repeatedly been bewailed in this, the Land Claims Court (“this Court”). Twenty-two years ago the victims of apartheid legislation and forced removals were invited to lodge restitution claims, thereby exercising a constitutionally enshrined right to redress. Thousands of communities and individuals documented their claims to reclaim the soil their fathers and grandmothers had tilled and upon which their cattle had grazed. Just over two decades have passed, and still the Commission has some 7419 claims³, including several large community claims, the processing of which has yet to be finalized, if not to commence. Thousands of claimants have gone to their graves without having seen the fulfilment of the hope the Constitution created by the establishment of the right to restitution. The countless failures on the part of the Commission to honour its constitutional obligations as a result of a combination of insufficient funding, delay, procrastination and inefficiency are a blot on the country’s democratic dispensation and a stark example of justice delayed causing justice to be denied.

5. The RA was amended on 1 July 2014 by the Restitution of Land Rights Amendment Act 15 of 2014 (‘the AA’). The AA revived the right to advance claims for the restitution of rights in land, which originally had to be lodged by 31 December 1998. Restitution claims could now be lodged again from the inception of the AA until 30 June 2019.

² The Commission on the Restitution of Land Rights created by section 4 of the RA.

³ As officially announced by the Commission after the Constitutional Court’s (‘CC’) judgment invalidating the Restitution of Land Rights Amendment Act 15 of 2014 in a media statement published on September 16, 2016.

6. The following sections of the RA were affected by the passing of the AA:

6.1 Section 2 (1) (e): The final date upon which claims to land could be lodged was amended from 31 December 1998 to 30th June 1919;

6.2 Section 6 (1): A new subsection (g)⁴ was added, obliging the Commission to prioritise the finalisation of claims that were in existence and still awaiting finalisation when the AA was passed ('old claims');

6.3 A further new subsection 6 (1A) was introduced, making provision for a national register of claims filed after July 2014;

6.4 Section 11 (1): Provision was made for the publication of claims newly filed both in the media with national coverage and those circulating in the province affected by the claim;

6.5 Section 12: The final date upon which the Commission could allow the lodging of a claim pursuant to a notice having been published in terms of section 12 (4)⁵ was amended in section 12 (5)⁶ to 30 June 2019;

6.6 Section 17 (2): A new criminal offence was added to punish any attempt or action to prevent or obstruct any person from pursuing any rights under the RA, or to unduly influence such a person not to pursue such rights;

⁴ (g) ensure that priority is given to claims lodged not later than 31 December 1998 and which were not finalized at the date of the commencement of the Restitution of Land Rights Amendment Act, 2014

⁵ 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, to lodge claims within a period specified in such notice.

⁶ 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 31 December 1998

6.7 Section 22: A new section 22A was added, which dealt with the appointment of judges to the Court;

6.8 Section 23, 26 and 26A of the RA were repealed;

6.9 Section 38B and 38D were amended to provide for direct access to the Court prior to the new cut-off date of 30 June 2019; and

6.10 Section 42D: The cut-off date before which the Minister could agree to acquire any land was amended. In addition, the Minister was obliged to take into account all factors enumerated in section 33⁷ of the RA before taking such a decision. A further clause provided for a delegation of the Minister's powers conferred upon her or him by the section to the Director

⁷ 33. *Factors to be taken into account by Court*

In considering its decision in any particular matter the Court shall have regard to the following factors:

(a) The desirability of providing for restitution of rights in land to any person or community dispossessed as a result of past racially discriminatory laws or practices;

(b) the desirability of remedying past violations of human rights;

(c) the requirements of equity and justice;

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

(d) the desirability of avoiding major social disruption;

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

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

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

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

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

General or to the Chief Land Claims Commissioner or a Regional Land Claims Commissioner.

7. The AA did not ring fence any claims finalized prior to its introduction; nor any claims pending before this Court or awaiting administrative finalisation thereof by the Commission. It merely introduced sub-section 6 (1) (g) into the RA obliging the Commission to 'give priority' to existing claims lodged not later than 31 December 1998, hereafter referred to as 'old claims'.

8. The implications of the re-opening of the period to introduce new claims for restitution for another five years were significant. Claims already finalized by either the Commission or the Court were not protected from new claims filed since July 2014. Claimants, many of them communities who had waited for decades to obtain redress, could suddenly be faced with the potential loss of the land they had eventually received, through a new claim being lodged over the same land. The Commission, having at no stage of its existence been able to 'get on top' of the claims it had accepted by the end of 1998, was swamped by between 75 000 and 80 000 new claims⁸. Given these facts, one shudders to think how long the disposal of the newly introduced claims might take. A vague instruction to the Commission to 'give priority' to the existing non-finalized claims in the amended section 6 (1) (g) did in no manner whatsoever address the administrative nightmare facing the Commission in having to deal with new claims competing with pending claims or claims already finalized, to say nothing of the effect new competing claims could and did have upon matters pending before the Court.

⁸ See the CC's *LAMOSIA judgment* par [85].

9. The position of the landowners, whose immovable property was and remained the object of a restitution claim, already unenviable at the best of times, was prejudiced further. As matters stood once an old claim, duly lodged, was published by the Regional Land Claims Commissioner, the landowner's freedom to enter into transactions in respect of the property was curtailed significantly. No sale, development, exchange, donation, lease, subdivision or rezoning of land affected by any claim could be embarked upon without one month's prior notice to the Regional Land Claims Commissioner before the claim was finally settled or adjudicated upon. Raising capital by offering the affected land as security presented a challenge because financial institutions were reluctant to accept the security of an immovable property subject to a claim. Existing improvements had to be kept intact and preserved unless the Regional Land Claims Commissioner was satisfied that such removal or destruction was *bona fide* and not intended to prejudice any claimant or persons residing on the land. (RA section 11(7) and (8)⁹). This impediment still

⁹ (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, rezone or develop 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, where such notice was not given in respect of

(i) any sale, exchange, donation, lease, subdivision or rezoning of land and the Court is satisfied that such sale, exchange, donation, lease, subdivision or rezoning was not done in good faith, the Court may set aside such sale, exchange, donation, lease, subdivision or rezoning or grant any other order it deems fit;

(ii) any development of land and the Court is satisfied that such development was not done in good faith, the court may grant any order it deems fit;

(b) no claimant who occupied 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;

applies to all pending restitution claims. The AA would prolong the restrictions imposed upon the landowners' freedom to contract and to deal with their assets, and the consequent limitation of their farming operations, for many more years to come.

10. The financial implications of the re-opening of the claims to both the landowners and the public purse must be enormous.

11. The AA was approved by the National Council of Provinces after seemingly insufficient effort to consult the landowners, or successful claimants under the RA who might be affected by the introduction of the AA, or their representative organisations. Successful claimants who obtained land under the RA might now be affected by new claims.

12. Against this background the applicants in *Land Access Movement of South Africa and Others v Chairperson of the National Council of Provinces and Others*¹⁰ ('LAMOSA') approached the Constitutional Court ('CC') for an order declaring the AA invalid. The challenge of the civic organisations and Community

(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.

¹⁰ (CCT40/15) [2016] ZACC 22; 2016 (5) SA 635 (CC)

Property associations that joined forces in this application was based on two grounds:

- a).The National Council of Provinces and all or some of the Provincial Legislatures failed to conduct appropriate and sufficient consultations to ensure adequate public involvement prior to approving the AA as demanded by section 72 (1) (a)¹¹ and 118 (1)(a)¹² of the Constitution respectively; and
- b). Section 6 (1) (g), as introduced by the AA, was impermissibly vague and failed to adequately protect existing claimants.

13. The applicants raised the alleged failure to consider the position of the landowners, successful claimants and the general public before approving the AA as one of the principal planks for the submission that the first respondent had failed to observe the Constitution. They submitted that extensive consultations should have been conducted with new landowners to whom land has been restored before exposing them to the risk of new claims over the land they had recently become owners of.

14. The applicants' main ground of attack before the CC was, as stated in par 12 above, that the National Council of Provinces failed to observe the duty imposed

¹¹. The National Council of Provinces must

(a) facilitate public involvement in the legislative and other processes of the Council and its committees...

¹² A provincial legislature must :

(a) facilitate public involvement in the legislative and other processes of the legislature and its committees

upon it by the Constitution to facilitate adequate public participation in its legislative process before approving the AA. The CC has exclusive jurisdiction to adjudicate an alleged failure by Parliament to observe the Constitution.¹³ A party relying upon this cause of action must approach the CC directly. The applicants' alternative cause of action, that the AA's section 6 (1) (g) was impermissibly vague, could only be placed before the CC by an application for direct access. A motion to this effect was duly submitted.

15. The Constitutional Court upheld the applicants' first cause of action in respect of which it exercised its exclusive jurisdiction.

16. The Constitutional Court found that there had indeed been insufficient engagement with the public by the National Council of Provinces prior to approving the AA. It criticised the manner in which the public consultation process had been conducted at provincial level.¹⁴ It ruled that the AA was therefore invalid.

¹³ Section 167 (4) of the Constitution.

¹⁴ *First, from start to finish, the provinces had less than one calendar month to process fully a complex piece of legislation with profound social, economic and legal consequences for the public. The timeline gave the provinces a mere three to five calendar days to notify the public of the hearings, from the date the Provincial Legislatures were briefed until the date the public hearings commenced. The provinces had only eight calendar days to conduct the hearings, consider public comments and confer appropriate negotiating mandates, from the start of the hearings until the negotiating mandate meeting [para 17].*

THE CONSEQUENCE OF A STATUTE'S INVALIDITY

17. Once a statute is declared invalid it ceases to have any legal consequences¹⁵, everything done on the strength thereof is normally rendered invalid as well. The RA must therefore be read as though the AA was never enacted; subject to any qualification the CC may incorporate in its order invalidating the latter. As the Court put it in *LAMOSASA*¹⁶:

If the Court were to declare the AA invalid without limiting the retrospective effect of the declaration, the lodged new applications would cease to exist. The new applicants' right to restitution would be extinguished with the AA because the right to restitution in section 25(7) only exists "to the extent provided by an Act of Parliament".

18. The CC emphasized the constitutional significance of the restitution of land rights generally and the AA in particular¹⁷. Allowing the claims put forward in good faith since July 2014 to be extinguished would be unfair and prejudicial to the new claimants. The Court therefore exercised its powers in terms of section 172¹⁸ of the

¹⁵ *Cross-Border Road Transport Agency v Central African Road Services (Pty) Ltd and Another (Road Transport Association as Amicus Curiae)* 2015 (5) SA 370 (CC);(2015 (7) BCLR 761 (CC) at para [13] and the authorities there cited

¹⁶ Para [86]

¹⁷ *the subject to which the right relates touches nerves that continue to be raw after many decades of dispossession. The importance of the right to restitution, therefore, cannot be overstated. Restitution of land rights equals restoration of dignity. The sudden availability of land – a commodity which was pie in the sky for many – also facilitates the enjoyment of other constitutional rights. Families which – because of lack of land – lived in overcrowded shelters will be afforded an opportunity to enjoy privacy. This is also closely linked to the enjoyment of the right of access to housing. Lack of land results in unacceptably high levels of population density. This in turn does not conduce to a healthy environment. Restored land affords the recipients a wholesome environment. Compensation under the amended Restitution Act is also of great significance.* (Para [63]. (Footnotes omitted)

¹⁸ 1. *When deciding a constitutional matter within its power, a court*
a. must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and

b. may make any order that is just and equitable, including

Constitution to fashion a solution that would allow the new claims to continue to exist pending a re-enactment of the AA, or an intervention by the CC itself should Parliament fail to re-enact within a period of two years. It expressed its intention to keep new claims in existence as follows:

[86] In the circumstances, it seems unjust to invalidate the claims that have been lodged already. Section 172(1)(b)(i) of the Constitution gives this Court a discretion to make a just and equitable order, including an order limiting the retrospective effect of the declaration of invalidity. I consider it to be just and equitable that the order of invalidity should take effect from the date of judgment. That will leave new applications already lodged when judgment is handed down intact. If the Court were to declare the Amendment Act invalid without limiting the retrospective effect of the declaration, the lodged new applications would cease to exist. The new applicants' right to restitution would be extinguished with the AA because the right to restitution in section 25(7) only exists "to the extent provided by an Act of Parliament".

[87] The applicants are asking for a suspension of the declaration of invalidity for 18 months, with accompanying prayers for: a mandamus that the Commission continues to settle or refer to the Land Claims Court all land restitution claims filed by 31 December 1998, notwithstanding that a claim has been lodged under the amended Restitution Act in respect of the same land; the grant of permission to the Commissioner to continue accepting new applications under the amended Restitution Act; and an interdict that claims lodged under the amended Restitution Act not be investigated or processed in any manner.

[88] I am loath (to) grant the suspension prayed for. That is so because it will have the effect of heaping more new applications on the Commissioner when there are

i. an order limiting the retrospective effect of the declaration of invalidity; and

ii. an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

2. a. The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.

b. A court which makes an order of constitutional invalidity may grant a temporary interdict or other temporary relief to a party, or may adjourn the proceedings, pending a decision of the Constitutional Court on the validity of that Act or conduct.

c. National legislation must provide for the referral of an order of constitutional invalidity to the Constitutional Court.

d. Any person or organ of state with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order of constitutional invalidity by a court in terms of this subsection.

difficulties regarding how to handle those that have been lodged already. The prospective declaration of invalidity I propose means no new applications will continue being filed after judgment, which would have been the case if we were to suspend the declaration of invalidity. In a manner of speaking, all affected parties get something. First, no further new applications can be lodged, thus diminishing the number of claims filed under the impugned Act. This ameliorates the situation that troubles the applicants. Second, new applications that have already been lodged are not invalidated.

[89] In the face of the prospective order of invalidity, a question arises as to when and how the preserved new claims that compete with old claims will be considered. The effect of the prospective nature of the declaration of invalidity is to keep alive the contentious section 6(1)(g) of the Restitution Act insofar as the disposal of the old and preserved new claims is concerned. In terms of this section the Commission must "ensure that priority is given" to old claims. This raises all the problems that the applicants are complaining about and brings about uncertainty that may be prejudicial to claimants whose claims were lodged by 31 December 1998. Because the AA has been declared invalid in its entirety, I do not find it necessary to grapple with what exactly section 6(1)(g) means merely for purposes of how it should apply to old and preserved new claims. It seems to me that a just and equitable remedy is to interdict the settlement, and referral to the Land Claims Court, of all new claims, whether competing with the old or not. Our wide remedial power under section 172(1)(b) of the Constitution permits us to do so. Even though the new claims have been kept alive, the reality is that the Restitution Act under which they were lodged has been found to be invalid. The interdict is consonant with this reality. In the face of the declaration of invalidity, there cannot be much cause for complaint for keeping the new applications in abeyance. Also, the question how new claims should be dealt with whilst there are outstanding old claims is fraught with imponderables. It is best left to the Legislature to resolve.

[90] It is not inconceivable that – because of a shift in government policy or any other reason – Parliament may decide not to re enact an amending Act, or only do so after many years. For that reason, it becomes necessary to make provision for what should become of the interdict against the processing, referral to Court or finalisation of new claims by the Commission. It seems fitting that if, when a period of 24 months elapses, Parliament shall not have passed the envisaged amending legislation, the Chief Land Claims Commissioner must be directed to approach us for appropriate relief on the settlement, and referral to the Land Claims Court of outstanding new claims. Other parties to this application or any person with a direct and substantial interest in its outcome are at liberty to seek that same relief. (Footnotes omitted).

19. The Court's order ('the Order'), following immediately after the above paragraphs, is couched in the following terms:

The following order is made:

1. It is declared that Parliament failed to satisfy its obligation to facilitate public involvement in accordance with section 72(1) (a) of the Constitution.
2. The Restitution of Land Rights Amendment Act 15 of 2014 is declared invalid.
3. The declaration of invalidity in paragraph 2 takes effect from the date of this judgment.

4. Pending the re-enactment by Parliament of an Act re-opening the period of lodgement of land claims envisaged in section 25(7) of the Constitution, the Commission on Restitution of Land Rights, represented in these proceedings by the Chief Land Claims Commissioner (Commission), is interdicted from processing in any manner whatsoever land claims lodged from 1 July 2014.

5. The interdict in paragraph 4 does not apply to the receipt and acknowledgement of receipt of land claims in terms of section (6)(1)(a) of the Restitution of Land Rights Act 22 of 1994.

6. Should the processing, including referral to the Land Claims Court, of all land claims lodged by 31 December 1998 be finalized before the re-enactment of the Act referred to in paragraph 4 above, the Commission may process land claims lodged from 1 July 2014.

7. In the event that Parliament does not re-enact the Act envisaged in paragraph 4 within 24 months from the date of this order, the Chief Land Claims Commissioner must, and any other party to this application or person with a direct and substantial interest in this order may, apply to this Court within two months after that period has elapsed for an appropriate order on the processing of land claims lodged from 1 July 2014.

8. The National Council of Provinces must pay the applicants' costs, including costs of two counsel.

20. This Order has raised significant questions as to how this Court should proceed with old claims (filed prior to 31 December 1998), that have been referred to this Court for determination, but are, or may be affected by new claims filed after July 2014 ('new claims'). The Order is silent on this aspect.

21. Accordingly the Acting Judge President convened a joint sitting of two cases currently before this Court in which there are new claims in competition with old claims to obtain clarity on the following issues¹⁹:

¹⁹ The full directive issued by the Acting Judge President reads:

1. *In the light of the recent Judgment of the Constitutional Court in the matter of Land Access Movement of South Africa and Others v Chairperson of the National Council of Provinces and Others (CCT40/15) [2016] ZACC 22 (28 July 2016), there will be a combined hearing in the matters of AmaQamu Community concerning: Various farms in Camperdown District Municipal area LCC01/2009 and Emakhaseneni Community and Another v The Minister of Rural Development and Land Reform and Others LCC03/2009. The hearing will take place at the Land Claims Court in Randburg on 19 – 23 September 2016.*

The status of competing claims lodged after 1 July 2014 in the light of the CC judgment in the *Land Access Movement of South Africa and Others v Chairperson of the National Council of Provinces and Others (LAMOSA)*;

and

The effect of the judgment in *Land Access Movement* case²⁰ on the adjudication of the pending land restitution claims lodged by 31 December 1998, in cases where competing land restitution claims have been lodged on or after 1 July 2014 until 28 July 2016.

22. A third matter pending before the Court, that of the *Qwabe Community*, was later added to the combined hearing at the request of the landowners involved in it. All parties involved in the three matters, as well as a number of interested parties,

2. *The following issues will be adjudicated at the aforementioned combined hearing:*

2.1 *The status of competing claims lodged after 1 July 2014 in the light of the Constitutional Court judgment in the Land Access Movement of South Africa and Others v Chairperson of the National Council of Provinces and Others (CCt40/15) [2016] ZACC 22 (28 July 2016);*

2.2 *The effect of the judgment in Land Access Movement case on the adjudication of the pending land restitution claims lodged by 31 December 1998, in cases where competing land restitution claims have been lodged on or after 1 July 2014.*

3. *Persons and organisations interested in the issues to be adjudicated may apply to be joined as amici curiae by not later than 18 August 2016.*

4. *Any person wishing to make submissions relating to the issues to be adjudicated as set forth in paragraph 2 above, must file heads of argument by no later than 12 September 2016.*

Signed Y S Meer

Acting Judge President of the Land Claims Court

29 July 2016

20 See footnote 10 above

were invited to file heads of argument and to address this Court during the joint session. The Court is indebted to the participants, whose contributions were of great assistance.

COMMON CAUSE CONSIDERATIONS

23. The CC granted Parliament two years to consider the re-enactment of the AA in a fashion that is constitutionally compliant, failing which the Chief Land Claims Commissioner or any party to the *LAMOS*A case or any other person with a direct and substantial interest, may approach the CC after the lapse of two further months for an appropriate order. During this period the Commission is interdicted from 'processing' any claims filed from 1 July 2014 until 28 July 2016, unless the processing of all old claims is concluded before the end of this period.

24. This Court and all the parties participating in the joint session are *ad idem* that it is for all intents and purposes impossible for the Commission to overcome the huge backlog of old claims it is still facing before the lapse of the period granted to Parliament to reconsider the re-enactment of the AA. This judgment must proceed from the assumption that there will still be old claims to be processed by the time a re-enactment has been promulgated or the issue returns to the CC.

25. While the Commission has been interdicted from processing any claims filed after 1 July 2014 ('new claims'), there is no interdict against the continued

performance of this Court's duties and functions *per se* in the Order. What remains to be established is whether this Court can determine, adjudicate or deal with any new claims in spite of the interdict granted against the Commission and, if so, on what grounds and in which fashion it may do so.

THE STATUS OF NEW CLAIMS POSSIBLY AFFECTING PENDING MATTERS:

THE PARTIES' SUBMISSIONS

26. The prevailing sentiment expressed in most submissions during the hearing was a sense of frustration at any suggestion of a further delay in the finalisation of old claims pending before this Court; and alarm and disquiet at the possibility that finalized old claims may be affected by new claims. Reference was made repeatedly to section 11(5) of the RA²¹, which protects the rights of a dispossessed person whose claim was not considered when another claim was successfully finalized. Such claimant may apply for the rescission or variation of the order by which land was awarded to the successful claimant. Various suggestions were therefore made that this Court could take any new claims that competed or overlapped with existing claims on board and if not finalize them, at least pronounce upon their validity to avoid the deleterious effect of potential future claims.

²¹ (a) If after an order has been made by the Court as contemplated in section 35 or an agreement has been entered into as contemplated in section 14(3) or 42D, it is shown that another claim was lodged in terms of this Act in respect of the land to which the order or agreement relates, any interested party may apply to the Court for the rescission or variation of such order or the setting aside or variation of such agreement.

(b) The Court may grant such an application, subject to such terms and conditions as it may determine, or make any other order it deems fit.

27. Two schools of thought emerged from the submissions addressed to this Court. On the one hand the *amici*, with the exception of the Afrisake *amicus*, strongly argued that the Order preserved new claims lodged with the Commission only to the extent that the receipt of a new claim prior to 28 July 2016 was recorded. Unless Parliament intervened by re-enacting the AA in some form or another, or the CC issued an order breathing further life into their dormant existence, the new claims did not qualify the new claimants to participate in any pending proceedings concerning old claims, so the argument went.

28. The other parties presented different arguments in support of the contention that, despite the interdict preventing the Commission from processing any new claims, this Court was still at liberty to accord judicial recognition to new claimants and their claims. Foremost among these was the Commission, represented by Mr Chaskalson SC and Mr Majozi.

29. Mr Chaskalson emphasized that the Order interdicted the Commission from processing any new claims lodged with it, but that the powers, functions and duties of this Court had not been limited at all. He proceeded to submit that the preserved new claims had been accorded the status of fully protected claims under the RA. This implied that, if a new claimant had already applied for direct access prior to the invalidation of the AA, such application had to be treated as valid by this Court. New claimants who had not applied for direct access prior to 28 July 2016 could no longer

do so as section 38B(1)²² of the RA applies only to old claims since the invalidation of the AA. By the same token new claims could not be brought before this Court by way of intervention in terms of section 38D (1) and (2)²³ in old claim proceedings

²² 38B. *Application to Court for restitution of right in land*

(1) Notwithstanding anything to the contrary contained in this Act, any person who or the representative of any community which is entitled to claim restitution of a right in land and has lodged a claim not later than 31 December 1998 may apply to the Court for restitution of such right: Provided that leave of the Court to lodge such application shall first be obtained if

(a) an order has been made by the Court in terms of section 35 in respect of a right relating to that land; or

(b) a notice has been published in the Gazette in terms of section 12(4) or 38D(1) in respect of that land and the period specified in the said notice has expired. [Subs. (1) amended by s. 10 of Act 18/99]

(2) An application contemplated in subsection (1) shall be in the form prescribed by the rules.

(3) The regional land claims commissioner may at any stage after the lodgement of an application contemplated in subsection (1) suspend the investigation of any claim lodged in terms of section 10 in respect of the land in question until

(a) the Court has ordered that the suspension be lifted; or

(b) the application has, in accordance with the rules, been withdrawn,

and the applicant has informed the regional land claims commissioner accordingly.

(4) The Court may at any stage of the proceedings order that all claims lodged in terms of section 10 in respect of the land in question be transferred to the Court, whereupon the regional land claims commissioner shall forward without delay all documents in his or her possession pertaining to such claims to the registrar.

(5) Where all interested parties have reached agreement as to how the claim should be finalized, the Court may make the agreement an order of the Court.

(6) After hearing the application, the Court may

(a) make any order in terms of section 35;

(b) dismiss the application;

(c) transfer all the claims before the Court in respect of the land in question to the regional land claims commissioner: Provided that the regional land claims commissioner shall not by virtue of such transfer be obliged to give priority to any claim so transferred;

(d) make no order thereon but grant leave for the applicant to renew the application on the same papers supplemented by such further affidavits and documents as the case may require.

²³ (1) *If at any stage during proceedings under this Chapter the Court is satisfied that it is necessary or appropriate that all claims for restitution in respect of the land in question be considered at the same time, it may direct the applicant to publish in the Gazette and in such other manner as it deems appropriate, a notice advising potential claimants of its decision and inviting them to apply for leave to intervene in the application or action within the period specified in such notice.*

after the invalidation of the AA. The Court was, however, fully entitled to invite new claimants *mero motu* to apply for leave to intervene in proceedings concerning an old claim if such intervention would be in the interests of all parties involved in the relevant old and new claims. Joinder of the competing new claims in existing old claims would be necessary and this Court would have the power to insist that such joinder be effected. This Court was further entitled to oblige the Commission to file a report in respect of a competing new claim in terms of section 38C of the RA²⁴, which the Commission could not 'process' of its own accord because of the interdict. However, a report being prepared for this Court at the latter's request would be providing evidence rather than processing a claim.

30. In all other respects, preserved new claims must enjoy the status of old claims, Mr Chakalson argued further. This meant that this Court could not, while finalizing an old claim, ignore any new claim in respect of the same land, as decreed by section 35 (1) (a)²⁵ of the RA. New claimants would be entitled to apply for the

(2) After the expiry of the period contemplated in subsection (1)

(a) no claim in respect of the land in question shall be lodged with the regional land claims commissioner;

(b) no application for leave to intervene in order to enforce restitution of a right in such land shall be lodged with the registrar;

(c) no application to the Court in terms of section 38B shall be lodged with the registrar in respect of the land in question:

Provided that the Court may allow a claimant or applicant on good cause shown, to lodge such a claim or application after the expiry of such period, but not later than 31 December 1998. [

²⁴ 38C. Reports by regional land claims commissioner or Director-General

The regional land claims commissioner or the Director-General may, of his or her own accord, file a report in any application in terms of this Chapter and shall do so if so directed by the Court.

²⁵ (1) The Court may order

rescission of any order awarding restitution pursuant to an old claim in terms of section 11 (5) . In addition, this Court was obliged to bear the provisions of section 33 of the RA in mind while adjudicating an old claim, especially sub-section (d) thereof, which is aimed at preventing major social disruption being caused by any order. Major social disruption might well be caused by granting an old restitution claim without hearing a new claim over the same land. As the Constitutional Court was silent on the fate of new pending new claims before this Court²⁶, the default position, he argued should apply. This entitled the Court to deal with new claims.

31. In summary, the Commission argued that this Court could not, in assessing old and new claims, assume that old order claims had a stronger right to restitution, even though the fact that old claimants had already had to wait eighteen years for their cases to be finalized would be a valid consideration in terms of section 33 of the RA.

32. The landowner respondents in the Emakhaseneni Community Claim argued that the Court had already recognised the new claimants as parties with full standing by allowing them to participate in the preparatory steps of an inspection of the land

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

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

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

²⁶ See par [88] of the CC judgment, quoted above in par 18.

claimed. The Commission and all other parties had participated in and agreed to such arrangements and had thereby, so the argument ran, waived any reliance upon the Commission's statutory duty to investigate the validity and extent of any new claim. The Court had, prior to the *LAMOS* – judgment being delivered, ruled that all interested parties, in particular the new claimants, should participate in the inspections at the inception of the trial of the old claim to ensure that, if the new claims eventually proved to be valid, no duplication of the trial proceedings would be necessary.²⁷

33. The Qwabe Community claimants argued that new claims could be adjudicated upon in the present proceedings by allowing the competing claimants to intervene as parties in terms of Rule 12²⁸ and/or Rule 13²⁹ of the Rules of this Court.

²⁷ The relevant part of the minute of the telephonic pre-trial held on 15 July 2016 reads: '**Regarding the inspection: Judge Bertelsmann emphasizes that, if the matter is to go ahead, all interested parties must be properly represented and must before the time set for the inspection, file a schedule of points they wish to inspect and point out, and copies thereof must be provided to all other parties prior to such inspection. All parties are to be properly prepared for the inspection, and those who have yet to clarify their status and/or file papers, must do so before the inspection.**' The quoted passage of this minute is immediately preceded by the following recordal: '(3) (e) An inspection of the new claims by the Commission is still outstanding, which the Commission intends to conduct from the 8th August onward.' (This date was four days after the intended commencement of the hearing).

²⁸ 12 JOINDER OF PARTIES AND CAUSES OF ACTION

(1) Any number of persons, each of whom has a claim (whether jointly, jointly and severally, separately or in the alternative) may join as plaintiffs or applicants in a case against the same person, if their claims relate to substantially the same question of law or fact.

(2) A plaintiff or applicant may join several causes of action in the same case.

(3) Several parties may be joined in the same case, either jointly, jointly and severally, separately or in the alternative, whenever the question arising between them or any of them and the plaintiff or applicant relates to substantially the same question of law or fact.

(4) Subject to any Court order on service, anybody initiating a case must cite as parties all persons -

(a) against whom relief is claimed;
 (b) whose rights may be affected by the relief claimed; and
 (c) who may have an interest in the claim.

(5) The Court may at any time upon application by any party or of its own accord, order that a person be joined as a party in the case upon such terms and conditions as the Court considers appropriate, including conditions as to -

(a) the payment of costs;
 (b) the delivery of a notice of appearance; and

Such would prevent a multiplicity of actions and curtail costs while bringing finality to all claims over the land involved. (The Emakhseneni landowners agreed with this submission and argued that *LAMOSA* had not invalidated the new claims filed. The landowners pointed to the fact that the filing of new claims in their matter had been preceded by a notice in terms of section 12 (4)³⁰ of the Restitution Act.)

33. In the alternative, the Qwabe claimants suggested that the new claimants might invoke the provisions of Section 38 B of the Restitution Act and apply for direct access. (Counsel for the Qwabe community conceded in their heads that this section can usually only be invoked in respect of claims duly lodged with the Commission or

(c) the further procedure in the case.

(6) When there has been a order of causes of action or of parties, the Court may, on the application of any party, order that separate hearings be held in respect of some or all of the causes of action or some or all of the parties.

(7) Whenever causes of action or parties are joined in the same case, the Court may make an order in favour of those parties who may be entitled to relief or grant absolution from the instance, and must make an order for costs as it considers just.

²⁹ **13 INTERVENTION OF PERSONS**

(1) Any person whose rights may be affected by the relief claimed in a case and who is not a party in the case may, within a reasonable time after he or she became aware of the case, apply to the Court for leave to intervene in the case.

(2) The Court may grant an application under subrule (1) on conditions which the Court considers appropriate, including conditions as to -

- (a) the payment of costs; and*
- (b) the further procedure in the case.*

(3) The state may intervene as a party in a case by delivering a notice to that effect.

³⁰ *(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, to lodge claims within a period specified in such notice.*

a Land Claims Commissioner, but submitted that the section was wide enough to permit an application under it by the new claimants.)

34. Lastly, the Qwabe community suggested as a further alternative that this Court should grant a declaratory order in terms of Section 22 (1) (cA)³¹ of the Restitution Act to dispose of the validity or otherwise of the new claims affecting this community's claim once and for all. It was strongly argued that following this course would be in the interests of justice. The new claimants had at least the status of interested parties and could be admitted as such to participate in the proceedings – a submission generally supported by the landowners in all matters in the same or slightly different terms.³²

35. The landowners in the Qwabe matter went further than the claimants and submitted that, while the Commission was interdicted from referring competing claims to this Court, the Order preserving the new claims filed after 1 July 2016 amounted to a recognition of these claims as having the same status as a claim validly lodged before 31 December 1998 because they no longer depended upon processing by the Commission. (This argument was also advanced in slightly different terms by the Amamqamu Community Claimants and the Commission). The claimants who lodged the preserved claims could therefore apply for leave to

³¹ (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 25(7) 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;*

³² *Prima facie* section 22 (1) (cA) of the RA empowers this Court to issue declaratory orders on matters of law only. It is unnecessary to delve into this question in the present context.

intervene in terms of Rule 13 or section 29 RA.³³ They could be joined as parties under Rule 12 or make use of the direct access procedure provided in Chapter IIIA of the RA. (This argument was also advanced by the Emkhaseneni landowners). Whatever the position, this Court was not entitled to finalize the existing old claim while it was aware of another claimant as intended in section 35 (1) (a) RA.

36. The Emakhaseneni landowners expanded upon this theme and submitted that once the new claimants were recognized as interested parties, the Court could order them to be joined as parties to the proceedings and dispose of their claims without thereby straying beyond the ambit of the CC's judgment.

37. While generally finding itself in agreement with the submissions made by the claimants and landowners in the Qwabe and Emakhaseneni matters, the Afrisake *amicus* contended that section 42D of the RA would entitle the Minister to acquire land affected by new claims filed since July 2014. (This submission appears to be doomed to fail because of the express provision in subsection (1)³⁴ of this section

³³ 29. *Intervention to proceedings before Court, right to appear and legal representation*

(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*

³⁴ (1) *If the Minister is satisfied that a claimant is entitled to restitution of a right in land in terms of section 2, and that the claim for such restitution was lodged not later than 31 December 1998, he or*

that a claim must have been filed prior to December 1998 to allow the Minister to exercise this power).

38. The successful applicants in the *LAMOSA* proceedings before the CC entered the fray after having been given leave to join as *amici curiae*. Their stance was unequivocal that no new claim could be adjudicated upon by this Court pending the re-enactment of the AA or the intervention of the Constitutional Court. The mere fact that claims lodged under the invalid AA had been preserved by the Constitutional Court did not:

38.1 Endow them with any status other than that of a claim delivered to the Commission, which the Commission is expressly prohibited from dealing with until all pending old claims have been processed by it. Consequently

38.2 No joinder of new claimants as parties to pending old proceedings was permissible;

38.3 No direct access to the Court by new claimants could be entertained;

38.4 No purchase of land by the Minister of land claimed by new claimants could be embarked upon;

38.5 No joinder of new claimants by the Court was possible;

38.6 No new claimants could or can in future intervene in any proceedings because new claimants do not enjoy the status of parties; and

she may enter into an agreement with the parties who are interested in the claim providing for one or more of the following.....

38.7 Recognition as existing parties to any proceedings adjudicating old claims is impossible.

39. At best, this Court could afford them the status of interested parties in the matters in which their intended claims overlapped or competed with existing old claims presently being adjudicated by this Court, but merely to allow them to challenge the entitlement of the old claimants to the restitution of the land of which the old claimants allege they have been dispossessed.

40. These arguments were adopted and supported by all the *amici curiae* who had participated as applicants in the *LAMOSIA* litigation save for Afrisake NPC and were permitted to participate in the joint hearing.

ANALYSIS OF THE SUBMISSIONS

41. The consideration of the parties' conflicting submissions must commence with an analysis of the Order quoted above.

THE INTERPRETATION OF THE JUDGMENT

42. Several parties suggested, albeit as an alternative argument, that the order issued by the CC was ambiguous or contradictory because the status of competing claims was left in limbo and therefore unclear. As a result, the Emakhaseneni claimants submitted, the adjudication of all claims, both those lodged before

December 1998 and the new claims, should be held in abeyance until the legislature or the Constitutional Court had brought finality to the question how the new claims should be disposed of.

43. The Commission vigorously opposed the suggestion that this Court should decline to adjudicate the claims' validity before it. Mr Chaskalson underlined that, even if it might be argued that there was a *lacuna* or an apparent contradiction in the CC's judgment or the Order, judicial comity should prevent this Court from being instrumental in having the CC's judgment referred back to it with a request for elucidation thereof. This Court must interpret and apply the CC's judgment and Order as best it can and leave it to any party dissatisfied with the result to take the matter to a higher Court.

44. We agree with Mr Chaskalson. However, whilst the order is silent on the fate of pending new claims before this Court we do not find any conflict or ambiguity in the Order. Judgments and orders must be interpreted purposively by determining the intention from the words employed in the context of the particular dispute before the Court. As was stated in *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd and Others*³⁵ :

"The starting point is to determine the manifest purpose of the order. In interpreting a judgment or order, the court's intention is to be ascertained primarily from the language of the judgment or order in accordance with the usual well-known rules relating to the interpretation of documents. As in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention." See *Firestone South Africa (Pty) Ltd v Genticuro AG 1977 (4) SA 298 (A)*.

³⁵ 2013 (2) SA 204 (SCA) at para [13]

45. In this context it is important to note that the declaration of invalidity of the AA is prospective. The Commission is interdicted from '*processing*' any claims that have been lodged under the AA from 1 July 2014, other than to allow the receipt and acknowledgement of the lodging of restitution claims in terms of section 6 (1) (a) of Act 22 of 1994³⁶. As the old claims had to be lodged before 31 December 1998 this part of the Order can only refer to new claims filed after 1 July 2014. It is also clear that the Order is aimed only at claims lodged on or before 28 July 2016, as the CC has expressly stated in its judgment that no new claims may be filed after the declaration of invalidity³⁷, which is, with respect, the natural consequence of such declaration.

46. The attention must next turn to what the judgment and Order refer to as '*processing*'. The concept of processing something denotes an active involvement in the production of an article or the advancement of some development or another. The word '*process*'³⁸ has been defined in similar terms. In *Park Finance Corporation*

³⁶ 6. General functions of Commission

(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 or transferred to it in terms of this Act;

³⁷ Para [88] of the judgment

³⁸ a series of actions or steps taken in order to achieve a particular end:

"military operations could jeopardize the peace process" (Oxford University Dictionaries, as found on the internet)

*(Pty) Ltd v Van Niekerk*³⁹ it was described as ‘..an action to enforce a particular right....’

47. In the context of the RA it is clear that the receipt of a claim and the acknowledgement thereof does not amount to an active engagement with the claimant or the case made out in the claim form. In *Gamevest (Pty) Ltd v Regional Land Claims Commissioner, Northern Province and Mpumalanga and Others*⁴⁰ par [28] and [29]⁴¹ it was stated that these two activities are merely a formal act. Examination and advancement of a claim duly lodged only commences thereafter. It is therefore obvious that the Order only entitles the Commission to perform a basic administrative function in respect of the claims lodged in terms of the AA until 28 July 2016. Paying any further attention to such a claim is interdicted.

³⁹ 1956 (1) SA 673 (T)

⁴⁰ 2003 (1) SA 373 (SCA)

⁴¹[28] ... *the scheme of the Restitution Act is such that the receipt of a claim and an acknowledgement of such receipt is a formal act, not amounting to an administrative decision or action. Only after the lodgement can and must the Regional and Claims Commissioner examine the claim, and satisfy himself or herself whether the claim is inter alia not precluded by the provisions of s 2 (see s 11(1)(b)). This is not a task that can be done in a superficial, cursory manner. Section 11 deals with this stage of the process. To read s 6, which sets out the general functions of the Commission, as incorporating, on the mere receipt of a claim, the obligation to inspect the documents and decide whether the claim is a valid one, would lead to an absurd result. It would render s 11(1)(b) tautologous and devoid of meaning. The reference to s (11)(1)(b) in s 11(4) would also have to be ignored. That was manifestly not the intention of the legislature.*

[29] *The words 'subject to the provisions of section 2' in s 6(1)(a) are, as far as the processing of claims is concerned, of no import. What the legislature intended to say, but failed to do, was that as far as claims are concerned, the functions and duties of the Commission etc are to see that the provisions of s 2 (entitlement to restitution) are applied and complied with. Section 6 was not intended to say when the validity of a claim is to be tested; that is set out in s 11, which deals specifically with the procedure in deciding that issue. Patently, the validity of a claim cannot be tested at the very moment of the receipt of the claim forms.*

48. The preservation of the documents lodged to notify the Commission of new claims, as the Order ensures, could not by any stretch of the imagination be described as the recognition of the new claim advanced in these documents. The lodging of a claim would, absent the interdict, entitle the claimant to no more than to demand that the Commission consider the claim at a future date. The right to pursue and enforce any claim is dependent upon acceptance of the validity of the claim. The Order preserves nothing more than the mere acceptance that the new claimant intends to prosecute a claim. The potential right to pursue this claim in the future is all that the Order preserves. This potential right is, in addition, conditional upon the happening of one of two – with respect – uncertain and unpredictable events: either the re-enactment of the AA or a similar act by Parliament; or a decision by the Constitutional Court if Parliament fails to act.

49. By the same token it cannot be argued that the fact that this Court allowed new claimants to participate in the initial stages of adjudication of an old claim – subject to investigation thereof by the Commission, – elevates new claims to recognised claims that can be dealt with by way of joinder or intervention. The new claims at present rest in a frozen state imposed by the interdict and the terms of the Order preserving their existence as claims lodged with the Commission. They await potential fruition depending upon the decision taken by Parliament or further directives by the CC. Even if the new claimants attend future proceedings of old claims before this Court they will have no rights to assert other than to present a challenge to the merits of the old claim, as will be set out in greater detail below.

50. The Order has left the manner in which new claims will be dealt with in the future deliberately open. In its judgment the CC states that the future solution to the problem of new claims competing with old claims is beset by imponderables and best left to the Legislature to resolve. This Court should not and cannot second-guess the CC. Quite apart from the inability to foresee all permutations that might exist to resolve the issue of the new claims, it would transgress judicial comity to embark upon dealings with new claims, the fate of which the CC has assigned to Parliament – at least for the next two years.

51. While only the Commission is interdicted from processing new claims, it would be impossible for this Court to deal with new claims in any fashion without the assistance of the Commission. Even if the new claimants could be joined to the proceedings, or were able to intervene in them as plaintiff or defendant, they could not participate meaningfully in the trial without the assistance of the Commission. Their claim would still need to be investigated⁴², to be reported on⁴³, possibly to be gazetted or made subject to an order in terms of section 12 of the RA – all functions that need to be performed by the Commission which the latter is precluded from embarking upon. The Commission is also involved in the finalisation of matters that come before this Court as a result of an application for direct access.⁴⁴ Last, but certainly not least, the new claimants would in all probability need to be funded through the good offices of the Commission, which might possibly be regarded as assisting the processing of any claim.

⁴² Section 6 (1) (cA) RA

⁴³ Section 6(1) (eA)

⁴⁴ See e.g. section 38B(3) and (4) RA; section 38C (filing a report); section 38E(b) (complying with Court directives); section 34 (2) (investigating and filing a report). This list is not comprehensive.

52 The route of direct access to the court is also blocked. Section 38B of the RA, enabling a party to approach the Court directly, is premised upon the existence of a claim lodged and accepted by the Commission.⁴⁵ Such claim has to have been lodged before 31 December 1998, which date is still the operative date since the AA has been declared invalid.

53. The Order preserves the priority that should be given to the finalisation of old claims, as set out in the judgment in par [89]⁴⁶. The intention is obvious that old claims must be dealt with before the new claims are considered. This express intention is correctly relied upon by the *LAMOSIA amici* to support the argument that this Court cannot adjudicate new claims until Parliament or the Constitutional Court has addressed the problem. The need to dispose of old claims as expeditiously as possible, which the *amici* underlined, is manifestly indisputable.

54. Given the above considerations no declaration of rights regarding new claims is required, as these rights have been fully circumscribed in the preceding paragraphs.

55. This leaves the question whether new claimants should be ignored in their entirety in the adjudication of old claims. The parties were *ad idem* that new claimants who intend to advance claims that, if they could be dealt with by this Court,

⁴⁵ See *Haakdoornbult Boerdery CC and Others v Mphela and Others* 2008 (7) BCLR 704 (SCA) at para [14]: *The proceedings in the LCC were brought under s 38B of the Act, which entitles a disaffected party to approach the LCC directly, usually because of the lack of progress on the part of the state in processing the claim. See further Mahlangu NO v Minister of Land Affairs and Others* [2004] ZASCA 74.

⁴⁶ Quoted in para [18] above

would compete with or overlap land claimed under old claims presently being adjudicated by this Court, do have an interest in the outcome of such litigation. The interest may be tenuous and the potential assertion thereof unclear, but as long as the lodging of the new claims is not invalidated, its existence cannot be denied. Courts must take cognisance of those whose interest may be affected by its judgment. In the light of the fact that this Court is unable to consider the validity or otherwise of the new claims, the potential participation of new claimants in existing proceedings relating to old claims must of necessity be restricted to the question whether the old claim can be validly contested by a new claimant. In practice this Court will therefore only be able to admit new claimants to participate in the proceedings before it who contest the old claimants' right to restitution of the land that is the subject matter of the old claim. New claimants will only be allowed to challenge the right of the old claimants to restitution of all or part of the land concerned. Essentially such claimant will therefore fulfil the role of an *amicus curiae* to assist the Court in determining the question whether the old claimant has established a case or not.

56. Should the new claimant recognise the right to restitution of the old claimant while intending to advance a claim over the same land by the enforcement of the new claim, such claimant's interest may be too tenuous to admit his or her participation in the proceedings, but the presiding judge may consider in each case whether it would be in the interests of justice to allow such claimant to participate or not.

57. During argument the question was raised whether the costs of the proceedings should be awarded against the National Council of Provinces. The latter bore the costs of the hearing before the Constitutional Court but it is not a party in these proceedings. The joint hearing was of a consultative nature and arranged at the request of the Court to obtain guidance for the future conduct of cases pending before it. Those proceedings concern constitutional rights. There is moreover no dispute to resolve before us and no successful or unsuccessful party. It is therefore fair that no order as to costs is made.

53. The following order is therefore made;

1. No new claim lodged between 1 July 2014 and 28 July 2016 can be adjudicated upon or considered in any manner whatsoever by this Court in any proceedings for the restitution of rights in land in respect of old claims lodged before 31 December 1998;
2. New claimants who contest old claims lodged before 31 December 1998 may be admitted as interested parties solely to the extent that their participation may contribute to the establishment or rejection of the aforementioned old claims or in respect of any other issue the presiding judge may allow to be addressed in the interests of justice.
3. There will be no costs order.

Thus dated and signed at Randburg on this 17 day of November 2016.



PP

BERELSMANN J

(with MEER AJP, GILDENHUYS J and SARDIWALLA AJ concurring)