IN THE LAND CLAIMS COURT OF SOUTH AFRICA

Heard at **CAPE TOWN** on 10 August 2000 **CASE NUMBER**: LCC 39/98
before **Gildenhuys**, **Meer AJ** and **Rivett-Carnac (assessor)**

Decided on: 15 September 2000

In the case of

HERMANUS, RE Plaintiff

and

THE DEPARTMENT OF LAND AFFAIRS Defendant

in re

ERVEN 3535 AND 3536, GOODWOOD

JUDGMENT

GILDENHUYS AJ:

Introduction

[1] This is a claim for restitution in terms of the Restitution of Land Rights Act.[1] I will refer to that Act as the "Restitution Act." The claim relates to erven 3535 and 3536, Goodwood. I will refer to them as the "Goodwood properties". The claimant, Mr R E Hermanus, is a person of colour. He was dispossessed of the Goodwood properties. He claims restitution in the form of compensation. The Department of Land Affairs opposes some components of his compensation claim.

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1 Act 22 of 1994.

The facts

[2] The facts set out in this paragraph were agreed between the parties.

(a) The claimant was the owner of the Goodwood properties. He bought them from his father. They were transferred into his name on 25 July 1955. The claimant built a house on one of the properties, and lived there with his family.

(b) The claimant sold the Goodwood properties to the Group Areas Development Board on 19 March 1964 for the sum of R3 760,00. The sale was a forced sale, precipitated by the proclamation of the Goodwood Area as a so-called white group area during 1958[2] in terms of the Group Areas Act.[3]

(c) The claimant did not receive just and equitable compensation upon the dispossession of his Goodwood properties. The market value of the properties at the time was R5 500. The under-compensation amounts to R1 740.

(d) Because of changes over time in the value of money, the consumer price index must be used to escalate the amount of any loss from date of dispossession up to its present day value. The applicable escalation factor is 29.79545454. The present day value of the under-compensation is R51 844,09.

(e) On 12 March 1960, and in anticipation of the forced sale of the Goodwood properties, the claimant purchased Erf 5, Innestree Estate, Crawford, for R700. I will refer to it as the Crawford property. To obtain transfer, he paid transfer duty in the amount of R27,30, stamp duty in the amount of R1,75 and fees in the amount of R2,50: in total, R31,55.

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2 Proclamation 14 of 1958.

3 Act 77 of 1957.

(f) A mortgage bond for an amount of R700 was registered over the Crawford property to fund its acquisition. The registration costs would have been R32,75. This bond was cancelled on 23 April 1963 and a new bond of R5 127 was registered over the Crawford property. The registration costs would have been R60,90.[4] The purpose of the larger bond, according to the claimant, was to finance the building of a house on the Crawford property.

[3] According to testimony given by the claimant, he was emotionally very attached to the Goodwood properties, particularly because he acquired the land from his father. His father bought the land, together with several other erven, to provide for his children. The Goodwood properties were near to a church, where he participated in devotional services. He was unwilling to move away from Goodwood, where he had lived happily for eight years. He endured the stress, over several years, of repeated visits by group areas officials. He bore the indignity of being forced to sell his home. He witnessed the negative effect thereof on his unstable wife. All of this predisposed the claimant to unusual emotional distress in reaction to giving up his home and leaving the area.

[4] After building a house on the Crawford property, the claimant found himself unable to pay the builder in full, and to meet the attendant financial obligations. Eventually, he was forced to sell the house, and move with his family to a caravan in Grassy Park. Later the family moved to a shack, also in Grassy Park. The living conditions in Grassy Park were abhorrent. Ultimately, the claimant was able to rent a Council house in Mitchell's Plain, where he and his family still lives.

[5] The claimant never adapted to his new living environs. He was deeply embarrassed by his precarious financial circumstances, particularly his inability to pay the builder of the Crawford house. His first wife, who was prone to attacks of depression, was repeatedly hospitalised for mental illness. She passed away in the Valkenberg Hospital during 1975. The son from his first marriage developed a form of psychotic illness after the family left their Goodwood home. One night, whilst mentally

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4 The claimant did not present proof of the costs which he actually paid for the registration of the two bonds It was determined what those costs "would have been", according to the applicable cost tables used by conveyancers, and it was assumed that the claimant paid those amounts.

confused, he walked back to their previous neighbourhood in Goodwood, and was killed by a car in an accident close to Goodwood. The daughter from his first marriage was gang-raped near where the family lived in Grassy Park. This caused her to develop a mental illness, for which she was laid off from her work. She had to be treated at Valkenberg Hospital. All these maintaining factors contributed to the continued severe stress in the family, and militated against their recovery.

[6] While suffering the agony of these tragedies, the claimant himself felt suicidal at times. Eventually, he managed to some extent to pull his life together. After the death of his first wife, he remarried. Two children were born from the second marriage. The daughter from his first marriage responded positively to the treatment at Valkenberg Hospital, and she seems to be currently well. However, the claimant is not happy living in Mitchell's Plain, and is particularly concerned about gangsterism and crime in the area.

[7] Professor A R L Dawes, an Associate Professor of Psychology at the University of Cape Town, examined the claimant and gave evidence at the trial. He testified that the claimant and his family suffered a great deal after the dispossession of the Goodwood properties. The dispossession set in train a series of events that compromised the emotional health and functioning of the claimant and his family. Although he could not construct a direct causal link between the forced sale and their subsequent emotional status, he stated that the sale was a precipitating factor that increased their existing psychological vulnerability and reduced their ability to cope with the crises that followed.

Entitlement to restitution

[8] In terms of the Restitution Act, a claimant is entitled to restitution if he was dispossessed of a right in land after 19 June 1913, if the dispossession was the result of past racially discriminatory laws or practices,[5] if he has lodged a claim for restitution by no later than 31 December 1998,[6] and if just and

5 Section 2(1)(a) of the Restitution Act.

6 Section 2(1)(e) of the Restitution Act.

equitable compensation as contemplated in section 25(3) of the Constitution[7] was not paid.[8] The parties agree that these threshold requirements have been met. Restitution of a right in land includes equitable redress.[9] Equitable redress includes the payment of compensation.[10] The claimant claims payment of compensation.

The determination of compensation under the Restitution Act

[9] Although the Restitution Act contains no directive on the make-up of the compensation, the Court is enjoined in section 33 to have regard to certain factors when making its orders. The following of those factors may be relevant to an award of compensation in this matter:

> "(b) the desirability of remedying past violations of human rights;
>
> (c) the requirements of equity and justice;
>
> (eA) the amount of compensation or any other consideration received in respect of the dispossession, and the circumstances prevailing at the time of the dispossession;
>
> (eB) the history of the dispossession, the hardship caused, the current use of the land and the history of the acquisition and use of the land;
>
> (eC) in the case of an order for equitable redress in the form of financial compensation, changes over time in the value of money;"

[10] A claimant who has received just and equitable compensation at the time of dispossession is not entitled to claim restitution under the Restitution Act.[11] In order to determine whether a claimant has

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7 The Constitution of the Republic of South Africa, Act 108 of 1996.

8 Section 2(2)(a) of the Restitution Act. Quoted below in n 11.

9 See the definition of "restitution of a right in land" in section 1 of the Restitution Act.

10 See the definition of "equitable redress" in section 1 of the Restitution Act.

11 Section 2(2) of the Restitution Act reads:

> "No person shall be entitled to restitution of a right in land if -
>
> (a) just and equitable compensation as contemplated in section 25(3) of the Constitution; or
> (b) any other consideration which is just and equitable,

received just and equitable compensation at the time of dispossession, the Court is required to have regard to a different set of factors, namely those set out in the Constitution.[12] These factors are the following:

> "(a) the current use of the property;
> (b) the history of the acquisition and use of the property;
> (c) the market value of the property;
> (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
> (e) the purpose of the expropriation."

In contrast, any compensation to be paid by way of equitable redress must be established with regard to the factors listed in section 33 of the Restitution Act. The two sets of factors are not the same, although some of them do overlap.

[11] In determining compensation for purposes of equitable redress, a Court must have regard to the history of the dispossession and to the hardship caused by the dispossession.[13] These two factors are not on the list of factors to be considered for determining compensation under section 25(3) of the Constitution. Regard to them may well result in a higher award than would have been the case if cognisance had to be taken only of the factors listed in the Constitution.

[12] "Hardship" is not a word commonly used in connection with the determination of compensation for the compulsory acquisition of land. Its dictionary meaning is *privation*; *suffering or adversity.*[14] This can include both financial privation and emotional distress.

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calculated at the time of any dispossession of such right, was received in respect of such dispossession."

12 Section 25(3) of Act 108 of 1996.

13 Section 33(eB) of the Restitution Act lists "the history of the dispossession" and "the hardship caused" as factors to be considered. All the other factors listed in that subsection were taken from section 25(3) of the Constitution, which apply to the determination of compensation. It can be safely assumed that the above two factors were also intended to apply to the determination of compensation.

14 *Black's Law Dictionary* Garner (ed) 7th ed (West Group, Minn 1999) at 722.

[13] The Restitution Act does not, unlike most laws on expropriation,[15] break compensation down into different categories such as market value, financial loss, severance, disturbance and injurious affection. Mr Arendse, for the Department of Land Affairs, suggested that a court will only be driven to award compensation in excess of land value under very compelling circumstances. He submitted that, in this matter, the compensation must be limited to land value. Ms Norton pleaded for additional redress in respect of financial loss and in respect of emotional suffering. To determine whether such additional redress is justified under the Restitution Act, I must consider the ambit of the concept of "compensation", as used in the Restitution Act in relation to the dispossession of land.

[14] The older expropriation laws, particularly in the United Kingdom, did not prescribe any heads of claim. These were developed by the courts.[16] They were only incorporated into legislation as from a later date. In cases where the applicable law specifies no heads of claim, as in this matter, general compensation principles as well as the factors set out in section 33 of the Restitution Act must guide the Court towards establishing suitable heads.[17] Such heads of claim will be relevant to the Restitution Act only, not to other legislation.

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15 The Expropriation Act, 63 of 1975, for example, differentiates between market value and financial loss [section 12(1)] and provides for a percentage add-on to these amounts [section 12(2)], which add-on is sometimes referred to as a *solatium.*

16 See Todd *The Law of Expropriation and Compensation in Canada* (Carswell, 1992) 110:

> "Neither the English legislation nor the Canadian statutes which were copied from it did more than provide for the payment of 'compensation' or 'full compensation' for the value of the land taken for, or injuriously affected by, the execution of authorised works. In the absence of legislative definition, it fell to the courts to establish the criteria by which such compensation should be measured."

17 G Budlender, "The Constitutional Protection of Property Rights", in *Juta's New Land Law*, 1-64:

> "If Parliament determines in a statute that a particular factor is relevant, the courts will be bound to have regard to it."

May compensation include redress for financial loss in addition to market value

[15] The principles underlying the assessment of compensation cannot be stated with logical completeness. It was held in *Illovo Sugar Estate v South African Railways and Harbours*:[18]

> "The truth is that it is not possible to state with logical completeness, the principles underlying the assessment of compensation. It is sufficient to say that an owner manifestly ought not to receive more than his total loss, and that the value of his land may be assessed on such a basis and at such a figure as to negative all possibility of his having suffered any loss over and above that sum."

This accords with the position in other commonwealth countries, with which our expropriation law shares common roots. In *Horn v Sunderland Corporation*[19] Lord Scott referred to:

> "The statutory compensation cannot, and must not exceed the owner's total loss, for, if it does, it will put an unfair burden on the public authority... and it will transgress the principle of equivalence which is at the root of statutory compensation, the principle that the owner shall be paid neither less nor more than his loss."

It was held by Dixon J in the Australian case of *Nelungaloo (Pty) Ltd v The Commonwealth and Others*:[20]

> "Compensation *prima facie* means recompense for loss, and when an owner is to receive compensation for being deprived of real or personal property his pecuniary loss must be ascertained by determining the value to him of the property taken from him."

The general principle, according to the Canadian case of *Irving Oil Co Ltd v R*,[21] is that -

> ". . . the displaced owner should be left as nearly as is possible in the same position financially as he was prior to the taking, provided that the damage, loss or expense for which compensation was claimed was directly attributable to the taking of the lands."

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18 1947 (1) SA 58 (D) at 64.

19 [1941] 2 KB 26, 49 (CA, England).

20 [1948] 75 CLR 495 at 571. See also *May, Thomas Family, Cairns Family Trust and Frogmore Tobacco Estate (Pty) Ltd v Reserve Bank of Zimbabwe* 1986 (3) SA 107 (ZSC) at 121.

21 [1946] 4 DLR 625. See also *Hayden Warehouses & Storage Ltd v Toronto*, [1953] 1 DLR 81 at 82 (Canada).

Implicit in these *dicta* is an acknowledgment that the concept of compensation is wide enough to include redress for any financial loss directly caused by the dispossession, over and above the value of the dispossessed property.

May compensation include redress for non-financial deprivation

[16] Non-financial deprivation can be compensated by the add-on of a fixed percentage to the awards under other heads of claim, or by a separate award under the label of inconvenience, or under any other descriptive label. An award for non-financial deprivation, irrespective of what form it takes, is sometimes referred to as *solatium* or, in Afrikaans, *troosgeld*. The South African expropriation law, for many years, recognised a claim for inconvenience as a component of compensation for expropriation. It originated in the Irrigation and Conservation of Waters Act, 1912.[22] From there it found its way into the Native Trust and Land Act of 1936[23] (as it was then called), and eventually into the 1965 Expropriation Act.[24] Under the 1975 Expropriation Act it survived for some time, but only in respect of the expropriation of a right (as distinct from the expropriation of land).[25] It was abolished in 1992. Instead of a claim for inconvenience, the 1975 Expropriation Act allows the add-on of a fixed percentage to the compensation monies awarded under the other heads of claim.[26]

[17] The ambit of inconvenience is wide enough to include mental distress. It was said by Addleson J in *Minister of Agriculture v Federal Theological Seminary*, albeit *obiter*:[27]

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22 Section 98(3)(a)(iv) of Act 8 of 1912, inserted by section 9 of the Irrigation Amendment Act 46 of 1934. Its purpose was "to assuage as far as possible the consequences of expropriation": see *Mynhard v Union Government*, 2 *Watermeyer's Water Court Reports* 65, 66.

23 Act 34 of 1936.

24 Section 8(1)(b) of Act 55 of 1965.

25 Section 12(1)(b) of Act 63 of 1975, as it read before 1992.

26 Section 12(2) of the Act.

27 1979 (4) SA 162 (E).

> "It seems to me probable that the intention was to allow 'inconvenience' to include such 'intangible' matters as mental distress. The amount of compensation awarded for such an element might of course be nominal or minimal where the inconvenience is minor or highly subjective; but it is possible to conceive of situations where the subjective distress is very great and difficulty in assessing the *quantum* of compensation does not in my view detract from the validity of the concept that inconvenience of this type may form a proper subject for compensation."[28]

[18] The factor of hardship caused by the dispossession which the Court must have regard to under section 33(eB) of the Restitution Act, can also relate to emotional suffering. The requirement, also under section 33(eB) that the history of the dispossession must be taken into account, further lends support to the view that hardship must be broadly interpreted to encompass emotional suffering. This is so because the history of dispossessions is an integral part of the history of *apartheid* in South Africa. All dispossessions were embedded in the degrading and repressive policies of *apartheid*. The emotional suffering of those dispossessed, albeit in relative degrees, is well known. An award of a *solatium* could provide some solace for the emotional suffering of the claimant.

> "It is a kind of sweetener, reflecting some kind of apology."[29]

[19] In the Australian case of *Robertson v Commissioner for Main Roads*,[30] it was held that *solatium* refers to factors such as nuisance, annoyance, inconvenience and distress. Even where the authorising statute makes no provision for the payment of a *solatium*, the courts in some Australian states were ready to imply a right to do so in appropriate but limited circumstances.[31] The award can be a percentage of the amounts awarded under other heads of claim,[32] or it could be an amount fixed at the discretion of the Court.[33]

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28 Above n 27 at 178G-H.

29 Brown *Land Acquisition* 3rd ed (Butterworths, Australia 1991) at 133.

30 (1987) 63 LGRA 420 at 426.

31 Brown above n 29 at 134.

32 This is the basis on which many *solatium* awards are generally made in Australia. Under section 12(2) of the South African Expropriation Act, Act 63 of 1975, a fixed percentage must be added to the amounts awarded under section 12(1). It is commonly understood that this is by way of *solatium.*

33 This was done in *Robertson*, above n 30.

[20] In India, under the Land Acquisition Act of 1894,[34] a *solatium* of 30% of the value of the expropriated land is payable to the owner in consideration of the compulsory nature of the acquisition. It was described in *Narain Das Jain v Agra Nagar Mahapalika*[35] as follows:

> "Solatium is money comfort, quantified by the statute, and given as a conciliatory measure for the compulsory acquisition of the land of the citizen."

This percentage for *solatium* is "amongst the most generous in the world today."[36]

[21] In the United States of America, the *Uniform Relocation Assistance and Real Property Acquisition Policies Act* of 1970[37] provides, in the case of home losses through federal expropriation, for -

> "(i) payment to the owner of up to **Z**22,000 more than the fair market value of a comparable replacement dwelling;
> (ii) payment of up to **Z**400 to help tenants find comparable housing; and
> (iii) the assurance that no one will be forced to move from their dwelling unless there is other comparable housing available."[38]

[22] In Belgium compensation is sometimes awarded for the severance through expropriation of the sentimental relationship between the owner and the expropriated land.

> "De diverse uitspraken in verband met de toekenning van een vergoeding wegens sentimentele bindingen met het onteigende goed wijzen erop dat deze vergoeding moet toegekend worden wegens de lange duur van bewoning door de onteiegende, de bijzondere zorg die hij eraan heeft besteed en de leeftijd van de onteigende. Onvermijdelik komt men dan ook tot de conclusie dat de vergoeding wegens sentimentele waarde een zaak is voor bejaarden aan wie het recht ontnomen wordt de oude dag te slijten in hun vertrouwde omgeving."[39]

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34 Section 23(2).

35 (1991) 4 SCC 212 (India).

36 See Singh "Expropriation in India" contained in *Compensation for Expropriation: a Comparative Study* Erasmus (ed) (published by Jason Reese in association with the United Kingdom National Committee of Comparative Law, Oxford, 1990) Vol II at 46.

37 42 USC 4651 referred to by Sullivan "Eminent Domain in the United States: An Overview of Federal Condemnation Proceedings" in *Compensation for Expropriation* Volume 1,above n 36, at 169.

38 Sullivan, *op cit*, above note 37, at 169.

39 Denys *Uw Rechten bij Onteigening* (Mys & Breesch, 1997) at 71. Translated, the *dictum* reads:

> "The various judgments in connection with the award of compensation for sentimental attachment with the expropriated property indicate that such compensation must be awarded because of the long duration of the expropriatee's occupation, the particular care which he gave to it, and the age

The awards are relatively low - around 50 000 Belgian Francs per person.[40]

[23] In Germany, the effect which the expropriation may have on the personal position of an expropriatee may be taken into account on the grounds of equity.[41] A special payment (*Ausgleichanspruch*) may be made over and above the compensation for the expropriation.[42]

[24] The reason for awarding an additional amount of compensation by way of *solatium* has been described in the Irish decision of *Re Athlone Rifle Range*[43] as being "for the annoyance of being disturbed in the possession, and the difficulty and delay in procuring other suitable premises." In Canada it was described as being for *eventualités inappréciables et incertaines, impossibles à évaluer au moment de procès*.[44] Although *solatium* awards are made in several other jurisdictions, they are by no means automatic. If an expropriation statute sets out detailed and comprehensive heads under which compensation may be claimed without specifically referring to *solatium*, it is unlikely that the courts will find an additional implied head for *solatium*.[45]

The ambit of compensation under the Restitution Act

> of the expropriatee. Irresistibly one comes to the conclusion that compensation for sentimental value is a matter for the aged, from whom the right to spend their old age in their known environment was taken away."

40 Above n 39. There are approximately six Belgian Francs to a South African Rand.

41 Schmidt-Aßmann "Expropriation in the Federal Republic of Germany" in *Compensation for Expropriation* above n 36 Vol 2 at 91:

> "However, certain German statutes authorise compensation for certain losses that relate principally to the owner himself and provide a supplementary 'equitable compensation' in this regard. Such measures are intended to ease the economic or social hardships, such as in tenants' personal living conditions . . ., which may follow an expropriation. This compensation is awarded on grounds of equity, and, strictly speaking, should not be considered as part of the compensation for the expropriation itself."

42 Van der Walt, *Constitutional Property Clauses* (Kluwer Law International, 1999) 150.

43 1902 1 IR 433 at 437-8.

44 *The King v Lavaie*, unreported, quoted in *The Queen v Sisters of Charity* (1952) 3 DLR 358 at 388. Translated, the *dictum* reads:

> "for unascertainable and uncertain eventualities which are impossible to evaluate at the time of the suit."

45 Brown, above n 29, 134. Compare also the judgment of Lord Denning M.R in *Bailey v Derby Corporation*, [1965] 1 All ER 443, 16 P&CR 192, 198-199 (England).

[25] In deciding upon the ambit of compensation to be awarded to the claimant in this matter, I will be led by the considerations set out hereunder:

(a) On ordinary principles of justice, a person who, under compulsion of law, has his property taken from him, should be compensated in full.[46]

(b) Full compensation not only includes land value, but also other damage, loss or expense directly attributable to the taking of the land.[47]

(c) Compensation for emotional distress is not foreign to the principles of compensation in other jurisdictions and also in South Africa.[48]

(d) The dictate of section 33(eB) of the Restitution Act to have regard to the history of the dispossession and to the hardship caused by the dispossession, read with paragraphs (b) and (c) of section 33,[49] indicates that compensation under the Restitution Act should, over and above land value, also include redress for the financial loss suffered by a claimant as a direct result of the dispossession, and for the mental agony and distress directly caused by the dispossession.[50]

(e) The statutory heads of claim for expropriation in South Africa usually included, and still includes,[51] a claim for *solatium*, either by adding on a fixed percentage to the amounts awarded under other heads of claim, or by an award under the heading of inconvenience. If the compensation in this matter had to be determined under the 1975

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46 *In re John Freeman v Colonial Secretary of Natal* (1889) 10 NLR 71 at 73, *per* Connor CJ:

> "On ordinary principles of justice, if an owner of land has, under compulsion of law, to allow of an interest of his in the land being taken from him or injuriously affected, he should be compensated fully, unless legislation clearly provides otherwise."

47 See para [15] above.

48 See paras [16] to [24] above.

49 The relevant subsections of section 33 are quoted in para [9] above.

50 Hardship, by definition, can include mental distress. See para [12] above.

51 See section 12(2) of the Expropriation Act, 63 of 1975.

Expropriation Act,[52] the claimant would have been entitled to the percentage add-on provided for in section 12(2).

(f) It is morally correct that the mental suffering caused by racially motivated dispossessions should be acknowledged.[53]

[26] The parties agreed that, in determining market value of the Goodwood properties at R5 500, the valuer appointed by the Department of Land Affairs gave the benefit of whatever doubt there might have been at all material times to the claimant, given the circumstances under which the dispossession took place. Mr Arendse, on behalf of the Department of Land Affairs, submitted that this magnanimity should rule out any compensation award in addition to the shortfall in market value. I cannot agree. A liberal award under one head of claim (to which both parties agreed) is no reason not to award compensation under other heads of claim, or to be close-fisted with such an award. In any event, where there has been doubt as to the amount properly payable by way of compensation, courts have tended to resolve that doubt in favour of a liberal estimate.[54]

[27] Regard being had to all of the above, I have come to the conclusion that the compensation to be determined by the Court in this matter must include, in addition to the amount in respect of land value, a further amount to compensate the claimant for his direct financial loss in respect of the transfer and bond costs which he had to incur when acquiring the Crawford property, and also *solatium* for his emotional suffering.

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52 Although the Expropriation Act does not apply in this case, its provisions can give guidance on what is just and equitable: *Ash and Others v Department of Land Affairs* [2000] 2 All SA 26 (LCC), par [76], footnote 106.

53 "There are two crucial reasons for confronting the past. Firstly, as a civilised society, we must recognise the worth and dignity of those victimised by abuses of the past. If we fail to confront what happened to them, in a sense we argue that those people do not matter, that only the future is of importance. We also perpetuate, even compound, their victimisation"

Aryeh Neir, "Why deal with the Past" in *Dealing with the Past: Truth and Reconciliation in South Africa*, Boraine *et al* ed, Institute for Democracy in South Africa, 1994 at 3.

54 *Commissioner of Succession Duties (SA) v Executor Trustee & Agency Co of SA Ltd* (1947) 74 CLR 358 at 374 (Australia). See, generally, Brown, above n 29, at 102.

[28] I am well aware that, if restitution of a right in land should take the form of restoring the land to the claimant, there might be no legislative authority for also awarding a *solatium*. That is because *solatium* is a component of compensation. The factor of hardship which I must take into account, underlies an award of *solatium*. Restoration is a different form of restitution. It does not include compensation. The effect could well be that those claimants who receive restitution in the form of compensation might also get a *solatium*, whilst those who get their land back might not. This apparent discrepancy in the Restitution Act is, in my view, no reason for withholding a *solatium* in cases where the law enables me to grant it.[55]

The amounts of compensation to be awarded

[29] The parties agreed that the market value of the Goodwood properties at the time of dispossession was R5 500,00. The shortfall between the market value and the amount of compensation actually received at the time is R1 740,00. Escalated to present day value[56] and using the agreed consumer price index factor of 29,79545454, the shortfall amounts to a loss of R51 844,09.

[30] The transfer duty and related costs incurred by the claimant to obtain transfer of the Crawford property amounts to an agreed amount of R31,55. The registration costs of the two bonds over the Crawford property was agreed at R93,65. Escalated by the agreed factor of 29,79545454, the present day value of these amounts is R3 730,39. I have not included the registration cost of the original bond over the Goodwood properties, which the claimant also claimed, because I fail to see how the registration of that bond was necessitated by the subsequent dispossession. Although the *quantum* of the above amounts were agreed, the Department of Land Affairs did not concede that the claimant is entitled to be compensated for those expenses. It was necessary for the claimant to replace his home, and to do so he had to pay the transfer duty and related costs and the bond registration costs. If the Court had to consider the claim for those amounts as financial losses under the 1975 Expropriation Act,

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55 Compare the remarks made by Tindall JA in *South African Railways v New Silverton Estate* 1946 AD 830, 841 when considering a similar discrepancy.

56 See section 33(eC) of the Restitution Act.

the claim would have succeeded.[57] Bearing in mind that a right to compensation must be interpreted as a right to full compensation, I have no doubt that the claimant must be awarded these amounts.

[31] This leaves me with the claim for *solatium*. Much of the distress suffered by the claimant, including the distress caused by the death of his wife and son, the rape of his daughter, and the loss of the Crawford property is not the direct result of the dispossession. Although these afflictions might never have occurred had it not been for the dispossession, the dispossession is not the legally recognised cause for them.[58]

[32] The grief and distress caused by forced removals under the Group Areas Act is enormous. As stated by Dodson J in the *Slamdien* case:

> "The discriminatory component of forced removals was a source of enormous psychological harm on its own. Family life was interrupted. The education of children was interrupted. The economic and financial impact was often devastating. The estrangement which it caused between the different race groups is something which will haunt this country for generations."[59]

Not every past injustice is capable of being remedied.[60] No amount of compensation which the Court might award, will adequately compensate the claimant for his sufferings. Any attempt to do so, will place an unbearable burden on the *fiscus*.[61]

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57 *Bouwer v Stadsraad van Johannesburg* 1978 (1) SA 624 (W) at 630F-G, confirmed on appeal in 1979 (3) SA 37 (A) at 46B-C.

58 See *Minister of Land Affairs and Another v Slamdien and Others* [1999] 1 All SA 608 (LCC) at para [38] and *Pienaar v Minister van Landbou* 1972 (1) SA 14 (A) at 25B-C.

59 Above n 58 at para [17].

60 *Slamdien* above n 55 at para [27]; *Azanian Peoples Organisation (Azapo) and Others v President of the Republic of South Africa and Others* 1996 (4) SA 671 (CC) at 676G-H, per Mahomed DP:

> "It was wisely appreciated by those involved in the preceding negotiations that the task of building such a new democratic order was a very difficult task because of the previous history and the deep emotions and indefensible inequities it had generated; and that this could not be achieved without a firm and generous commitment to reconciliation and national unity. It was realised that much of the unjust consequences of the past could not ever be fully reversed. It might be necessary in crucial areas to close the book on that past."

61 *Nelungaloo*-case. above n 20 at 569 (Australia); *May*-case above n 20 at 119H (Zimbabwe):

> "The compensation, to be 'adequate', must be 'sufficient' to compensate the owner for the loss

[33] In determining compensation, the Court must balance the interests of the claimant with the interests of the community from whom the money to pay the compensation will come. In the words of the German Constitution:[62]

> "Die Entshädigung ist unter gerechter Abwägung der Interessen der Algemeinheit und der Beteiligten zu bestimmen"

Balancing the interests, I have come to the conclusion that , in this case, an award of a *solatium* is called for. The award must signify a symbolic reparation. It must not be an attempt to provide full redress for the claimant's emotional suffering. Such an award, albeit symbolic, will serve the all important function of acknowledging the dignity and worth of the claimant. By making the award symbolic, the conservative approach which the South African courts followed in the past when determining compensation for inconvenience, will be maintained.[63] It also accords with the conservative awards made by the Belgian courts. In my opinion, an amount of R6 000 by way of *solatium* would be appropriate.[64]

[34] When determining the award for *solatium*, I considered the possibility of adding on a fixed percentage to the amounts awarded under the other heads of claim. I decided against it. A claimant who receives a small amount under the other heads of claim does not necessarily suffer less hardship than a claimant who receives a large amount. The opposite could well be true. A lump sum award, which

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> of his property, without imposing an unwarranted penalty on the public because the acquisition is effected in the interest of the public or community. The interest of the owner of the property acquired must of necessity be balanced with the interest of the public from whom the money paid in compensation comes."

62 Section 14(3) of the Basic Law for the Federal Republic of Germany, 1949. Translated, the *dictum* reads:

> "Compensation must reflect a fair balance between the public interest and the interests of those affected."

63 Compare the awards in *Urquhart v Minister of Water Affairs*, Vos, *Water Court Reports* 315: R1 000; *Union Government v Friedman*, 1 *Watermeyer's Water Court Reports* 220: R 400; Union Government v Gass 1959 (4) SA 401 (A): R200; *Port Elizabeth Municipality v Potgieter , 2 Watermeyer's Water Court Reports* 20: R150*; Ex parte Village Council of Nylstroom* unreported Water Court decision by Jeppe DJ, decided on 23 June 1925: R600; *Senekal v Minister van Waterwese*, Vos, *Water Court Reports* 280: R400.

64 This is a present day apology, and I have used present day money values.

may differ from case to case as the circumstances of each case require, is more appropriate.[65] I must also emphasise that the award of a *solatium* is not automatic in every case.[66] As was stated by Jose Zalaquett:[67]

> "I believe reparations are indeed very important because they convey an acknowledgment of victims' dignity. But reparations must be made in such a manner that people do not see them as an entitlement, payment or trade-off. . . Once you start pulling a thread of the knot of reparation, you may continue without an end in sight. This is particularly true if the majority of the population has been aggrieved. For this reason it may be worth considering whether reparations in South Africa should be emphasised more in their symbolic and spiritual aspects than in their material ones . . . it may be beyond the means of any society to repair properly what has been a grievance inflicted upon the majority of the population. There may be ways of distinguishing particular injuries but this must be done in a manner that is understandable to the entire population so that no one has reason to wonder why only some received reparations."

Conclusion

[35] Neither party asked for a cost order. Consequently, I will make no cost order.

[36] The compensation to which the claimant is entitled, is hereby determined as follows:

Shortfall in compensation received for the market value of the Goodwood properties, escalated to its present day money value	R51 844,09
Transfer and bond costs incurred in connection with the acquisition of the Crawford property, escalated to its present day money value	R 3 648,45
Solatium for mental distress	R 6 000,00
Total award	R61 492,54

65 An award for non-financial deprivation is not susceptible of accurate determination in terms of money: see *Union Government v Gass* 1959 (4) SA 401 (A) at 417B. Having decided against a percentage add-on, the sum of R6 000 is an assessment, not an exact computation.

66 For the discretionary nature of such an award, see *Mynhard v Union Government*, above n 22, at 66.

67 "Why Deal with the Past" in *Dealing with the Past: Truth and Reconciliation in South Africa*, above n 53, at 8.

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ACTING JUDGE A GILDENHUYS

I agree

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ACTING JUDGE Y S MEER

I agree

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E S RIVETT-CARNAC
***ASSESSOR**

*(Assessor appointed in terms of section 28(5) of the Restitution of Land Rights Act No 22 of 1994).

For the plaintiff:
Adv M Norton instructed by *Papier Charles Inc, Cape Town*.

For the defendant:
Adv N Arendse SC instructed by *Regional Land Claims Commission, Cape Town*.