IN THE LAND CLAIMS COURT OF SOUTH AFRICA

Held at **CAPE TOWN** **CASE NUMBER**: 17/96

In the matter between

BLAAUWBERG MUNICIPALITY Applicant

and

L T BEKKER and L J BEUKES First Respondents

THE PROVINCIAL GOVERNMENT OF THE PROVINCE OF THE WESTERN CAPE Second Respondent

SURPLUS PEOPLE PROJECT Third Respondent

THE MINISTER OF LAND AFFAIRS Fourth Respondent

concerning:

FARM GROOTTE SPRINGFONTEIN

JUDGMENT

GILDENHUYS J:

Introduction

[1] This case concerns a claim for the restitution of a right in land under sections 121 and 123 of the Interim Constitution.[1] The Interim Constitution allows a person or community to claim restitution of a right in land if that person or community was dispossessed of that right under or for the purpose of furthering the objects of a law which would have been inconsistent with the prohibition of racial discrimination contained in section 8(2) of the Interim Constitution, if that section had been in operation at the time of such dispossession. Section 121(1) of the Interim Constitution envisages an Act of Parliament to provide for matters relating to the restitution of

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[1] Constitution of the Republic of South Africa Act 200 of 1993.

land rights. That Act has now been passed. It is the Restitution of Land Rights Act.[2] It commenced on 2 December 1994.

The facts

[2] The first respondents are two sisters, Lochline Tersia Bekker and Luceel Jeanette Beukes. They inherited the farm Grootte Springfontein from their father and obtained registration during 1967. On 25 February 1972, the farm was declared to be a coloured group area under Proclamation No 27 of 1972.[3] On 23 October 1974, the farm was expropriated[4] by the Community Development Board under section 38(1) of the Community Development Act.[5] It is common cause that the expropriation was effected under a law which would have been inconsistent with the prohibition of racial discrimination contained in section 8(2) of the Interim Constitution, had that section been in operation at the time of such expropriation. On 20 February 1976, compensation for the expropriation in the amount of R700 000,00 was paid to the first respondents.

[3] On 1 April 1987, the Community Development Board transferred ownership of the farm to the Development Board established under the Development Act (House of Representatives).[6] During 1993, the assets of the Development Board were transferred to the National Housing Board in terms of section 10 of the Housing Arrangements Act.[7] Thereafter, on 19 May 1995, the Minister of National Housing delegated certain of his powers and duties in terms of the aforesaid Act to the Provincial Assets Committee of the Provincial Government of the Province of the Western Cape, including the power to sell or otherwise dispose of land belonging to or vesting in the National Housing Board.

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2 Act 22 of 1994.

3 Government Gazette 3389, 25 February 1972.

4 Notice of Expropriation L4708/17/8.

5 Act 3 of 1966.

6 Act 3 of 1987.

7 Act 115 of 1993.

[4] As long ago as 28 November 1991, the first respondents lodged a claim in terms of section 91(a) of the Abolition of Racially Based Land Measures Act[8] (the predecessor of the Restitution of Land Rights Act) with the Advisory Commission on Land Allocation for the restoration of the farm. On 21 December 1993, the Advisory Commission on Land Allocation made a positive recommendation,[9] which was followed on 10 May 1995 by a resolution of the Cabinet of the Western Cape Provincial Government that the sale of the property at present market value be supported. The sale of the property, however, did not ensue because agreement was not reached on the purchase price.

[5] After the Restitution of Land Rights Act commenced, the first respondents requested the Regional Land Claims Commissioner of the Western and Northern Cape in terms of section 41(2) of the Restitution of Land Rights Act that their claim under the Abolition of Racially Based Land Measures Act be deemed to be a claim under section 10(1) of the Restitution of Land Rights Act. Pursuant to this request, the Regional Land Claims Commissioner published a notice of the claim in the Government Gazette.[10]

[6] The first respondents incorporated a company under the name of Springfontyn Property Holdings (Pty) Ltd, of which they are the sole shareholders, to receive transfer of the land. They found this necessary because the farm is agricultural land within the meaning of that term under the Subdivision of Agricultural Land Act,[11] which precluded them from taking transfer of the land in undivided shares without the consent of the Minister of Agriculture.[12]

[7] Some time later, agreement in principle was reached between the National Housing Board and the first respondents to settle the claim by the sale of the farm to Springfontyn Property Holdings (Pty) Ltd. This was confirmed by a resolution of the Assets Committee of the Provincial

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8 Act 108 of 1991.

9 The recommendation reads: "Dat die Raad van Verteenwoordigers met die vorige eienaars Mevroue Bekker en Beukes in onderhandeling mag gaan oor die terugkoop van die Plaas Grootte Springfontein op voorwaardes wat vir beide partye aanvaarbaar sal wees."

10 Government Gazette 16597, vol 362, 4 August 1995, published in terms of s 11(1) of the Restitution of Land Rights Act.

11 Act 70 of 1970.

12 Ss 3(b) and 4 of the Subdivision of Agricultural Land Act.

Government of the Western Cape on 23 October 1996. On 13 November 1996, a deed of sale was signed between the National Housing Board and Springfontyn Property Holdings (Pty) Ltd. The deed of sale contains the following suspensive condition:

> "6. Die VERKOPER sal oordrag van die eiendom in naam van die KOPER bewerkstellig sodra hy daartoe in staat is, maar nie voordat :-
> ....
> 6.2 die terme van hierdie ooreenkoms ingevolge artikel 14 van die Wet op die Herstel van Grondregte deur die Grondeisehof bekragtig is nie."

The deed of sale was forwarded to the Regional Land Claims Commissioner on 29 November 1996.

[8] Upon becoming seized of the matter, the Regional Land Claims Commissioner proceeded to investigate the claim. After being informed of the settlement (but before receiving the signed deed of sale), a notice of referral to the Land Claims Court was prepared by the Regional Land Claims Commissioner. It was signed on 19 November 1996 by the Regional Land Claims Commissioner on behalf of the Chief Land Claims Commissioner. The report accompanying the referral indicated that the referral was made under section 14(1)(c) of the Restitution of Land Rights Act, which is the appropriate section -

> "... (if) the parties to any dispute arising from such claim reach agreement as to how the claim should be finalised and the regional land claims commissioner is satisfied that such agreement is appropriate."

[9] On 20 November 1996, the day after the notice of referral was signed, the Land Restitution and Reform Laws Amendment Act[13] came into force. Section 2 of this Act reads as follows -

> "Amendment of section 2 of Act 22 of 1994
>
> 2(1) Section 2 of the principal Act is hereby amended -
>
> (a) by the substitution for subsection (1) of the following subsections :
>
> `(1) A person shall be entitled to enforce restitution of a right in land if -
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> (a) he or she is a person or community contemplated in section 121(2) of the Constitution or a direct descendant of such a person;
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> (b) the claim is not precluded by section 121(4) of the Constitution; and

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[13] Act 78 of 1996.

(c) the claim for such restitution is lodged within three years after a date fixed by the Minister by notice in the *Gazette'* and

(b) by insertion after subsection (1) of the following subsection :

`(1A) No person shall be entitled to enforce restitution of a right in land if just and equitable compensation as contemplated in section 123(4) of the Constitution, calculated at the time of any dispossession of such right, was paid in respect of such dispossession.'

(2) Subsection (1) shall be deemed to have come into operation on 2 December 1994."

[10] On 21 November 1996, the day after the amendment came into force, the Regional Land Claims Commissioner forwarded the notice of referral by mail to a number of interested parties.[14] The Chief Land Claims Commissioner had it hand-delivered to the Court on 22 January 1997. The first respondents (Beukes and Bekker), the Provincial Government of the Province of the Western Cape, the Blaauwberg Municipality (in whose area of jurisdiction the farm is situated) and the Minister of Land Affairs indicated in terms of the Land Claims Court rules that they intended to participate in the case. The Surplus People's Project was by agreement admitted as an *amicus curiae* in the case. The Blaauwberg Municipality and the Minister of Land Affairs were not parties to the settlement agreement. They opposed the restoration of the farm to the first respondents, as did the Surplus People's Project.

[11] The validity of the referral of 19 November 1996 was questioned by the Blaauwberg Municipality. At the time, there was no certificate from the Minister of Land Affairs that the restitution of the rights in question was feasible.[15] A copy of the relevant deed of settlement was not enclosed, nor was there a request signed by the parties concerned and endorsed by the Chief Land Claims Commissioner that the settlement agreement be made an order of court.[16] This caused the Regional Land Claims Commissioner to have second thoughts about the referral documents. He prepared and submitted a substitute referral document and report dated 7 May 1997, this time under section 14(1)(d) of the Act. This section applies where:

" . . . the Regional Land Claims Commissioner is of the opinion that the claim is ready for a hearing by the Court."

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[14] One of the interested parties was the Cape Metropolitan Council, the predecessor of the Blaauwberg Municipality.

[15] As required by s 15(1)(a), read with s 14(5A) of the Restitution of Land Rights Act.

[16] As required by s 14(3) of the Restitution of Land Rights Act for referrals under s 14(1)(c).

The Regional Land Claims Commissioner explained the substitution in an affidavit filed with the Court as follows -

> "The Commission is of the view that the matter was correctly referred under section 14(1)(c).
>
> Due to the opposition of the parties to the purported settlement, by the time of the first conference, the Commission takes the view that the Court may now deem that the matter should be dealt with under section 14(1)(d)."

[12] After the Court became seized of the matter but before the hearing thereof, the Blaauwberg Municipality (as applicant) served a notice of motion on the first respondents, the Provincial Government of the Province of the Western Cape (as second respondent), the Surplus People's Project (as third respondent) and the Minister of Land Affairs (as fourth respondent) wherein it claimed an order -

"1 Declaring that :

1.1 To the extent that the Regional Land Claims Commissioner purported to refer the abovementioned First Respondents' claim to this Honourable Court in terms of section 14(1)(c) read with section 14(3) of the Restitution of Land Rights Act, No 22 of 1994 ("the Act"), such referral is void and of no force or effect, alternatively such referral is liable to be and is hereby set aside;

1.2 Alternatively, declaring that the referral by the Regional Land Claims Commissioner of the abovenamed First Respondents' claim to this Honourable Court is a referral as contemplated in section 14(4) read with section 14(1)(d) of the Act.

1.3 Alternatively, declaring that the referral by the Regional Land Claims Commissioner of the abovenamed First Respondents' claim to this Honourable Court is a referral as contemplated in section 14(1)(d) of the Act.

2 Declaring that :

2.1 The provisions of section 2(1)(b) of the Act, as amended by section 2(1)(a) of the Land Restitution and Reform Laws Amendment Act, 78 of 1996, are applicable in a determination by this Honourable Court of the abovenamed First Respondents' claim;

2.2 The provisions of section 2(1A) of the Act, as inserted by section 2(1)(b) of the Land Restitution and Reform Laws Amendment Act, 78 of 1996, are applicable in a determination by this Honourable Court of the abovenamed First Respondents' claim;

2.3 The First Respondents are precluded from claiming restitution of the said land in terms of section 2(1) of the Act in the event of it appearing at the said action set down for hearing on Monday, 25 August 1997 that just and equitable compensation as contemplated in section 123(4) of the Constitution of the Republic of South Africa Act 200 of 1993, calculated at the time of disposition *(sic)* of the farm Grootte Springfontein, No 1, Cape Division, measuring 1265,1405 hectares in terms of the

provisions of section 38(1) of the Community Development Board Act, 33 of 1996, was paid in respect of such disposition *(sic)*."

[13] In addition to opposing the relief claimed by the applicant on its merits, the first respondents raised two points *in limine*. The first constituted an attack on the *locus standi* of the applicant to participate in the proceedings at all. The second was that the relief sought by the applicant was in the nature of a review of various decisions taken by the second respondent, the fourth respondent, the Chief Land Claims Commissioner and the Regional Land Claims Commissioner, that the applicant could only attack those decisions through review procedures before a competent authority and that this Court does not have the power to review those decisions. These points were argued simultaneously with the application for the declaratory orders, and were dismissed. The following order was granted on the prayers for declaratory orders contained in the applicant's notice of motion -

> **"a) In terms of prayer 1.3 of the Applicant's Notice of Motion, declaring that:**
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> The referral by the Regional Land Claims Commissioner of the First Respondent's claim to the Court is a Referral in terms of section 14(1)(d) of the Restitution of Land Rights Act No. 22 of 1994.
>
> **b) In terms of prayer 2.2 of the Applicant's Notice of Motion, declaring that:**
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> The provisions of section 2(1A) of the Restitution of Land Rights Act 22 of 1994 as inserted by section 2(1)(b) of the Land Restitution and Reform Laws Amendment Act, 78 of 1996, are applicable in a determination by the Court of the First Respondent's claim."

We undertook to give reasons later. The reasons for the dismissal of first respondents' objection to the *locus standi* of the applicant will be contained in a separate judgment by my colleague, Meer J. My reasons for making the declaratory orders set out above, follow.

[14] Although the question of the constitutional validity of section 2(1) of the Land Restitution and Reform Lands Amendment Act was mentioned by Mr Bertelsmann (who appeared on behalf of first respondents) in passing during his replying address, it did not form the basis of any argument presented on behalf of any of the parties. We did not consider this question in making the orders we gave, nor were we urged to do so.

Are declaratory orders appropriate?

[15] It was submitted on behalf of the first respondents that the relief which the applicant claims in respect of the decisions of the Regional Land Claims Commissioner (in prayer 1 of the notice of motion) is in the nature of a review, and because the review procedures prescribed by the rules of the Land Claims Court[17] were not followed, the application in respect of prayer 1 is defective.

[16] I disagree. The relief claimed by the applicant[18] constitutes declaratory orders. This Court has jurisdiction to make declaratory orders.[19] It may also, upon application by any party, decide upon an issue of fact or law before evidence is led in any action.[20] Declaratory orders are particularly appropriate where parties, before embarking on further litigation, wish certain issues to be clarified.[21] Such orders may be made in respect of the validity of administrative action.[22] The fact that the applicant may also be able to obtain relief through review proceedings, does not preclude the Court from granting a declaratory order.[23] Where, as in the present case, application is made for the prior adjudication of various points of law and fact through declaratory orders, relief in that form is more appropriate than relief through review proceedings.

Validity and effective date of the referral

[17] When the referral under section 14(1)(c) of the Restitution of Land Rights Act was signed by the Regional Land Claims Commissioner on 19 November 1996, also when it was mailed to the interested parties on 21 November 1996, and also when it was delivered to the Court on 22 January 1997, the referral was, in my view, defective for the following reasons: Firstly, the referral was not accompanied by the relevant deed of settlement and a request signed by the parties and endorsed by the Chief Land Claims Commissioner requesting that the agreement be

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17 Rule 35 of the Land Claims Court rules.

18 Prayers 1 and 2 quoted in paragraph 12 of this judgment.

19 Section 22(1)(cA) of the Restitution of Land Rights Act

20 Rule 57 of the Land Claims Court rules

21 Baxter, *Administrative Law* 2ed (Juta, Cape Town 1994), 698-704

22 *Afdelingsraad van Swartland v Administrateur, Kaap* 1983 (3) SA 469(C).

23 See for example: *Nguza v Minister of Defence* 1996 (3) SA 483 (T) at 486H-488B; *Standard Bank S A Ltd v Trust Bank of Africa Ltd* 1968 (1) SA 102 (T) at 105 F; *Safari Reservations Ltd v Zululand Safaris Ltd* 1966 (4) SA 165 (D) at 171F;

made an order of court.[24] Secondly, the referral was not accompanied by a certificate of the Minister of Land Affairs that the restitution of the farm is feasible, as required under section 14(5A) of the Restitution of Land Rights Act. Subsection (5A) came into force on 20 November 1996, after the referral was signed but before it was mailed to the interested parties or submitted to the Court. Subsection (5A) was already in force when the referral was mailed and submitted to the Court and in my view it should have been accompanied by a feasibility certificate. The mere signing of a referral document, without anything further done with it, cannot by itself be a referral to the Court as envisaged in subsection (5A).

[18] The referral of a claim by the Commission to the Court is a purely administrative function,[25] within the ambit of the Commission's investigative and reporting function.[26] It is not a quasi judicial function, which renders the chief land claims commissioner *functus officio* after the referral is made. The contents of the referral documents confer no rights to a particular form of restitution on any person. The Court need not accept any factual findings or recommendations contained therein. The mere non-compliance with prescribed requirements does not necessarily visit the referral with nullity,[27] nor does it preclude the Commissioner from augmenting a defective referral at a later date,[28] especially if nobody is prejudiced thereby.[29] The Chief Land Claims Commissioner is always at liberty to substitute, amend and amplify the notice of referral and the accompanying documents.[30] The Court may require the substitution, amendment or amplification of a defective referral before making an order on a restitution claim.

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24 S 14(3) of the Restitution of Land Rights Act

25 In the sense in which that term is used in *Pretoria North Town Council v A1 Ice Cream Factory*, 1953 (3) SA 1 (A) at 11.

26 S 6(1) of the Restitution of Land Rights Act.

27 *JEM Motors Ltd v Boutle and Another* 1961 (2) SA 320 (N) at 328, per Milne J: "Imperative provisions, merely because they are imperative, will not, by implication, be held to require exact compliance with them where substantial compliance will achieve all the objects aimed at." See also *Commercial Union Assurance Co Ltd v Clarke* 1972 (3) SA 508 (A) at 517C-E; *Winter v Administrator-in-Executive Committee* 1973 (1) SA 873 (A) at 886A-D;

28 To make it comply with s 14 of the Restitution of Land Rights Act and with rules 38 and 39 of the Land Claims Court rules.

29 See *Jockey Club of South Africa and Others v Feldman* 1942 AD 340 at 359.

30 Wiechers, *Administratiefreg* 2 ed (Butterworths, Durban 1984) 187 - 188; *Sekretaris van Binnelandse Inkomste v Florisfontein Boerdery* 1969 (1) SA 260 (A) at 265H-266A.

[19] On 7 May 1997, the Chief Land Claims Commissioner submitted a fresh notice of referral and report, which substituted the original notice of referral and report. This time the referral was made under section 14(1)(d) of the Restitution of Land Rights Act. The substitute report, although not purporting to be made under section 14(2) of the Restitution of Land Rights Act, deals with most of the matters required under that subsection. The missing documents which rendered the first referral defective have now been lodged. The second referral complies substantially with the prescribed legal requirements.

[20] During the hearing of the matter, much argument centred around the difference between a referral under section 14(1)(c) and a referral under section 14(1)(d). Who are "the parties to any dispute" arising from a claim and who must "reach agreement as to how the claim should be finalised" to make a referral under section 14(1)(c) appropriate? Are the "parties to the dispute"[31] restricted to parties with an interest in the land (ie the claimants, the present owners or holders of rights in the land and any organ of state which must pay for the land if it has to be expropriated), or are other parties (including organs of state) without an interest in the land but with a legal interest in the manner in which the claim will be disposed of, also included? In my view, it will be prudent for the Commission to include all parties which may have a legal interest in the claim (including organs of state which will be entitled to intervene in proceedings before the Court) in any settlement agreement. If all the parties whose involvement is necessary to implement the settlement have signed and if the Commissioner is not aware that the settlement is being opposed by any other party with a legal interest in the claim or by any organ of state with the right to intervene, the matter may be properly referred to the Court under section 14(1)(c). Should it afterwards appear that any non-signatory party or organ of state opposes the settlement, that party or organ of state may do so in the proceedings before the Court.[32] Their opposition does not render the referral under section 14(1)(c) invalid.

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[31] Within the meaning of the phrase as used in s 14(1)(c) of the Restitution of Land Rights Act.

[32] Form 3 of the Land Claims Court rules requires a list of persons (if any) who did not sign a request that the settlement agreement be made an order of the Court and whose rights or interests may be affected by the agreement.

[21] The Commission has more duties in respect of a referral under section 14(1)(d) than it has in relation to a referral under section 14(1)(c).[33] Apart from this, the procedure before the Court and the rights of any party opposing the claim are much the same. The Court will be slow to reject a referral merely because the Commission made the referral under the wrong section. In this case, the Commission changed its mind on the appropriate section under which the referral was made. The Commission is entitled to do that. Section 14(1)(d) is not inappropriate. I can envisage no prejudice to anyone if the referral is made under section 14(1)(d). We have accordingly ordered that the claim be dealt with as a referral under section 14(1)(d).

Interpretation of section 2 of the Land Restitution and Reform Laws Amendment Act

[22] Section 2(2) of the Land Restitution and Reform Laws Amendment Act reads as follows -

> "Subsection (1) shall be deemed to have come into operation on 2 December 1994."[34]

It was submitted, on behalf of the first respondents that, "subsection (1)", where it appears in section 2(2) of the Amendment Act, refers to the amended subsection 2(1) of the Restitution of Land Rights Act (the "principal Act") and not to subsection 2(1) of the Amendment Act. I do not agree. Where in the Amendment Act the legislator intends to refer to a section of the principal Act, it is done explicitly: See, for example, section 2(1) of the Amendment Act, which states -

> "Section 2 of the principal Act is hereby amended"
> [emphasis added]

If the legislator intended the reference "subsection (1)", where it appears in section 2(2) of the Amendment Act, to be a reference to the principal Act, it would have stated "subsection 2(1) of the principal Act". Not only the absence of the words "of the principal Act", but also the absence of a reference to "2" ["subsection (1)" in stead of "subsection 2(1)"] convinces me that the reference was intended to be to section 2(1) of the Amendment Act.

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[33] See s 14(3) as compared with s 14(2) of the Restitution of Land Rights Act.

[34] The full text of section 2 of the Amendment Act is quoted in para 9 of this judgment.

[23] Furthermore, I can find no logical reason why the legislator would want the amended section 2(1) of the principal Act to have retroactive effect and not section 2(1A). The purpose of both amendments is to exclude compensation claims by persons who received just and equitable compensation. To the extent that section 2(2) of the Amendment Act is ambiguous, an interpretation that its reference to "subsection (1)" is a reference to subsection 2(1) of the Amendment Act, is to be preferred.

Was the expropriation of the farm effected under an expropriation law repealed by the 1975 Expropriation Act?

[24] It was submitted, on behalf of the third and fourth respondents, that because the 1975 Expropriation Act[35] repealed certain expropriation provisions of the Community Development Act whereunder the first respondents were expropriated in 1974, the first respondents' claim is excluded by section 121(4) of the Interim Constitution. Section 121(4) reads as follows -

> "(4)(a) The provisions of this section shall not apply to any rights in land expropriated under the Expropriation Act, 1975 (Act 63 of 1975), or any other law incorporating by reference that Act, or the provisions of that Act with regard to compensation, if just and equitable compensation as contemplated in section 123(4) was paid in respect of such expropriation.
> (b) In this section `Expropriation Act, 1975' shall include any expropriation law repealed by that Act."

[25] It was furthermore argued on behalf of the third and fourth respondents that the amendments to section 2(1) of the Restitution of Land Rights Act are intended to confirm an existing legal position which might be open to doubt, namely that section 2(1) did not create a statutory restitution right otherwise excluded by section 121(4) of the Interim Constitution. If this is accepted, so the argument ran, the first respondents' claim is excluded by section 121(4) of the Interim Constitution.

[26] The purpose of section 121(4) of the Interim Constitution seems to be to exclude restitution claims by persons who or communities which received just and equitable compensation at the time of dispossession. The legislator set about achieving this aim in a cumbrous manner, and it comes as no surprise that an amendment to section 2 of the Restitution of Land Rights Act became necessary to clarify the position.

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[35] Act 63 of 1975.

[27] Expropriations effected under or for the purpose of furthering the objects of a racially discriminatory law, which constitute a threshold for restitution claims,[36] could be achieved by virtue of expropriation powers contained in the discriminatory laws themselves, or by virtue of expropriation powers contained in an expropriation law of general application. Where a racially discriminatory law contained expropriation powers, its compensation provisions were often inadequate to secure the payment of just and equitable compensation. On the other hand, expropriation laws of general application tended to contain fair compensation provisions. This background may provide the explanation why section 121(4) of the Interim Constitution was worded as it is. The legislator may have reasoned that if the expropriation took place under an expropriation law of general application, the compensation provisions would be fair. If these provisions were properly applied, the compensation would be just and equitable and there should be no restitution claim. On the other hand, so the reasoning might have gone, if the expropriation took place under a racially discriminatory law, the compensation provisions would not be fair, and there would be no possibility of payment of just and equitable compensation under those unfair provisions. It was accordingly not necessary to provide for the exclusion of a restitution claim in such circumstances.

[28] The expropriation of the farm by the Community Development Board took place in 1974, under the provisions of section 38(1)(a) of the Community Development Act.[37] Section 38(1)(a) of the Community Development Act was later substituted by a new section in terms of section 57(a) of the 1975 Expropriation Act. The legislator intended, through the 1975 Expropriation Act, to bring some measure of conformity to the wide variety of expropriation provisions contained in many different laws. Sections 27 to 95 of the 1975 Expropriation Act[38] dealt with amendments to or substitutions of the expropriation provisions of other laws, or repealed other laws. Most, but not all, laws which then contained expropriation provisions were amended or repealed by the 1975 Expropriation Act.

[29] Section 121(4)(b) of the Interim Constitution provides that a reference to “Expropriation Act, 1975" -

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[36] S 121(2)(b) of the Interim Constitution.

[37] Act 3 of 1966.

[38] These sections have now been repealed.

"... shall include any expropriation law repealed by that Act".

The Afrikaans text refers to "onteieningswet". It was argued, on behalf of the third and fourth respondents, that "expropriation law" includes every expropriation section repealed by the 1975 Expropriation Act, irrespective of the law in which it occurs. By referring to "any expropriation law" repealed by the 1975 Expropriation Act, so the argument ran, the legislator used a convenient mechanism of listing the laws under which expropriations which might constitute dispossessions for purposes of section 121 of the Interim Constitution, could have taken place. I do not agree. There are many easier ways to express such an intention. The possible reasoning of the legislator, as I have suggested above,[39] could be the reason why section 121(4) was worded as it is. Furthermore, the term "expropriation law", and particularly the Afrikaans "onteieningswet", tends to suggest a general law on expropriation (such as the 1965 Expropriation Act[40]) and not expropriation provisions contained in a law dealing with other matters. Lastly there are expropriation provisions contained in laws which were not amended or repealed by the 1975 Expropriation Act. Why would the legislator have omitted them from the list, if the intention was to have a list of laws under which expropriations which might constitute dispossessions, could take place?

[30] For the above reasons, I conclude that the substitution of section 38(1) of the Community Development Act by a new section in terms of section 57(a) of the Expropriation Act, does not constitute section 38(1) of the Community Development Act to be an "expropriation law repealed by" the Expropriation Act. The first respondents were not expropriated under an expropriation law repealed by the Expropriation Act, and section 121(4) of the Interim Constitution is therefore not applicable to that expropriation.

The retroactivity of section 2(1A) of the Restitution of Land Rights Act

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[39] In para 27.

[40] Act 55 of 1965.

[31] Section 2(1A) of the Restitution of Land Rights Act [as amended by section 2(1) of the Land Restitution and Reform Laws Amendment Act[41]] provides that no person shall be entitled to enforce restitution of a right in land if just and equitable compensation was paid in respect of the dispossession of that land.[42] Section 2(2) of the Land Restitution and Reform Laws Amendment Act, which came into force on 20 November 1996, provides that subsection 2(1) of that Act -

> "shall be deemed to have come into operation on 2 December 1994"

This section, literally interpreted, gives section 2(1A) retroactive effect, providing that -

> "... as at a past date the law shall be taken to have been that which it was not ...."[43]

The plain meaning of the language in a statute will guide its interpretation. See *Adampol (Pty) Ltd v Administrator, Transvaal*,[44] per Joubert JA:

> "The plain meaning of the language in a statute is the safest guide to follow in construing the statute. According to the golden or general rule of construction the words of a statute must be given their ordinary, literal and grammatical meaning and if by so doing it is ascertained that the words are clear and unambiguous, then effect should be given to their ordinary meaning unless it is apparent that such a literal construction falls within one of those exceptional cases in which it would be permissible for a court of law to depart from such a literal construction, eg where it leads to a manifest absurdity, inconsistency, hardship or a result contrary to the legislative intent."

However, the language of a statute is no more than a guide to its interpretation. One must go further and also consider the purpose and background of the legislation. In *Jaga v Donges NO and Another*,[45] Schreiner JA stated -

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41 Act 78 of 1996.

42 Section 2(1A) is quoted in full in para 9 of this judgment.

43 *Shewan Tomes & Co v Commissioner of Customs and Excise* 1955 (4) SA 305 (A) at 311H. See also *Van Lear v Van Lear*, 1979 (3) SA 1162 at 1164E and *Cape Town Municipality v F Robb & Co Ltd* 1966 (4) SA 345 (c) at 350G-351H.

44 1989 (3) SA 800 (A) at 804B.

45 1950 (4) SA 653 (A) at 662G-H.

"Certainly no less important than the oft-repeated statement that the words and expressions used in a Statute must be interpreted according to their ordinary meaning is the statement that they must be interpreted in the light of their context. . . . Often of more importance is the matter of the Statute, its apparent scope and purpose, and, within limits, its background."

[32] When interpreting legislation, consideration must also be given to the well-known legal presumption that the legislature does not intend to affect acts and transactions which have already been completed, or which stand to be completed shortly, or in respect of which action is pending.[46] Unless a contrary intention is evident, a statute is presumed to legislate for the future and not for the past.[47] This presumption is codified[48] in section 12(2) of the Interpretation Act[49] in respect of the repeal of a law by any other law, as follows -

"Where a law repeals any other law, then unless the contrary intention appears, the repeal shall not -

. . .

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any law so repealed; or

. . .

(e) affect any . . . legal proceeding, or remedy in respect of any such right, privilege, obligation . . . as is in this subsection mentioned;

and any such ... legal proceeding, or remedy may be instituted, continued, or enforced ... as if the repealing law had not been passed."

[33] The presumption is subject to any contrary intention of the legislature.[50] The contrary intention may be express or implied.[51] The origin of the presumption is that the legislature did not

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46 *S v Mhlungu &* Others 1995 (3) SA 867 (CC) at 897, para 65; *Adampol (Pty) Ltd v Administrator Transvaal* 1989 (3) SA 800 (A) at 805F-806D; *Bellairs v Hodnett & Another* 1978 (1) SA 1109 (A) at 1148F-G; Bell *v Voorsitter van die Rasseklassifikasieraad en* Andere, 1968 (2) SA 678 (A) at 684E-F; *Kalla and Another v The Master and Others* 1995 (1) SA 261 (T) at 269J; Cape *Town Municipality v Bethnal Investments (Pty) Ltd and Another* 1972 (4) SA 153 (C) at 163C-H; *Pretorius v Minister of Defence* 1981 (1) SA 1174 (ZA) at 1177H.

47 *Katzenellenbogen Ltd v Multin* 1977 (4) SA 855 (A) at 884A-B.

48 *Bartman v Dempers* 1952 (2) SA 577 (A) at 582C.

49 Act 33 of 1957.

50 *Bartman v Dempers* supra n 49 at 582C; *Nkomo and Another v Attorney General, Zimbabwe* 1994 (3) SA 34 (ZSC) at 39A-40D.

51 *Parow Municipality v Joyce & McGregor (Pty) Ltd* 1974 (1) SA 161 (C), per Van Winsen AJP at 165H-166A: ". . . in these rules of statutory exegesis are intended as aids in resolving any doubts as to the legislature's true intention. Where this intention is proclaimed in clear terms either expressly or by necessary implication the assistance of these rules need not be sought."

intend to achieve an inequitable result by removing existing rights.[52] In *Curtis v Johannesburg Municipality*[53], Innes CJ went so far as to hold that if a literal interpretation of a provision in a statute which gives it retroactive effect would be to take away existing rights:

> " . . . then the literal construction should not be adopted, unless it is evident beyond doubt that the legislature intended it, or unless any other construction would defeat the evident object of the statute, or would render it meaningless."

[34] To determine the object of the new section 2(1A) of the Restitution of Land Rights Act, it is necessary to have regard to circumstances existing at the time, which circumstances must be deemed to have been known to the legislature.[54] It was common knowledge that during the latter half of 1996 more than 10 000 restitution claims were already pending with the Commission. Very few claims were pending before the Court, and only one or two were finalised. The cut-off date for claims is three years after 1 May 1995. Against this background, did the legislature intend the limitation imposed by section 2(1A) to apply only to claims not yet lodged with the Commission, or were claims pending with the Commission but not yet referred to the Court also included? In finding an answer to this question, it must be remembered that there is no substantive right to any particular form of restitution, be it restoration, alternative land, compensation or some other form of relief. The Interim Constitution and the Restitution of Land Rights Act only provide a right to "claim" or "enforce" restitution, in other words, a right to engage in a process. A substantive right to a particular form of restitution only comes into existence when the Court makes a restitution order. Section (1A) does no more than to remove from dispossessed persons who received just and equitable compensation the right to engage in a process which can eventually lead to a restitution order.

[35] I have already concluded that the object of section 121(4) of the Interim Constitution is to exclude dispossessed persons who received just and equitable compensation from the right to claim restitution.[55] Its provisions are not wide enough to achieve this object in all cases. Those dispossessed persons who were expropriated under laws other than the 1975 Expropriation Act

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52 *Bell v Voorsitter Rasseklassifikasieraad* 1968 (2) SA 678 (A) at 685H; Shewan *Tomes & Co v Commissioner of Customs & Excise* 1955 (4) SA 305 (A) at 311C- 312A.

53 1906 TS 308 at 316.

54 *Escoigne Properties Ltd v Inland Revenue Commissioners* [1958] 1 A11 ER 406 (HL) at 414D.

55 See para 26 of this judgment.

or a law repealed by that Act, are not excluded, nor are those who were dispossessed by means other than expropriation (e g through a forced sale). I can find no logical reason for precluding some fully compensated persons from claiming restitution and not all of them. Perhaps the legislature, when choosing the words of section 121(4) of the Interim Constitution, did not realise that a literal interpretation of the section would not fully achieve its purpose. Perhaps the legislature expected the restitution law which had to be passed under section 121(1) of the Interim Constitution to fill the gaps. Although it may be possible under the Restitution of Land Rights Act for the Court, in its discretion,[56] not to grant a restitution order to a dispossessed person who received just and equitable compensation,[57] such a person remained entitled to engage in the claim process. It is the right to engage in the claim process which section 2(1A) removed, thereby giving effect to the object of section 121(4) of the Interim Constitution and placing it beyond doubt that dispossessed persons who received just and equitable compensation cannot obtain restitution.[58]

[36] The reason for the legal presumption that, when making a legal provision retroactive, the legislature does not intend to interfere with existing rights, is that it would be inequitable to interfere with such rights.[59] The legislature is presumed, unless a contrary intention is evident, not to intend an equitable result. The effect of section 2(1A) of the Restitution of Land Rights Act, and the explicit provision of retroactivity contained in section 2(2) of the Land Restitution and Land Reform Laws Amendment Act, must be examined against that background.

[37] A person who received just and equitable compensation when dispossessed of a right is not financially prejudiced. There may be prejudice of a different kind, such as the loss of land which has sentimental, cultural or religious value to the dispossessed person, or the impact on that person's dignity in being deprived of land for racially motivated reasons. Potential, non-financial

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56 Under s 33 of the Restitution of Land Rights Act.

57 Because the Court must have regard to the objects of the Constitution and because the Court must consider the requirements of equity and justice in every matter, dispossessed persons who were fully compensated at the time may find it difficult to persuade the Court to grant a restitution order.

58 A statutory provision which merely clarifies what is doubtful and does not introduce anything new has retroactive operation: see *Parity Insurance Co Ltd v Marescia and Others* 1965 (3) SA 430 (A) at 434C-E; *Ex parte Christodolides* 1959 (3) SA 838 (T) at 841A.

59 See the cases listed in n 52, supra.

prejudice of this kind was not sufficient to preclude the legislature from excluding restitution claims by persons who were fully compensated upon an expropriation under the 1975 Expropriation Act or a law repealed by the 1975 Expropriation Act. The possibility of such non-financial prejudice can therefore not be the reason why the legislature might have intended to preserve a restitution claim for fully compensated persons who were dispossessed under a different Act or in a different manner.

[38] It can be assumed that a substantial portion, if not a major portion, of all restitution claims which will eventuate before the cut-off date, are already lodged with the Commission and are in the process of investigation. There can be no doubt that section 2(1A) will apply to potential claims not yet lodged with the Commission. This would be the position even if section 2(1A) were not made retroactive.[60] If the intention of the legislature was to restrict the limitation of section 2(1A) to potential claims not yet lodged with the Commission, it would not only be discriminatory towards those claimants who, for whatever reason, have not yet lodged their claims with the Commission, but it would also render unnecessary the explicit provision that section 2(1A) applies retroactively as from 2 December 1994. In my view, the provisions of section 2(2) of the Land Restitution and Reform Laws Amendment Act were intended to express the legislature's intention that section 2(1A) applies to claims pending before the Commission, and possibly also to claims pending before the court. I can envisage no other purpose or reason why the legislature found it necessary to enact section 2(2). It must be presumed that every provision in a law is included for some or other purpose or reason.[61]

[39] Mr Bertelsmann, for the first respondents, relied strongly on the decision of the Appellate Division in the case of *Bell v Voorsitter, Rasseklassifikasieraad*[62] in contending that the presumption that the legislature does not intend to interfere with vested rights, requires the Court to find that claims pending before the Commission and the Court are excluded from the retroactive provision of section 2(1A). In that case, the Court considered the retroactive removal of the right of a third party to object to the racial classification of a person by the Racial

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60 By s 2 (2) of the Land Restitution and Reform Laws Amendment Act 78 of 1996.

61 *Kalla & Another v The Master and Others* 1995 (1) SA 261 (T) at 269E.

62 1968 (2) SA 678 (A).

Classification Board, and held that such removal does not apply to cases already pending before the Board, on the basis that -

> "die regte van gedingvoerende partye, by ontstentenis van 'n ander bedoeling, volgens die wetsbepalings wat ten tye van die instelling van die geding gegeld het, beoordeel moet word."[63]

In considering whether the legislature intended that the removal of a third party's right of objection also applies to proceedings already pending before a Racial Classification Board, the Court found that, if it was so intended -

> "... sou dit nie moeilik wees om omstandighede te bedink wat tot uiters onbillike resultate aanleiding sou kon gee nie."[64]

Botha JA, who delivered the judgment in the case, then proceeded to give examples of such inequitable results, and concluded -

> "Dergelike onbillike resultate wat die wetgewer nie kon bedoel het nie, word vermy indien hangende besware, volgens die hierbogenoemde reël, ooreenkomstig die bepalings van die ou artikel 11, beoordeel word."[65]

In the present case, the "onbillike resultate" which caused the Court in the *Bell* case to hold that the legislature did not intend the retroactive removal of the right to object to apply to pending proceedings, will not occur. This circumstance (no inequitable results), together with the other indications that the legislature intended the retroactive operation of section 2(1A) to include cases pending before the Commission, drives me to the conclusion that section 2(1A) is applicable to cases pending before the Commission.

[40] There is a further distinction between this case and the *Bell* case. The *Bell* case dealt with a case pending before a Racial Classification Board, which Board was entitled to decide the case. In the present case, the Commission cannot make a restitution award: that is the task of the Court. The Commission fulfils an administrative, investigate and facilitative function. This work must be

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63 Ibid at 684E.

64 Ibid at 685G. See also *Kalla and Another v The Master & Others* 1995 (1) SA 261 (T) at 270B-C.

65 Supra n 62 at 685H.

done before a case can be referred to the Court. Proceedings before the Commission cannot, in my view, have the same status as proceedings before a tribunal empowered to decide the case before it.

[41] Is section 2(1A) also retroactive in respect of proceedings pending before the Court? It is not necessary for me to decide this, because in my view the proceedings in this Court were not yet pending on 20 November 1996, the date on which the Land Restitution and Reform Laws Amendment Act came into operation. In the High Court an action is commenced when a summons is issued by the registrar, or in a case of a notice of motion which need not be issued by the registrar, when it is properly served upon the respondent.[66] Under the Restitution of Land Rights Act, it is not necessary to have a referral issued by the registrar of the Court before it is served on the interested parties. This does not mean that the mere signature of a referral notice by the Regional Land Claims Commissioner renders that referral "pending" before this Court. To give "pending" its ordinary meaning, something more is required: service on interested parties or lodging of the papers with the Court. All of this happened after 20 November 1996.

[42] Mr Bertelsmann referred to the decisions of *Mlandu and Others v Bulbulia and Another*[67] and *Mobius Group (Pty) Ltd v Duff NO en 'n Ander*[68] in support of a submission that proceedings become pending in this Court on the date on which a notice of referral is signed. In my view, those cases do not support that submission. The cases relate to labour legislation. The date of referral, within the meaning given thereto under the legislation concerned, is relevant to determine the date from which certain prescribed time periods run. In the *Mlandu* case, the Transvaal Provincial Division held that the date of referral is the date contained in the body of the referral document.[69] In the *Mobius Group* case, the Appellate Division held that the date of referral is the date on which the referral document is delivered or sent by registered post to the prescribed inspector.[70] In none of these matters did the Court have to decide the question when a referred

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66 *Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk* 1972 (1) SA 773 (A) at 780C-H.

67 1989 (2) SA 745 (W).

68 1994 (1) SA 604 (A).

69 Supra n 67 at 752D.

70 Supra n 68 at 611 C - I. If this decision is followed, the date of referral in the present case would be 21 November 1996, which is after section 2(1A) has come into operation.

case actually becomes "pending" before the Court. In my opinion, regard must be had to the ordinary meaning of the term "pending action" when determining whether the presumption that the legislature does not intend retroactive legislation to affect pending actions, applies to these proceedings. If I do this, as I must do, the conclusion that these proceedings were not pending in this Court on 20 November 1996, is inevitable.

[43] I may add, without making a decision thereon, that there are indications that the legislature intended section 2(1A) to apply retroactively also to proceedings which were then pending before this Court. Such an interpretation would be in consonance with the objects of section 121 of the Interim Constitution and the Restitution of Land Rights Act.[71]

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A GILDENHUYS
Judge of the Land Claims Court

MEER J:

[1] I am in agreement with my colleague's finding in this matter. The facts are set out in his judgment and need not be repeated. In the Order we granted, the First Respondents' attack on the Applicant's locus standi, raised in limine, was dismissed. My reasons therefor are as set out below:

[2] The First Respondents attacked the Applicant's locus standi on the following grounds:

(i) The Applicant does not have the degree of interest necessary to satisfy standing in these proceedings. The Applicant's only interest in the proceedings lay in its intention to launch an application in terms of section 34 of the Restitution of Land Rights Act 22 of 1994, (hereinafter referred to as "The Act"). It does not have the direct and substantial interest required by our law and as such its interest is no

[71] Compare *Bartman v Dempers* 1952 (2) SA 577 (A) at 581A-B and F-G.

more extensive than the interest which any citizen may have in the present proceedings.

(ii) The Applicant had no connection whatsoever with the land in question when the claim was instituted in 1992, for the reason that the Applicant did not then exist. Until the promulgation of Proclamation 13 of 1997 (on 30 June 1997), the Applicant had no jurisdiction over the land in question and could consequently not have involved itself in any litigation pertaining to such land.

(iii) The Applicant is not the state as contemplated in section 29 of the Act, as alleged by it, and accordingly does not have a right to intervene.

The Applicant does not have the direct and substantial interest necessary to satisfy standing in these proceedings

[3] Against this charge the Applicant submitted that its interest stems from the fact that it is a municipality having all the powers and duties of a municipality with jurisdiction in respect of the land in question. In addition it has an interest in certain infrastructure on the land.

[4] The powers and functions of local government are referred to in Chapter 10 of the Interim Constitution.[1] Section 175(1) provides:

> "The powers, functions and structures of local government shall be determined by law of a competent authority".

Section 175(2) provides:

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[1] Act 200 of 1993

Because this case was pending when the new constitution came into force on 4 February 1997, the Interim Constitution applies to it. Section 17 of Schedule 6 to the final constitution provides :

> " All proceedings which were pending before a court when the new constitution took effect, must be disposed of as if the new constitution had not been enacted."

> "A local government shall be assigned such powers and functions as may be necessary to provide services for the maintenance and promotion of the well being of all persons within its area of jurisdiction."

[5] In keeping with the above directive from the Interim Constitution, a master development plan for the Atlantis area was created. From the record in the main application and the Applicant's replying affidavit it emerges that such a plan, incorporating the farm Grootte Springfontein, (hereinafter referred to as the property), was formulated by the Applicant's predecessors, and the Applicant is involved in the implementation thereof. The property is incorporated into Town 4 of the plan, zoned for residential development, and the Applicant states that the only barrier to such a development is the uncertainty surrounding the future of the property. The Applicant also mentions the possibility of its purchasing the property in order to develop it in the public interest, it not being in the public interest, in the Applicant's view, that the property be sold to the Claimants.

[6] A letter from the Applicant's predecessor, the Cape Metropolitan Council,[2] dated 13 June 1996 states in relation to the farm:

> "The land was incorporated into the master plan for Atlantis and the overall strategy for the development of Greater Atlantis was developed around the master plan . . .
>
> "It should be noted that because of the proposed development it was possible to zone farm Springfontein for residential development."

[7] A letter from the Mayor of Atlantis dated 4 September 1995 also refers to the development plan and states that:

> "Town 4 which incorporates the farm Grootte Springfontein was seen as an important node to further promote development of Atlantis."

[8] The Cape Metropolitan Council incorporated infrastructure planning into the development, and installed a water pipe, a sewerage pipe, a sewerage dam and a gravel road.[3] According to a

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[2] In December 1995, the area of jurisdiction of the Cape Metropolitan Council was divided into six areas for which substructures were established. The Northern substructure was the metropolitan local council under whose jurisdiction the property fell. The Northern substructure changed its name to Blaauwberg Municipality in April 1997. Hence the Cape Metropolitan Council is the predecessor of the Applicant .

[3] As appears from the First Respondents application to the Advisory Commission on Land Allocation.

letter from a firm of consulting engineers, the value of the infrastructure specifically located on the farm is estimated at approximately R5 million including interest.

[9] When a municipality has legally formulated a development plan incorporating certain land, on which it has installed infrastructure to the value of R5 million, and such land is claimed for restoration, it has in my view a direct and very substantial interest in legal proceedings pertaining to such a claim. For it may be adversely affected if the claim succeeds, its development plan may be thwarted and its infrastructure lost. Its interest in such circumstances is direct and substantial, encompassing legal rights and interests in the land claimed, or the subject matter of the litigation. To suggest that it has no standing in such circumstances flies in the face of the approach traditionally adopted by our courts in numerous cases to locus standi,[4] namely, that a prospective party must have a direct and substantial interest in the subject matter of the litigation.

[10] This approach was adopted by me in an earlier as yet unreported judgement also in this case,[5] in an examination of the common law meaning of the term " interested person" in relation to such a person applying for leave to intervene under Section 29(1) of the Act. I also found that standing could be widened beyond the direct and substantial interest required at common law, in accordance with constitutional principles of statutory interpretation in Section 35(3) of the Interim Constitution.[6] The Applicant passes the common law direct and substantial interest test and it is therefore not necessary to apply the wider standing criteria to it.

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4 *Bagnall v The Colonial Government* (1907) 24 SC 470; *Patz v Green and Co* 1907 TS 427 at 433 -5; *Director of Education v McCagie and others* 1918 AD 616 at 621-2 and 631; *Cabinet for the Transitional Territory of South West Africa v Eins* 1988 (3) SA 369 (A) at 3891; *Shifidi v Administrator - General for South West Africa and others* 1989 (4) SA 631 (SWA) at 637D-F; *Milani and another v South African Medical and Dental Council and another* 1990 (1) SA 899 (T) at 902D-903G; *Waks en andere v Jacobs en 'n ander* 1990 (1) SA 913 (T) at 917B-919C; *Natal Fresh Produce Growers' Association and others v Agroserve (Pty) Ltd and others* 1990 (4) SA 749 (N) at 758G-759D.

5 *In re Beukes and Bekker concerning the farm Grootte Springfontein,* LCC 17/96, date, as yet unreported at paras 27-31.

6 Ibid paras 35 - 36

[11] The Applicant's standing must permit it to oppose a claim which could prevent the property from being developed according to its plans for the well being of the persons within its area of jurisdiction.

[12] The Applicant submitted that it would have had a right to bring an application in terms of Section 34 of the Act for an order that the property not be restored to the claimants in the public interest. This is indeed so. As a local authority with a development plan in respect of land falling within its area of jurisdiction, the Applicant clearly has a direct interest in a restitution claim for land forming part of the plan, as well as standing under Section 34 of the Act.

[13] The Applicant's standing derives also from its development powers under the Local Government Transition Act[7] (hereinafter referred to as the Local Government Act). In formulating and implementing a master plan for the area the Applicant and its predecessor were performing a statutory power and duty as set out in the Local Government Act. The Blaauwberg Municipality is a Metropolitan Local Council established by proclamation[8] under the Local Government Act. Section 5(4) of Proclamation 27 of 1996 established it as :

> "a municipality as contemplated in Ordinance 20 of 1964 with all the powers, duties and functions by law conferred or imposed on a municipality ..."

[14] Section 1 of the Local Government Act defines municipality to include a Metropolitan Local Council such as the Blaauwberg Municipality.

[15] The powers and duties of a Metropolitan Local Council are enumerated in Schedule 2A to the Local Government Act. Of these the one of most significance to the Applicant's standing and the present restitution claim occurs at Section 2 of the Schedule, which states:

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7 No 209 of 1993

8 Proclamation 27 of 1996. This Proclamation established the Northern Substructure as a municipality. On 18 April 1997 Provincial Gazette No 5128 changed the name of the Northern Substructure to Blaauwberg Municipality.

> "2. **Integrated Development Plan** - A Metropolitan Local Council shall formulate and implement a local integrated development plan incorporating local land use planning, transport planning, infrastructure planning and the promotion of integrated local economic development, in accordance with the metropolitan integrated development plan."

[16] The master plan for Atlantis incorporating infrastructure on the property is part of the integrated development plan which the Applicant is empowered to formulate and implement. The claim in question could impede the exercise of the Applicant's power and the performance of its duties under the Local Government Act, and it must be permitted to intervene. It is eminently in keeping with the Applicant's power and the performance of its duties to promote the development of the area under its jurisdiction, that it be permitted to oppose a restitution claim which impedes such development.

[17] Regard being had to the above, I am of the view that the Applicant has the necessary direct and substantial interest in the subject matter of this case as the municipality with jurisdiction in respect of the land in question, and as the investor in infrastructure thereon. Its standing is in keeping with the powers granted to it under the Local Government Act, and also in accordance with constitutional directives.

The Applicant lacks locus standi as it was not in existence when the claim was launched

[18] The second ground on which the First Respondents attacked the Applicant's locus standi was that the Applicant had no connection with the property when the claim was instituted with the Advisory Commission on Land Allocation, because the Applicant did not then exist. I do not agree. Save that the claim lodged with the Advisory Commission on Land Allocation by the First Respondents in 1992, is deemed at section 41(2) of the Act to have been lodged in terms of section 10(1) of the Act, there is no other link between the present restitution application and the application lodged with the former Advisory Commission on Land Allocation. The Applicant's existence or lack thereof when that application was lodged in 1992, has no bearing on the present claim and accordingly is of no relevance to it. That particular objection to the Applicant's locus standi cannot therefore be sustained.

[19] The First Respondents further attacked the Applicant's standing by stating that it only acquired rights with effect from 1 July 1997.[9] Prior thereto the Applicant had no jurisdiction over the land and was therefore not entitled to intervene in these proceedings. I find no substance in this submission. I am of the view that the Applicant enjoyed the necessary standing at all relevant times, as appears more fully from the following :

1. The Applicant " inherited" its standing in respect of the restitution claim from the Cape Metropolitan Council, its predecessor. The Regional Land Claims Commissioner for the Northern and Western Cape served the Notice of Referral in respect of the restitution claim on the Cape Metropolitan Council on 19 November 1996 and a substitute referral on 7 May 1997.

2. The area of jurisdiction of the Cape Metropolitan Council was delimited into six areas for which substructures were established, one of which was the Northern Substructure, under whose jurisdiction the property fell.

3. On 28 May 1996 Proclamation 27 of 1996 declared the Northern Substructure to be a municipality as contemplated in Municipal Ordinance 20 of 1974. Section 7 of the Ordinance states that the Municipality is the successor in law of the previous local authority, namely the Cape Metropolitan Council and Section 7© gives it legal status.

4. On 25 November 1996 the Chief Executive Officer of Blaauwberg Municipality wrote to the Regional Land Claims Commissioner about its interest in the land.

5. In April 1997, as recorded in Government Gazette No 5128, the name of the Northern Substructure was officially changed to Blaauwberg Municipality. (However prior to this the applicant had already referred to itself as Blaauwberg Municipality in a letter sent to the Regional Land Claims Commissioner under such name on 25 November 1996).

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[9] In terms of Proclamation 13 of 1997.

[20] Thus, the Applicant became a Municipality with locus standi on 28 May 1996. If it was required to have locus standi before that date it acquired such standing by virtue of the succession in title provided for in the Cape Municipal Ordinance No 20 of 1974.[10]

The Applicant's status as the State as contemplated at section 29 of the Act

[22] The Applicant submitted that it was included in the term " State" as contemplated at Section 29(2)[11] of the Act and accordingly has a right to intervene. Mr Chaskalson, who appeared for the Third and Fourth Respondents addressed the Court comprehensively in support of this submission. The court is indebted to him for his assistance on the subject. The Applicant has of course already been shown to enjoy standing on the basis of the direct and substantial interest test. I am of the view that in the circumstances, the further pursuit of its standing on the grounds of its status as the state or otherwise, would be a somewhat peripheral and purely academic exercise. I am of the view that it is neither necessary nor appropriate for me to make a finding on this particular issue for the purposes of this case.

[23] The Applicant raised also the fact that the First Respondents had waived their rights to raise the issue of its standing by their conduct.[12] In response thereto the First Respondents, correctly in my view, stated that locus standi is not a matter for arrangement between parties by consent. Locus standi in judicio is a matter of law which can be raised in the course of the proceedings either mero motu by the Court or by one of the parties.

Y S MEER
Judge of the Land Claims Court

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10 At section 7.

11 Section 29(2) of the Act provides :

" The State shall have the right to intervene as a party to all proceedings before the Court"

12 The First Respondents did not raise the applicant's standing at pretrial conferences and also served documents on it.

Dated: 10 October 1997