THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Case no: 136/2003
REPORTABLE

In the appeal between:

Johanna Magdalena Cornelia PRINSLOO
First appellant

BOTHA FAMILY TRUST Second appellant

and

THE NDEBELE-NDZUNDZA COMMUNITY
First Respondent

REGIONAL LANDS CLAIMS COMMISSIONER, MPUMALANGA Second Respondent

MINISTER OF LAND AFFAIRS AND AGRICULTURE
Third Respondent

Before:	Scott JA, Cameron JA, Mthiyane JA, Lewis JA and Ponnan JA
Appeal:	Monday 16 May 2005
Judgment:	Tuesday 31 May 2005

Restitution of Land Rights Act 22 of 1994 – 'Community' – Group using land until about 1940 under tribal authority and customs – No residence, immediate supervision or control by registered owners – 'Community' constituted – 'Rights in land' – use, control and possession – 'Dispossession' – physical coercion not required – Section 2(2) – 'just & equitable compensation' – meaning of – matter referred back to Land Claims Court

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JUDGMENT

CAMERON JA:

[1] On the edge of the Highveld escarpment in Mpumalanga, northeast of Middelburg and to the east of Groblersdal, lies the farm ‘Kafferskraal’ (the farm). Its name dates back at least 133 years, to 1 December 1872, when the Transvaal Republic first granted the land in private ownership to a white farmer, Abraham Johannes Korf. Since then the name has appeared on the title deeds. It is opprobrious, the racial epithet among the most abhorrent in South Africa today. But the claimants to the farm, referred to as ‘the Ndebele-Ndzundza community’, the first respondent in this appeal (the claimants), emphasised its significance in the Land Claims Court (LCC) and again in argument before us: the very name confirms, they say, that the land has long been settled by black people, and that this fact survived the superimposition of white registered title.

[2] And indeed history gives this warrant. Human habitation of the area can be traced back to the first half of the 17th century, before the colonisation of the Cape. According to oral tradition and the regimental back-dating system used in Ndebele

custom, [1] chief Ndzundza and his followers settled at KwaSimkhulu, some 30km southeast of the farm, in about 1636. The present claimants number among their descendants. They constitute a branch of the Ndebele-Ndzundza Tribe who, after being attacked and dispersed by Mzilikazi in 1822, resettled in strongholds on what became known as the 'Mapochsgronden' to the northeast of the farm. After a bitter war, the Volksraad of the Transvaal Republic in 1883 distributed these ancestral lands, extending over some 36 000 hectares, in private ownership to white farmers. The burghers then scattered the tribe by enforcing a system of indentured labour on white farms. This resulted in what the appellants' expert called 'the diaspora of the Ndebele'.

[3] The history of the farm is entwined with that 'diaspora' and with the 'Mapoch war'. But the land does not form part of the Mapochsgronden. Before the war it had already been granted in private ownership to A J Korf. The present claimants' immediate connection with the farm dates back to some time

[1] Dr Christo Jansen van Vuuren, the ethnological expert for the appellants, explained that the Ndebele male initiation rite or ingoma is held every four years and entails the allocation of regimental names (iindanga) to initiates who complete the ritual. These names are allocated in a fixed sequence and repeated in exact cyclical order (similar to East African systems). The Ndzundza maintains a system of only fifteen names, cyclically repeated. Men remember their own regimental names and others' for life. Both Ndebele men and women remember the regimental names of ancestors. Initiations, birth, settlements and events can therefore be dated with fair accuracy.

before the turn of the 20th century, when Madzidzi, one of the leaders imprisoned after the Mapoch war, escaped and settled on the farm with some of his followers: his mission was to ensure preservation of the system of male initiation essential to Ndebele culture and the perpetuation of the tribe as a distinctive community.

[4] And that indeed happened: on the land now claimed the male initiation rite (ingoma) was restored under Madzidzi. Madzidzi lies buried on the farm. Among the claimants is his grandson, who was the claimants' chief witness. They comprise persons who still live on the farm, as well as on seventeen surrounding farms, to which they have also laid claim. Others live on the farm 'Goedgedacht' (or Goedehoop), in the district of Nebo in what was formerly Lebowa. This was purchased for the community in 1938, and it is here that some members of the community were relocated in about 1939 or 1940.

[5] The regional land claims commissioner for Mpumalanga, the second respondent, referred only the claim in respect of the farm to the LCC for adjudication under the Restitution of Land Rights Act 22 of 1994 (the Act). The Department of Land Affairs, against whom the claim lies, supported the claim (the Minister of Land Affairs and Agriculture is the third respondent).

The claim in respect of the other farms has seemingly been held in abeyance while the present claim is adjudicated.

[6] The appellants have their own bonds of sentiment and history with the farm. The first appellant, Mrs Prinsloo, is the granddaughter of Willem Jacobus Grobler, who purchased Portion 1 of the farm in 1939. In 1996 two of his granddaughters, the first appellant's cousins, sold that portion to a private farming company, which reached a settlement with the claimants regarding the claim. Portion 1 is therefore not part of the proceedings. In 1941 Grobler also bought Portion 2 of the farm. That is now registered in the first appellant's name.

[7] The second appellant is the Botha Family Trust, the registered owner of Portion 3 of the farm. The Botha family's links to the farm go back to 1889, when a granddaughter of Abraham Johannes Korf married Phillipus Rudolph Botha, the great-grandfather of the generation whom we may presume (the evidence was inexplicit) are the current trust beneficiaries.

[8] Only Portions 2 and 3 of the farm are thus at issue in the appeal. The question is whether the claimants have established a right to restitution in the farm as contemplated in

s 2 of the Act, which provides for 'entitlement to restitution'. Section 2(1) reads:

'A person shall be entitled to restitution of a right in land if –

(a) he or she is a person dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices; or

(b) it is a deceased estate dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices; or

(c) he or she is the direct descendant of a person referred to in paragraph (a) who has died without lodging a claim and has no ascendant who –

(i) is a direct descendant of a person referred to in paragraph (a); and

(ii) has lodged a claim for the restitution of a right in land; or

(d) it is a community or part of a community dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices; and

(e) the claim for such restitution is lodged not later than 31 December 1998.'

[9] By agreement between the parties, the question of the claimants' entitlement to restitution was the sole issue referred for trial before the LCC. That court (Moloto J, with Prof MJ Wiechers as assessor), found that the claimants were entitled to restitution, and granted them leave to set down the

remaining issues for determination. The LCC later refused leave to appeal, but this court granted the necessary leave.

[10] There are two principal issues. The first is whether the claimants are a 'community' within the Act. The second, if they are, is whether they were 'dispossessed' of the land as contemplated by the Act. These questions each entail the further question whether the 'community', if there was one, had a 'right in land'.

Are the claimants a 'community' within the Act?

[11] Section 1 of the Act provides that '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'.

The appellants concede that in the popular sense of the word the claimants are a 'community', but dispute that they qualify under the particular meaning of the statute. In a careful and lucid argument on behalf of the appellants, in which he pointed to a number of factual errors and historical misperceptions in the LCC judgment, Mr Havenga contended that the Ndebele-Ndzundza Tribe lost its traditional rights in land after the

Mapoch war in 1883, and never regained those rights in respect of any traditional lands.

[12] There were, counsel pointed out, no Ndebele strongholds on the farm itself: they were some distance away, in the Mapochsgronden. He contended that it was in any event unlikely that the farm or any of those surrounding it were part of the Ndebele traditional lands before the 1883 war. By that time the farm had already been given in private ownership. There was thus no 'community' in relation to the farm, holding any land in common, as required by the Act, in accordance with shared rules. Mr Havenga emphasised in this connection the diffuseness of the community's broader claim, which avowedly still includes the seventeen neighbouring farms.

[13] This contention requires the evidence to be considered. The appellants' ethnologist, Dr Christo Jansen van Vuuren, an acknowledged expert on Ndebele history and culture, testified that 'the people who lived on that farm before 1883 must have been Ndebele, as well as Pedi'. His evidence gives warrant to the claimants' assertion, against counsel's submission, that the history of indigenous settlement of the farm both pre-dates and overlaps with the grant of registered title.

[14] The claimants' chief witness was Mr Mbulawa Abraham Mahlangu, grandson of Madzidzi. Mr Havenga subjected his evidence to some measure of justified criticism. Nevertheless, Mr Mahlangu's account of the history of the community and its relation to the land, derived from received oral history, was corroborated at crucial points by the documentary record. He stated that the claimants' community –

> 'remained at Kafferskraal as our land. We were under nobody. We were just the inhabitants of that place. After some years a white person came, his name was Henwood. He then told us that that place belonged to him and that we should pay an amount per year and then they started to let these Madzidzi people pay a certain amount.
>
> …
>
> There were no white people. The [community] were working for themselves, they were ploughing and there were also herds of cattle.'

[15] The Ndebele-Ndzundza people, he said (sketching something of an idyll), 'regard the farm as their natural place':

> 'This is the place where they had built their houses, they were ploughing and they had herds of cattle, they were happy about the food which they obtained from the field and they were satisfied about the type of life which they lived there'.

[16] Neither Willem Jacobus Grobler nor his descendants ever lived on the farm. They lived on a neighbouring farm,

Waterval, which W J Grobler purchased in 1916. That is also where the first appellant and her two sons, who conduct farming operations, live at present.

[17] We do not know where the presumed beneficiaries of the Botha Family Trust live, or where their predecessors lived, since no evidence was presented on their behalf regarding Portion 3. There was at all events nothing to gainsay the oral-historical account presented on behalf of the claimants that in the period up to the fifth decade of the last century, 'there were no white people' actually living on the farm, as opposed to holding its legal title.

[18] And the documentary evidence, though it relates principally to Portion 2, supports this claim. Between 1887 and 1891, one C M du Plooy, who married one of the daughters of A J Korf, the original grantee, became the registered owner of the sections now constituting Portion 2. In 1902 he sold this portion to J W Henwood. It was in that year, according to oral tradition, that Madzidzi was formally installed as a chief: and the evidence indicates that by this time he and his followers had been residing on the farm for some years.

[19] Shortly after Henwood became registered owner, in 1904, the Commissioner for Native Affairs, Sir Godfrey Lagden,

reported that a portion of the tribe of Nyabela resided on the farm under the care of Madzidzi (a brother of Nyabela). In his evidence before the Beaumont Commission in 1916, Madzidzi stated that part of the Ndzundza was living on the farm, and that they had to work for the surrounding farmers without pay. In his evidence before a local committee of the Eastern Transvaal (established after government refused to implement the land acquisitions for blacks the Beaumont Commission recommended), Madzidzi again stated that he was residing on the farm, though he requested to be permitted to relocate.

[20] Of some significance in determining the residents' relation to the land is that in 1921 J W Henwood was willing to sell. On 8 November 1921 he wrote to Madzidzi's nephew, Chief Fene (Mfene) Andries Mapoch, stating that he had discussed the sale of the farm with Fene's son Cornelius:

> 'We have talked the matter over and I have given him my word that a reasonable time will be given you to inspect the farm and to conclude purchase of same.
>
> You are now quite free, subject to the Native Commissioner's permission, to take possession and live on the farm with your followers.'

[21] Henwood was not himself living on the farm: he wrote from Middelburg, where his letterhead shows he was operating as a

'direct importer'. Of further significance is a follow-up letter the local Commissioner wrote in December 1921 to the Secretary for Native Affairs, 'strongly' recommending the sale of the farm to Fene. His letter records that 'a large number of Mfene's people are already living on the farm'. This was despite the fact that 'the farm is not in a native area'.

[22] The 'large number' of people were Madzidzi and his followers, the antecedents of the present claimants. Further official correspondence in that year records that Madzidzi 'resides with about 75 taxpayers on a portion of Kafferskraal No 62 on rent paying terms'.

[23] The sale was later vetoed because of objections by 'neighbouring European owners' and because the Member of Parliament for Middelburg 'very strongly opposed' it. Requesting an audience with the Minister of Native Affairs, Chief Mfene wrote protesting that 'Our hearts are bursting with grief.' He died later that year.

[24] The question of the sale of the farm did not disappear. A departmental letter to the Assistant Native Commissioner at Pokwani recorded on 15 March 1935 that Chief 'Jaftha Mahlangu' (the son of Madzidzi, also known as Mtjhartjhana Jonas) and another chief had in the past already made

application, on behalf of their followers, to purchase the farm: but because it was not in an area 'released' for purchase by blacks under the racial legislation, the department had not approved the sale. This is significant because it appears to refer to a prior attempted purchase by Madzidzi's son, separate from the 1922 attempted purchase by his cousin, Mfene.

[25] Other possible avenues of land acquisition appeared to close in anticipation of, and in the wake of, the enactment of the Native Trust and Land Act 18 of 1936. Despite this, the sale of the farm to or on behalf of the community remained a current issue. On 5 August 1938, N L Henwood (son of J W Henwood) wrote to the Secretary for Native Affairs.

> 'I would like to sell my farm Kafferskraal No 62, District Middelburg, Transvaal; in extent 1470 morgen. This farm has been a native area for many years and is totally unimproved. …
>
> I might mention that the Chief of the Mapoch Natives (Jonas Machechan) lives on this farm with his tribe. His father and grandfather before him, for the past fifty odd years or more, have done so. No white people have ever lived there, and it is, and always has been, entirely a Native farm.'

[26] Henwood Junior was writing from Springs, where his letterhead shows that he was a dealer in steel fittings. He too was not living on the farm. But his letter shows more than this.

It not merely affirms the absence of white residential occupation of the farm, but it records that the farm ‘is, and always has been, entirely a Native farm’. The sale foundered, however, as did those earlier, on a departmental veto because the land was not within a ‘released area’ for blacks.

[27] Although the deeds history of the farm appears to indicate that ‘Kafferskraal No 62’ included the whole farm, Henwood was, of course, proposing to sell only the portion of the farm registered in his name. But the claimants assert that the residents his letter referred to occupied the whole farm, and that his description of the nature of its human habitation applies equally to the rest of the farm. These assertions seem justified. It does not seem likely that Henwood would have referred to his portion as constituting a ‘native area’ or that he would have claimed that ‘no white people have ever lived there’, or that the farm was ‘entirely … Native’ if the rest of the farm was in any respect distinctively different.

[28] Certainly there is no evidentiary basis for inferring that the rest of the farm was different. There is as mentioned no direct evidence regarding the human settlement of Portion 3, and in its absence there is nothing to gainsay the accuracy of the oral-historical account that the claimants’ predecessors occupied

both portions at issue in the appeal. Nor is there anything to gainsay the inference that no white people lived on any part of the farm until after the relocation of 1939.

[29] This evidence in my view warrants the following factual conclusions:

(a) The claimants' predecessors constituted a group of people who lived on and worked the farm for a continuous period of nearly fifty years from before the end of the 19th century until their relocation in the late 1930s.

(b) They lived under the authority of a chief designated by the traditional tribal hierarchy: in the late 19th century and first two decades of the 20th century, under Chief Madzidzi, and for the next twenty years under his son and successor, Chief Japtha Mahlangu.

(c) They held the land as a group, and in common with each other.

(d) They occupied the farm exclusively and without immediate supervision or direct control from the white landowners.

(e) They did so in accordance with the ancient customs and traditions of the Ndebele-Ndzundza people.

[30] The bonds of custom, culture and hierarchical loyalty that characterised the inhabitants' occupancy and their relation to

the land are most tellingly shown by the fact that Madzidzi was sent to resuscitate the traditional Ndebele rite of initiation on the farm, and that he did so.

[31] This evidence in my view justifies, as overwhelmingly likely, the inference that the group's customs included rules regulating their access to, and use of, the land.

A 'right in land'?

[32] What was the group's 'right in land'? The Act defines the concept extremely widely, as meaning:

> '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' (s 1).

[33] According to the most influential modern analysis of ownership, that by Tony Honoré, the incidents of the classic right of ownership are the right to possess, the right to use, the right to manage, the right to the income of the thing, the right to the capital, the right to security, the rights of transmissibility and the absence of term, the prohibition of harmful use, the liability

to execution and residuarity.[2] Honoré emphasises that though these incidents are 'standard', they are not individually necessary 'for the person of inherence to be designated "owner" of a particular thing in a given system'.

[34] Plainly the farm's occupants did not enjoy a number of the standard incidents of ownership, such as the right to security, the right to the capital of the farm, the transmissibility of its title, and residuarity. But the restitution legislation does not require there to have been ownership before dispossession. It requires far less. In the present case the group over decades occupied, used and managed the farm, and did so without the proximity of its white owners and despite their registered title. They did so before any white owner asked them to pay rent, and they continued to do so afterwards.

[35] Counsel for the appellants contended that the fact that Henwood Senior exacted rent from Madzidzi and his followers from 1902 contradicted the claimants' assertion that their predecessors had rights in the land. I do not agree. It is correct that Henwood collected rent, and that subsequent documents allude to the occupants as paying rent, or living

[2] Tony Honoré 'Ownership' in AG Guest (ed) *Oxford Essays in Jurisprudence* (1961) p 107, discussed in the context of the racial legislation of apartheid by Carole Lewis 'The Modern Concept of Ownership of Land' 1985 *Acta Juridica* 241-266.

under labour conditions. But I cannot see how this negates the conclusion that the residents enjoyed rights in the land as contemplated by the statute. The Act's definition expressly includes customary law interests and the rights of labour tenants and sharecroppers: the farm's residents certainly exercised nothing less.

[36] Counsel contended also that the fact that the land was granted in registered white ownership before Madzidzi's arrival excluded the inference that the claimants' predecessors enjoyed rights in the land. I cannot accept this. First, the evidence of Dr Jansen van Vuuren offers support for continuous indigenous occupation predating the grant of registered ownership. But in any event, the statute recognises rights of communal ownership under indigenous law.[3] In my view the fact that registered title exists neither necessarily extinguishes the rights in land that the statute contemplates, nor prevents them from arising.

[37] The subtlety and complexity – and the inescapable contradictions – of the position in which the farm's residents found themselves is reflected in the following exchange during the cross-examination of Mbulawa Abraham Mahlangu:

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[3] *Alexkor Ltd v The Richtersveld Community* 2004 (5) SA 460 (CC) para 62.

‘Do you agree that in 1902 Mr Henwood became the owner of a portion of Kafferskraal? – He was not the owner. He let the people pay because of his colour.’

[38] The Act recognises complexities of this kind, and attempts to create practical solutions for them in its pursuit of equitable redress. The statute also recognises the significance of registered title. But it does not afford it unblemished primacy. I consider that in this case the farm’s residents established rights in the land that registered ownership neither extinguished nor precluded from arising.

[39] To conclude this aspect of the appeal: I agree with Dodson J in *In re Kranspoort Community*[4] that the concept of ‘community’ envisaged by the Act requires –

‘that there must be, at the time of the claim,

(1) a sufficiently cohesive group of persons to show that there is still a community or a part of a community, taking into account the impact which the original removal of the community would have had;

(2) some element of commonality with the community as it was at the time of the dispossession to show that it is the same community or part of the same community that is claiming.’

[4] 2000 (2) SA 124 (LCC) para 34 (Moloto J concurring; Mr Plewman assessor).

[40] The claimants have fulfilled these conditions. The farm's residents constituted a group, or a part of a group, whose rights in land were derived from shared rules determining access to and use and enjoyment of land they held in common. The last major question is whether this community was 'dispossessed' of their rights.

Was the community 'dispossessed'?

[41] As explained, the farm Goedgedacht or Goedehoop was purchased, together with others, in the late 1930s for the Ndebele communities, and the evidence showed that shortly before his death in 1940, Madzidzi's son, Japhta Mahlangu, was settled there with many of his followers. In a letter dated 20 September 1940, the Assistant Native Commissioner of Pokwani, Middelburg District, notified the Secretary for Native Affairs that 'Chief Jafta Mahlangu, of the Mapoch tribe, has been settled on Goedehoop 279, and with his followers allotted lands' on adjoining farms.

[42] The measure was intended to be temporary. It was intended to find another location for the community. But transience became near-permanence. When taxed in cross-examination with the suggestion that Goedgedacht was a suitable location

for the community, Mbulawa Abraham Mahlangu responded thus:

'I just want to explain the manner in which they went to Goedgedacht. It does not mean that they were given that place, Goedgedacht. The [thrust] is that they were taken and they were placed or put in that place and they were promised that they were still going to look for a certain place that can be given to them.

[Adv Havenga:] The documents … show that Goedgedacht had six dams, twelve strong fountains, it was under irrigation and it had 3 000 hectares, 3 000 morgen large. Do you know the farm Goedgedacht? – I know it.

And this information is correct, is it not? – I do not know why we are supposed to talk about Goedgedacht, because we want our land, and that is Kafferskraal.

Is it correct that Goedgedacht is the farm that Ikosi Jafta and his royal family settled? – It is true. But they were taken there by marshal, you know, they were sort of forced to go there.'

[43] Mahlangu was born in September 1938. So he was scarcely a toddler when his family moved. Yet, as on other occasions in his evidence, his oral-historical account – that the community was 'sort of forced' to move – finds warrant in the documentary evidence. From this it is clear that there was no physically coerced removal: that, as appears from the evidence of the claimants' expert, Mr De Waal, was a feature of land

resettlement as implemented by the National Party government that came to power in 1948.

[44] Mahlangu himself indeed confirmed that a section of the community stayed on the farm. But the conditions on which they remained were that they would work for the new owner:

'Ja, they wanted to let them work or to make them work for their farming purposes because they could not survive without these people.'

[45] This evidence suggests that after 1940 the nature of the remaining community members' relation to the soil changed. The attempt by Henwood Junior to sell portion of the farm to the community had failed. Instead the first appellant's grandfather bought Henwood's portion. The result was that the community was faced with an unenviable choice – between relocating to Goedgedacht and remaining on the farm, but with the loss of their previous favourable circumstances, which included absence of direct supervision and control by the farm's registered owners.

[46] The fact that there was no physically forced removal does not mean that there was no dispossession: *Abrams v Allie NO*.[5] Dispossession is a broad concept, which must be broadly

[5] 2004 (4) SA 534 (SCA) para 11, per Scott JA on behalf of the Court.

interpreted, bearing in mind the amplitude of the statute's definition of 'right in land':

> 'The concept of dispossession in s 25(7)[6] of the Constitution and in s 2 of the Act is not concerned with the technical question of the transfer of ownership from one entity to another. It is a much broader concept than that, given the wide definition of 'a right in land' in the Act. Whether there was dispossession in this case must be determined by adopting a substantive approach … .'[7]

[47] Mr De Waal testified, when pressed in cross-examination with the fact that the removal of part of the community was not physically coerced, that Goedgedacht already had a resident population, which chose to remain when farm community members were relocated. And, more tellingly, he said, there was no evidence or suggestion that the community was compensated in any way for the improvements and structures and crops they had to leave behind.

[48] In my view, given these facts, the circumstances of the relocation of the farm's community to Goedgedacht in 1939 constituted a dispossession of the rights it had enjoyed in relation to the farm over approximately the previous half-century. They were not given any real choice: they had to relocate to a different area, and work and live in changed circumstances – or remain on the farm under conditions that

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[6] Constitution s 25(7): 'A person or a 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.'
[7] *Alexkor Ltd v The Richtersveld Community* 2004 (5) SA 460 (CC) para 88.

were significantly changed. They no longer had control or use of the land over which for many decades they had enjoyed unrestricted access and control.

[49] This conclusion makes it unnecessary to consider a further possibility raised during argument: whether the community experienced a 'constructive dispossession' in relation to Portion 2 of the farm. It will be recalled that Henwood Junior was willing to sell the farm in 1938, that previously the community had wished to buy it, but that previous sales as well as Henwood's were blocked by the racial legislation and practices of the time. Whether in such circumstances it amounts to a dispossession to thwart acquisition of land by a community with long-standing ties to it (the definition of 'racially discriminatory practices' includes 'practices, acts or omissions') need not be considered now.

Procedural defects

[50] The appellants relied in the LCC and in written argument before us on a number of procedural defects in the application for restitution. These matters were not pressed on us in argument. I agree in any event with the conclusion of the LCC

that the claim was lodged substantially in compliance with the Act and the rules promulgated under it.

Was the claim excluded by s 2(2) of the Act?

[51] Section 2(2) of the Act provides:

> '(2) No person shall be entitled to restitution of a right in land if –
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> (a) just and equitable compensation as contemplated in section 25(3) of the Constitution; or
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> (b) any other consideration which is just and equitable,
>
> calculated at the time of any dispossession of such right, was received in respect of such dispossession.'

[52] The LCC found that this provision did not apply. It gave two reasons. It pointed out that the Goedgedacht relocation was originally intended as a temporary measure, and held that therefore it could not have been intended as compensation 'calculated at the time of dispossession'. It also found merit in the claimants' argument that because Goedgedacht was provided as part of homeland consolidation, in itself a racially discriminatory process, it 'cannot now be accepted as compensation for past discriminatory acts'.

[53] In my view, neither reason was sound. I do not consider that the Act, or the Constitution, contemplates that compensation

originally intended as temporary can never be included in the calculation of just and equitable compensation. It would not be logical to exclude compensation, received and enjoyed as such, merely because it was originally intended to be temporary, and the Act gives no warrant for suggesting that it should be excluded.

[54] Nor do I consider that the fact that the compensation was provided as part of a manifestly discriminatory process necessarily invalidates it for statutory purposes. Again, the Act gives no basis for excluding such compensation (compare *Abrams v Allie NO*). [8] Everything depends on the circumstances. Here, the appellants asserted during cross-examination of the claimants' witnesses that Goedgedacht constituted adequate compensation, and referred to it in terms suggesting well-irrigated and bounteous land.

[55] These factual issues should be fully examined when the other matters that were held over for determination when the issues were separated at the start of proceedings in the LCC are considered at the resumed trial.

Costs of appeal

[8] 2004 (4) SA 534 (SCA) paras 15-27.

[56] Except to the extent just indicated, the appeal must be dismissed. The LCC made no order as to the costs of the proceedings before it, which we understand is frequently its approach. Although in their written argument on appeal the claimants sought costs, no argument was directed to us on the question. It may be that it is appropriate, given that this appears to be something of a test case, for us to follow the LCC's approach. Should depriving the claimants of their costs however be unjust or inappropriate, the parties are afforded an opportunity to direct representations to us.

Order

(1) Except to the extent indicated in para (2) below, the appeal is dismissed.
(2) The application of s 2(2) of the Act is remitted to the Land Claims Court for further consideration in the light of this judgment.
(3) There is no order as to costs. The parties may if so advised within 15 days submit written representations on this part of the order.

E CAMERON
JUDGE OF APPEAL

CONCUR:
SCOTT JA
MTHIYANE JA
LEWIS JA
PONNAN JA