

IN THE LAND CLAIMS COURT OF SOUTH AFRICA

Held at **CAPE TOWN** on 26 November 1998
before **DODSON J** and **MEER J**

CASE NUMBER: LCC107/98

In the case of

**THE MINISTER OF LAND AFFAIRS
OF THE REPUBLIC OF SOUTH AFRICA**

First applicant

**THE MINISTER OF PUBLIC WORKS
OF THE REPUBLIC OF SOUTH AFRICA**

Second applicant

and

OMAR SLAMDIEN

First respondent

MOEGAMAT SALIE SLAMDIEN

Second respondent

THE CHIEF LAND CLAIMS COMMISSIONER

Third respondent

JUDGMENT

DODSON J:

Introductory

[1] This matter concerns the ambit of the right to restitution in respect of the loss of land rights as a result of past racially discriminatory laws or practices. It comes to the Land Claims Court by way of an interlocutory application in terms of rule 57 of the Land Claims Court Rules.¹ The application

1 Rule 57 provides:

“PRIOR ADJUDICATION UPON ISSUES OF LAW OR FACT

(1) Should the Court, upon application by any party or of its own accord, be of the opinion that there is an issue of law or fact in a case which may conveniently be decided -

(a) before further documents are delivered in the case;

(continued...)

arises from a claim by the first and second respondents for the restitution of rights in land. The claim was referred to the Land Claims Court by the third respondent in terms of section 14(1) of the Restitution of Land Rights Act.² I will refer to it as “the Restitution Act”. The applicants seek declaratory relief to the effect that the first and second respondents are precluded from claiming restitution because they were not “dispossessed of a right in land . . . as a result of past racially discriminatory laws or practices” as required by section 2(1)(a) of the Restitution Act. Only the first and second respondents have opposed the application. The third respondent, the Chief Land Claims Commissioner, will accept the decision of the Court. The report of his Commission,³ however, supports the first and second respondents’ claim and recommends that the land claimed be restored to them or that they be awarded alternative state-owned land. If I refer to “the respondents” this is intended to include only the first and second respondents.

The facts

[2] The parties have prepared an agreed statement of facts. The first respondent purchased a property in Surrey Estate, Cape Town on 16 April 1955.⁴ I will refer to it as “the property”. On 5 July 1957, the area in which the property fell was declared a group area for the “coloured group” in terms of section 3 of the Group Areas Act⁵ with effect from 6 July 1960.⁶ On 5 December 1960, transfer of the property was registered in favour of the first respondent. He is described in the deed of transfer as a member of the “coloured group”.

1 (...continued)

(b) before evidence is led in an action; or

(c) separately from some other issue,

the Court may order a separate hearing of that issue . . .”

2 Act 22 of 1994.

3 The Commission on the Restitution of Land Rights established in terms of section 4 of the Restitution Act. The report was prepared by the Regional Land Claims Commissioner: Western and Northern Cape in terms of section 14(2) of the Restitution Act.

4 The property was previously known as Lot No. 3, Block D (portion of Lot C of Lot BB), situate in Cape Town Municipality, Division of Cape Province of Cape of Good Hope. The description was subsequently changed to Erf 36307, Cape Town, situate in Surrey Estate at Athlone, in the Municipality of Cape Town, Administrative District of Cape. It is now consolidated with a number of other erven into Erf 39687, Cape Town, situate in Surrey Estate at Athlone, in the Municipality of Cape Town, Administrative District of Cape, held by the Republic of South Africa under Certificate of Consolidated Title No 32594/1971. The property is described on the Surveyor-General’s Diagram No 193/56.

5 Act 41 of 1950.

6 The declaration as a group area was effected by Proclamation 190 of 1957 published in a Government Gazette dated 5 July 1957.

[3] On 7 July 1966, the Secretary for Coloured Affairs wrote to the Secretary for Public Works. The letter was headed

“CAPE DUINEFONTEIN ESTATE: ACQUISITION OF SITE FOR A FUTURE PRIMARY SCHOOL”

Paragraphs 3 and 4 of the letter read as follows:

“3. There is . . . need for an additional primary school site in the area covered by the Portavue, Surrey and Duinefontein Estates. The aided school in the latter Estate requires to be replaced at an early date and whilst the pupils may be taken up temporarily in the Portavue and proposed Portavue no. 2 schools, an additional school will be required in the near future for the Duinefontein area . . .

4. It is, therefore, recommended that a site of between 2 - 3 morgen in the most suitable situation, if possible without improvements, be acquired in the area zoned and that as soon as it has been decided which section should be acquired, the Provincial Secretary and the Town Clerk, Cape Town, be informed accordingly in order that rezoning and sub-division may be effected and building plans passed . . .”

[4] On 10 February 1969, the Secretary for Public Works wrote to the Secretary for Agricultural Credit and Land Tenure in connection with the matter. The relevant portions of the letter read:

“1. In his minute . . . dated 7th July, 1966, . . . the Secretary for Coloured Affairs recommended that a site of between 2 - 3 morgen be acquired in the area which has been zoned for coloured educational purposes. The area selected comprises the following erven:- [the erven listed included the property] . . .

. . . .

6. The Department of Coloured Affairs is in agreement with the location of the site and recommends its acquisition.

. . . .

7. Kindly therefor arrange for the transfer of the properties concerned into the name of the State and furnish me with the Deed of Transfer.”

[5] The property was purchased by the State from the first respondent on 16 March 1970. The Surrey Primary School was subsequently erected on the consolidated erf formed by the property and adjoining properties purchased or expropriated for this purpose. The second respondent, who is the first respondent’s father, was one of the occupants of the property who had to vacate it pursuant to the sale. The State entered into the sale agreement, not in terms of any statutory power, but in terms of its common law prerogative power to contract.⁷

⁷ In regard to the State’s prerogative power to contract, see, for example, *Minister of Home Affairs and another v American Ninja IV Partnership* 1993 (1) SA 257 (A) at 268C to F; *Baxter Administrative Law* 1ed (Juta, Cape Town 1984) at 389.

[6] On 1 July 1995 the respondents lodged a claim for restitution of the property with the Regional Land Claims Commissioner: Western and Northern Cape in terms of section 10 of the Restitution Act. On 15 October 1998, the claim was referred to this Court.

Applicable constitutional and statutory provisions

[7] The following are the main provisions relevant to the decision of this matter. The first is section 25(7) of the Constitution of the Republic of South Africa.⁸ I will refer to it as “the Constitution”, unless I wish to distinguish it from the “Interim Constitution”,⁹ in which event I will refer to the former as “the 1996 Constitution” and the latter as “the 1993 Constitution”. Section 25(7) of the Constitution reads:

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

The Act of Parliament which determines the extent of the rights conferred by section 25(7) of the Constitution is the Restitution Act, as amended.¹⁰ The most important amending Act for present purposes is the Land Restitution and Reform Laws Amendment Act of 1997, the latter Act having amended the Restitution Act with a view, amongst others, to aligning it with the 1996 Constitution. Section 2(1)(a) of the Restitution Act is based on section 25(7) of the Constitution and reads:

“(1) A person shall be entitled to restitution of a right in land if-

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

A number of the terms in section 2(1)(a) are defined in section 1 of the Restitution Act. Of these the only ones which impact on this matter are the following:

“‘racially discriminatory laws’ include laws made by any sphere of government and subordinate legislation;

‘racially discriminatory practices’ means racially discriminatory practices, acts or omissions, direct or indirect, by-

8 Act 108 of 1996.

9 Act 200 of 1993.

10 The amending Acts are the Restitution of Land Rights Amendment Act 84 of 1995, the Land Restitution and Reform Laws Amendment Act 78 of 1996 and the Land Restitution and Reform Laws Amendment Act 63 of 1997. It is not necessary to consider whether the Land Affairs General Amendment Act 61 of 1998, which came into force on 28 September 1998, applies because the amendments do not impact on this matter.

- (a) any department of state or administration in the national, provincial or local sphere of government;
- (b) any other functionary or institution which exercised a public power or performed a public function in terms of any legislation;”

[8] There are other qualifying criteria for entitlement to restitution in section 2 of the Restitution Act, but these are not in dispute for purposes of this application. The applicants did not dispute that the way in which the first and second respondents lost their rights in land (if any, in the case of second respondent) was a “dispossession” as that term is referred to in section 2(1)(a) of the Restitution Act¹¹ or that such dispossession occurred after 19 June 1913. The applicants did dispute second respondent’s assertion that his occupation of the property was based on a “right in land” as that term is defined in the Restitution Act. However, on the view I take of the matter, it is not necessary for me to decide this issue and I will assume in favour of the second respondent that his claim does not fail on this basis. What must be decided then in this application is whether the dispossession in this case was “as a result of past racially discriminatory laws or practices” as contemplated by section 2(1)(a) of the Restitution Act.

The parties’ contentions

[9] The range of grounds on which the respondents rely is not completely clear. At one point in the first respondent’s opposing affidavit he asserts that their claim is based “not on past racially discriminatory laws but on a past racially discriminatory practice”, that practice being the building of a racially exclusive coloured school. However, later in his affidavit, first respondent states that this practice “had its origin in legislation which was racially based” without identifying that legislation. He also says that the practice “occurred under or for the purpose of furthering the object of the (sic) law which would have been inconsistent with the prohibition of racial discrimination contained in Section 9(3) of the Constitution . . . had that section been in operation at time of this dispossession”. Again no law is identified under which the practice occurred, but he identifies the Group Areas Act of 1950¹² as the law whose objects were promoted. This is also confusing as the terminology used is that of the 1993 Constitution and the Restitution Act before its amendment in 1997. When the matter was argued, the respondents relied primarily on the racially based practice, but were not prepared to relinquish the argument based on racially discriminatory laws. I will assume in respondents’ favour that they have raised an argument, (in addition to the argument based on a racially discriminatory practice) based on the current wording of the Constitution and the Restitution Act, that they were dispossessed as a result of a racially discriminatory law, being the Group Areas Act of 1950.

11 I will assume that this concession was correctly made.

12 Act 41 of 1950.

[10] The applicants' reply to the respondents' arguments is of the "floodgates" type. They point out that South African society was regulated almost entirely on a racial basis.¹³ Acceptance of the respondents' argument would mean that virtually any action of previous governments (after 19 June 1913) which resulted in a deprivation of land rights, would give rise to a claim under the Restitution Act, unless it was precluded by section 2(1A).¹⁴ Section 2(1A), they say, does not provide a realistic check on the floodgates.¹⁵ The solution is to be found in the application of the principles developed by the courts in relation to causation. In this case there is not a sufficiently close causal link between the dispossession and a racially discriminatory law or practice to satisfy the requirements of section 2(1)(a) of the Restitution Act.

[11] On the basis of these contentions, it seems to me, on a generous interpretation of the respondents' opposing affidavits, that the following points emerge for decision:

- (i) Was the Group Areas Act of 1950 a "racially discriminatory law" as that phrase is referred to in section 2(1)(a), and defined in section 1, of the Restitution Act?¹⁶
- (ii) Was the building of a racially exclusive coloured primary school a "racially discriminatory practice" as that phrase is referred to in section 2(1)(a), and defined in section 1, of the Restitution Act?
- (iii) Was the dispossession of the property "as a result of" the law referred to in (i) or the practice referred to in (ii)?

13 They refer to the judgment of this Court in *Farjas (Pty) Ltd and another v Regional Land Claims Commissioner, Kwazulu-Natal* 1998 (2) SA 900 (LCC) at 937E where Bam P said:

"One of the reasons why this issue will frequently be a vexed and hotly contested one is precisely that South African society was saturated with laws which directly and indirectly discriminated against persons along the lines enumerated in s 8(2) (of the Constitution). There was scarcely any aspect of life and activity that was not permeated with racial discrimination."

[The reference to the Constitution is a reference to the 1993 Constitution.]

14 Section 2(1A) is quoted in para [33] *infra* at (iii).

15 This argument is dealt with in para [33] *infra* at (iii).

16 In identifying the issue thus, I assume, without deciding the point, that the word "laws" in section 2(1)(a) means entire statutes and does not require the claimant to identify a specific part of the law as being racially discriminatory and as having resulted in the dispossession.

Method of interpretation

[12] What method should be used in interpreting section 2(1)(a)? The approach to the interpretation of constitutional and statutory provisions in our law is not harmonious.¹⁷ The Constitutional Court has made it clear that the approach to be adopted in interpreting the Constitution is a purposive one. This was the approach adopted in the first judgment of that court, namely *S v Zuma and others*.¹⁸ It was confirmed by the President of that court in *S v Makwanyane and another*.¹⁹ It was applied in relation to subsequent judgments under the 1993 Constitution²⁰ and has continued to be applied in relation to the 1996 Constitution.²¹ That it must be accepted as binding all other courts to the purposive method in constitutional cases is clear.²² This Court signaled its acceptance of a purposive approach early in its life in the judgment of Meer J (Gildenhuys J concurring) in *Dulabh and another*

17 Devenish, *Interpretation of Statutes* 1 ed (Juta, Cape Town 1992) at 52.

18 1995 (2) SA 642 (CC) at 650H to 653B.

19 1995 (3) SA 391 (CC) at 403C to 404A.

20 See, for example, *S v Mhlungu and others* 1995 (3) SA 867 at 873H to 875A and 896H to 897A. Despite the characterisation by the majority of the minority judgment in that matter as a “literal” approach, the minority judgment expressly refers to and applies a purposive approach, albeit with a greater emphasis on the textual component of the purposive analysis.

21 See, for example, *Soobramoney v Minister of Health, KwaZulu - Natal* 1998 (1) SA 765 (CC) at 772F to 773A and at 779B to I.

22 This is so, despite the lively academic debate which persists in relation to this issue. See, for example, Davis “Interpretation” in Davis, Cheadle and Haysom *Fundamental Rights in the Constitution: Commentary and Cases* (Juta, Cape Town 1997) at 334 to 341; Motlale “The Constitution is not anything the Court wants it to be: the *Mhlungu* decision and the need for disciplining rules” in Vol 115 Part 1 *SA Law Journal* (Juta, Cape Town 1998) at 141 to 155; Davis “Democracy and Integrity: Making Sense of the Constitution” in Vol 14 Part 1 *SA Journal on Human Rights* (Juta, Cape Town 1998) at 127 to 145, Rautenbach “Introduction to the Bill of Rights: Interpretation” *Bill of Rights Compendium* (Butterworths, Durban 1998) at 1A-13 to 1A-21.

v Department of Land Affairs.²³ In that case the purposive method was used in order to determine the “ambit of restitution” under the 1993 Constitution.

[13] Even though the law of statutory interpretation has not wholeheartedly adopted a purposive approach, it seems to me that where one is dealing with a statute which the Constitution specifically requires to be enacted in order to give content to the right concerned, it would be absurd to adopt a different approach to the statute’s interpretation. This is all the more so in respect of a part of the statute which substantially retains the wording of the corresponding constitutional provision.²⁴ The approach to the interpretation of the Restitution Act was also dealt with in the *Dulabh* case and the Court expressed itself in favour of a purposive approach to its interpretation too.²⁵ The Court also referred with approval²⁶ to the portion of the judgment of Schreiner JA in *Jaga v Dönges, NO and another; Bhana v Dönges, NO and another*,²⁷ which is often quoted in support of a purposive approach to the interpretation of statutes:

“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. But it may be useful to stress two points in relation to the application of this principle. The first is that ‘the context’, as here used, is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is the matter of the statute, its apparent scope and purpose, and, within limits, its background. [The second point is not important for present purposes.]”²⁸

23 1997 (4) SA 1108 (LCC). At 1123I to 1124B, Meer J says:

“[46] To fully determine the ambit of restitution, one should reach beyond the immediate linguistic context of the word ‘restitution’, its ordinary and grammatical meaning, as contained in the interim Constitution (ss 123(3), 121(2) and 8) and the Act (s 2(1)), to its wider legal and jurisprudential context so as to give effect not only to the purpose of the legislation, but also to the sense, spirit, ethos, morality and fundamental principles of the interim Constitution and the [Restitution] Act.”

See also *In re Beukes and Bekker concerning the Farm Grootte Springfontein* [1998] 1 All SA 34 (LCC) at 41 to 42 para [26] and at 43 para [31]; *Blaauwberg Municipality v Bekker and others* [1998] 1 All SA 88 (LCC) at 102 para [31], at 104 para [34] and at 107 para [43]; *Ex Parte Mayibuye i-Cremis Committee: In Re Sub 121, Farm Trekboer* [1998] 4 All SA 604 (LCC) at 610 para [12], at 611 para [14], at 614 para [5], at 615 para [7] and at 616 para [9].

24 *Supra* para [7].

25 *Dulabh and another v Department of Land Affairs* *supra* n 23 at 1128A to B.

26 *Dulabh and another v Department of Land Affairs* *supra* n 23 at 1126C

27 1950 (4) SA 653 (A).

28 *Ibid* at 662G to H. It has also received the approval of the Constitutional Court in justifying a purposive approach. See, for example *S v Makwanyane and another* *supra* n 19 at 403J.

Section 39(2) of the Constitution is also relevant in this regard. It requires that:

“[w]hen interpreting *any legislation* . . . every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights”. [my emphasis]

In my view, this provision too compels me to adopt the purposive approach to a provision of a statute which originates directly from the Bill of Rights and is designed to give content to one of the rights provided for in it.²⁹ I will therefore use it to interpret section 2(1)(a) in preference to the literal or subjective approaches.³⁰

[14] The purposive approach as elucidated in the decisions of the Constitutional Court and this Court requires that one must:

- (i) in general terms, ascertain the meaning of the provision to be interpreted by an analysis of its purpose and, in doing so,
- (ii) have regard to the context of the provision in the sense of its historical origins;
- (iii) have regard to its context in the sense of the statute as a whole, the subject matter and broad objects of the statute and the values which underlie it;
- (iv) have regard to its immediate context in the sense of the particular part of the statute in which the provision appears or those provisions with which it is interrelated;
- (v) have regard to the precise wording of the provision; and
- (vi) where a constitutional right is concerned, as is the case here, adopt a generous rather than a legalistic perspective aimed at securing for individuals the full benefit of the protection which the right confers.³¹

29 Section 25(7) forms part of the Bill of Rights - it is contained in the property clause.

30 The latter is based on ascertaining the “intention of the legislature”. On these two approaches, see, for example, Devenish supra n 17 at 26 to 35.

31 This set of “guidelines” is derived largely from the judgments of Chaskalson P in *S v Makwanyane and Another* supra n 19 at 403G to 404A and of Wilson J in the decision of the Supreme Court of Canada in *R v Big M Drug Mart Ltd* (1985) 18 DLR (4th) 321 dealing with the Canadian Charter of Rights. The part of the judgment concerned (at 395-96) has been cited with approval in a number of South African cases dealing with constitutional interpretation. See, for example *Shabalala and others v Attorney-General and another* 1996 (1) SA 725 (CC) at 740; *S v Makwanyane* supra n 19 at 403; *S v Zuma* supra n 18 at 651E to H; *Dulabh v Minister of Land Affairs* supra n 23 at 1121; *Jenkins v Government of the Republic of South Africa and another* 1996 (3) SA 1083 (Tks) at 1093; *Van Huyssteen and others, NNO v Minister of Environmental Affairs and Tourism and others* 1996 (1) SA 283 (C) at 305.

[15] With reference to the last of these guidelines, the observation needs to be made that the adoption of a purposive approach will not always mean the adoption of a wide or literal interpretation of the words concerned. It may well be that, upon a proper analysis of the purpose of the provision, a meaning which is narrower than the ordinary, literal meaning of the provision is arrived at. The goal is to ascertain the proper ambit of the provision. This point is made in the judgment of Chaskalson P in *Soobramoney v Minister of Health, KwaZulu-Natal*³² where he says:

“The purposive approach will often be one which calls for a generous interpretation to be given to a right to ensure that individuals secure the full protection of the bill of rights, but this is not always the case, and the context may indicate that in order to give effect to the purpose of a particular provision ‘a narrower or specific meaning’ should be given to it.”³³

[16] A further observation which needs to be made in relation to the Constitutional Court decisions is that a purposive approach still allows reference to the maxims and presumptions of statutory interpretation. This is apparent particularly from the approach of Kentridge JA in his minority judgment in *S v Mhlungu*.³⁴

Purposive analysis

[17] Applying the purposive method to the interpretation of section 2(1)(a) of the Restitution Act, one must start with the historical origin of the Restitution Act in general and of that section in particular.³⁵ That origin is so notorious that I may take judicial notice of it. It is the policy of previous governments which sought to divide up the country spatially along racial and ethnic lines. That policy was central to the broader policy of governing the country on the basis of racial separation. The policy of racial zoning was extended throughout the rural and urban areas of the entire country. It was implemented via a complex matrix of statutes regulating the ownership and

32 *Supra* n 21.

33 *Soobramoney v Minister of Health, KwaZulu-Natal* *supra* n 21 at 772H to 773A. This point is also made by O’Regan J in *S v Makwanyane and another* *supra* n 19 at 506A to B. See also the comments of Davis in Davis, Cheadle and Haysom *supra* n 22 at 18 and the judgment of Van Dijkhorst J in *De Klerk and another v Du Plessis and others* 1995 (2) SA 40 (T), especially at 45J to 46C, to which Davis refers.

34 *Supra* n 20 at 897C to 898A. See also Cowen “The Interpretation of Statutes and the Concept of ‘the intention of the legislature’,” 1980 (43) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* at 375, 381, 383 to 387 and 391 and Cowen “Prolegomenon to a Restatement of the Principles of Statutory Interpretation” 1976 *Tydskrif vir die Suid-Afrikaanse Reg* 131 at 159 and 163.

35 On the history of the Restitution Act and the provisions of the 1993 Constitution dealing with restitution, see Visser and Roux “Giving back the country: South Africa’s Restitution of Land Rights Act, 1994 in context” and Murphy “The restitution of land after apartheid: The constitutional and legislative framework” both in Rwelamira and Werle (eds), *Confronting Past Injustices: approaches to amnesty, punishment, reparation and restitution in South Africa and Germany* (Butterworths, Durban 1996) at pages 89 to 96 and 113 to 119.

occupation of land on a racial basis with clear boundary delineations between the different racial zones, either in the statutes themselves³⁶ or in the proclamations of such zones in terms of those statutes.³⁷ Where it so happened that the owners or occupants of an area racially zoned were of the wrong race group, the law contained an arsenal to ensure that such persons could be deprived of any rights to the land which they might enjoy and coerced into moving to the correct racial zone.³⁸ The consequences of the implementation of this policy are also notorious in all senses of that word.³⁹ The places to which people were removed were in many instances desolate, undeveloped and far from proper amenities and sources of employment.⁴⁰ Because the area zoned for the white racial group was an extra-ordinarily large portion of the overall area of the country,⁴¹ it was the other race groups who inevitably bore the brunt of the policy of racial zoning. The discriminatory component of forced removals was a source of enormous psychological harm on its own. Family life was disrupted. 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.

[18] The first attempt to deal with the wrongs inflicted by forced removals was contained in the Abolition of Racially Based Land Measures Act.⁴² The primary purpose of that Act as reflected in an extract from its long title is “[t]o repeal or amend certain laws so as to abolish certain *restrictions based on race or membership of a specific population group on the acquisition and utilization of rights to land . . .*” [my emphasis]. In its first four chapters, this Act repeals, either substantially or in their entirety, an extraordinary number of statutory provisions which fit the description of a racially

36 See, for example, the “Schedule of Native Areas” in the Natives Land Act 27 of 1913 and section 2 of, and the first schedule to, the Native Trust and Land Act 18 of 1936.

37 See, for example, the proclamation of group areas in terms of the two Group Areas Acts, namely Act 41 of 1950 and Act 36 of 1966. For a general account of how the various statutes zoned the country along racial lines, see Robertson “Dividing the Land: An Introduction to Apartheid Land Law” in Murray and O’Regan (eds) *No Place to Rest: Forced Removals and the Law in South Africa* (Oxford University Press, Cape Town 1990) at 122 to 136.

38 See Marcus “Section 5 of the Black Administration Act: the Case of the Bakwena ba Mogopa” in Murray and O’Regan (eds) *supra* n 37 at 13 to 26.

39 See generally Platzky and Walker, *The Surplus People: Forced Removals in South Africa* (Ravan Press, Johannesburg 1985).

40 *Ibid* at 128ff and especially at 326 to 368, which is the chapter dealing with conditions in relocation areas.

41 See the extract from Platzky and Walker *supra* n 39 at para [18] below dealing with the impact of the Natives Land Act.

42 Act 108 of 1991.

based land measure in the extract from the long title.⁴³ It is significant that the first⁴⁴ and earliest statute repealed by the Abolition of Racially Based Land Measures Act was the notorious Black Land Act⁴⁵ which came into force on 19 June 1913. Its effect is described in *The Surplus People: Forced Removals in South Africa*:⁴⁶

“This Act was one of the most important pieces of legislation of the first Union government. It has shaped land policies in this country ever since.

What it did was to take the different African reserve systems in each province and make them the basis of the Union’s subsequent native policy. *It made the reserves the only areas where Africans could lawfully acquire land . . . Africans were no longer allowed to buy land outside the proclaimed boundaries of the reserves. Nor were they to be allowed to rent such land in the future [except in the Cape until 1936]. Those Africans who were already renting white-owned land . . . were to be phased out over time.* In future Africans would only be allowed to live on white-owned land if they were labour tenants or full-time wage workers. Otherwise their place was in the reserves.

. . . .

The areas reserved for African occupation in 1913 . . . amounted to about 9 million hectares - about 7% of all the land in South Africa. Extensive areas of African freehold land and of unsurveyed state land which ha[d] long been regarded as African areas were left out of the schedule [to the Act - it listed all the farms included in the reserves]. In 1916 it was estimated that over one and a half million hectares of African land was excluded in this way, not counting the far larger area of rented white land that was also lost. . .”

[my emphasis]

[19] What is important to note from this extract is that the law discriminated on a racial basis specifically in respect of the ownership and occupation of land with a view to securing the racial zoning of the country as between whites and “natives”. Amongst the other statutes affected by the

43 See the portion which I have emphasised.

44 Section 1(a).

45 Act 27 of 1913 - known at the time of its promulgation as the Natives Land Act.

46 Platzky and Walker supra n 39 at 83 to 85. At 85 the authors refer to Sol Plaatje in his book *Native Life in South Africa* where he wrote:

“Awakening on Friday morning, June 20, the South African native found himself not actually a slave but a pariah in the land of his birth”

See also AJ Christopher *The Atlas of Apartheid* (Witwatersrand University Press, Johannesburg 1994) at 32 to 33.

Abolition of Racially Based Land Measures Act were the Black Administration Act,⁴⁷ the Development Trust and Land Act,⁴⁸ the Group Areas Act,⁴⁹ a number of “laws in respect of asiatics and coloureds”⁵⁰ and the Black Communities Development Act.⁵¹ Again, the observation must be made that these and the other laws amended or repealed were provisions which in various respects discriminated against persons in the exercise of land rights and sought to promote the scheme of racial zoning to which I have referred above.

[20] Chapter VI of the Abolition of Racially Based Land Measures Act went on to create the “Advisory Commission on Land Allocation”. I will refer to it as “the ACLA”. Its function was to advise the State President about the allocation of undeveloped State land previously acquired in terms of a racially based land measure referred to in the Act, and rural land acquired by the State, to persons who lodged claims and who were “disadvantaged in respect of the land concerned by the application of a law repealed by this [ie the Abolition of Racially Based Land Measures] Act”. Nowhere was the concept of a racially based land measure defined, but this was unnecessary as all the statutory provisions to be repealed were individually dealt with and referred to in the Act. The provisions creating and empowering the ACLA were apparently criticised⁵² because of its narrow advisory brief and the limited land available for the provision of remedies. This led to an amendment in 1993⁵³ which enhanced the powers of the Commission and expanded the area of land which it might consider for restitution. It did not in any way change the type of laws which might give rise to a restitution claim.

[21] The whole issue of land restitution became part of the debate around property rights which preceded the adoption of the 1993 Constitution. As a result, a fresh approach to restitution was adopted in sections 121 to 123, read with section 8(3)(b), of the 1993 Constitution. Those provisions regulated in detail the basis upon which restitution could be claimed and the remedies which were available. Section 122 provided for the establishment of the Commission on the Restitution of Land Rights. The most important provision for present purposes was section 121 which read:

“121. Claims

47 Act 38 of 1927, known at the time of its promulgation as the Native Administration Act. It is amended by sections 4 to 10 of the Abolition of Racially Based Land Measures Act.

48 Act 18 of 1936, known at the time of its promulgation as the Native Trust and Land Act. It is repealed by sections 11 to 12 of the Abolition of Racially Based Land Measures Act.

49 Act 36 of 1966. It is repealed by section 48 of the Abolition of Racially Based Land Measures Act.

50 See chapter III of the Abolition of Racially Based Land Measures Act.

51 Act 4 of 1984. It is repealed by section 72 of the Abolition of Racially Based Land Measures Act.

52 See, for example, Murphy *supra* n 35 at 114.

53 Abolition of Racially Based Land Measures Amendment Act 110 of 1993.

- (1) An Act of Parliament shall provide for matters relating to the restitution of land rights, as envisaged in this section and in sections 122 and 123.
- (2) A person or a community shall be entitled to claim restitution of a right in land from the state if-
 - (a) such person or community was dispossessed of such right at any time after a date to be fixed by the Act referred to in subsection (1); and
 - (b) such dispossession was effected *under or for the purpose of furthering the object of a law which would have been inconsistent with the prohibition of racial discrimination contained in section 8(2), had that section been in operation at the time of such dispossession.*
- (3) The date fixed by virtue of subsection (2)(a) shall not be a date earlier than 19 June 1913.

....”

[my emphasis]

[22] Section 121(1) gave rise to the promulgation of the Restitution Act in 1994. The test for determining whether or not a person qualifies to claim restitution as set out in section 121(2) was incorporated in section 2(1)(a) of the Restitution Act (as it then read) by cross-reference. Section 121 to 123 of the 1993 Constitution read with the Restitution Act made a number of important changes to the land restitution regime. Section 41(1) of the Restitution Act repealed all of the provisions of the Abolition of Racially Based Land Measures Act dealing with the creation, duties and functions of the ACLA or Commission on Land Allocation as it had become known after the 1993 amendments to that Act. For the first time, claims could also be submitted in respect of land, both rural and urban, which, at the time of the claim is privately owned. Claims were no longer circumscribed to narrow categories of land. The range of remedies available was broadened to include compensation, a broader category of alternative state-owned land and “alternative relief”. The regime became far more rights based than discretionary. The institutions created to oversee the process, including this Court, were given wider and more independent powers. The range of persons entitled to claim was expanded to include communities and direct descendants.

[23] Where the new restitution regime did not signal a substantial departure from the old regime was in the range of laws which would give rise to a restitution claim. The date adopted in terms of section 121(2)(a) of the 1993 Constitution was in fact 19 June 1913.⁵⁴ The significance of this cut-off date is that it is the commencement date of the Black Land Act. That Act also represents the starting point for the land claims regime under the Abolition of Racially Based Land Measures Act. The origin of the formula in section 121(2)(b) for identifying the laws which would give rise to a claim (see emphasised portion in para 21 above) is described by one commentator as follows:

“The 1991 White Paper on Land Reform was the first public document to make use of the term ‘racially based land measure’. The concept was not, however, defined, the relevant legislation simply being listed in the Abolition Act for the purposes of repeal.

54 Section 2(3) of the Restitution Act as it then read.

Clearly the device could not have been used for the purposes of the constitutional settlement. Some more general way of referring to apartheid land law had to be found, without however restricting the entitlement to restitution any more than was necessary. . . . By relating the definition of apartheid land law in s 121(2)(b) of the interim Constitution to the equality clause in s 8, the drafters were able to emphasise the point that the land restitution process would be aimed at reversing past inequalities, while simultaneously immunising that process from constitutional impugment under the equality clause.”⁵⁵

That, in my view, is the most plausible explanation for the formula. It would not have been desirable to repeat the vast list of statutes that were contained in the Abolition of Racially Based Land Measures Act in the 1993 Constitution, which regulated a far broader range of matters than just land reform. A more general method had to be found. Despite the broad terminology employed, it did not, in my view, seek to expand the range of laws on which a claim could be based beyond what the commentator describes as “apartheid⁵⁶ land law”, that is laws which discriminated against persons *in the exercise of rights in land*.⁵⁷ This view is fortified by certain other considerations to which I will refer below as part of the purposive analysis of section 2(1)(a) of the Restitution Act, as it now reads, and section 25(7) of the 1996 Constitution.

[24] Where the formula in section 121(2)(b) did go further than the land restitution regime of the Abolition of Racially Based Land Measures Act was in including persons dispossessed “for the purposes of furthering the objects of” a racially discriminatory law. It would seem that this sought to include as claimants persons who may not have been able to point to a particular racially discriminatory statute under which they were dispossessed, but who could show that the dispossession was in order to promote the objects of a racially discriminatory statute.⁵⁸

[25] The question of land restitution was again one of the issues dealt with in the deliberations of the Constitutional Assembly⁵⁹ in relation to the property clause which ultimately formed section 25 of the 1996 Constitution. The formula for entitlement to restitution in section 121(2)(b) of the 1993

55 Budlender, Latsky and Roux, *Juta’s New Land Law* (Juta, Cape Town 1998) at 3A-17 to 3A-18.

56 “Apartheid” must have been used by the commentator loosely to mean racially discriminatory rather than to refer to the official policy of apartheid which made its appearance after 1948.

57 Laws which would have been included by the formulation in section 121(2)(b) of the 1993 Constitution, but not referred to in the Abolition of Racially Based Land Measures Act, would have been those statutes falling under the rubric of “apartheid land law” (as that term is used in n 56 supra) which gave rise to dispossessions of land rights after 19 June 1913, but which had been repealed before the Abolition of Racially Based Land Measures Act came into force and were for that reason not mentioned in that Act. This could theoretically include statutes which were promulgated before the Black Land Act of 1913 and which were still in force and led to a dispossession of land rights on or after 19 June 1913.

58 Budlender, Latsky and Roux supra n 55 at 3A-18.

59 Section 68 of the 1993 Constitution.

Constitution was drafted in a cumbersome way.⁶⁰ Moreover, the detailed substantive provisions for restitution contained in sections 121 to 123 were not appropriate for inclusion in a final constitution, particularly as the land claims process is a finite one and is not meant to continue in perpetuity.⁶¹ It is also one of the hallmarks of the 1996 Constitution that it was drafted in plain language.⁶² These factors, rather than any desire substantially to alter the substantive basis for restitution, account in my view for the differences between section 25(7) of the 1996 Constitution⁶³ and sections 121 to 123 of the 1993 Constitution. What is particularly important to note is that there was a repeat of the date of 19 June 1913, thus reaffirming the Black Land Act as marking a starting point in the restitution process. In fact, this date was fixed in the Constitution, rather than leaving it to the statute to peg, as had been the case in the 1993 Constitution. As I have explained in paragraph [7] above, the Land Restitution and Reform Laws Amendment Act of 1997 then incorporated, more or less verbatim, the qualifying formula of section 25(7) of the Constitution into section 2(1)(a) of the Restitution Act, but went on to define a number of the words and phrases.

[26] The history of the Restitution Act and section 2(1)(a), as set out above, strongly points to its underlying purpose being to address dispossessions of land rights which were the result of a particular class of racially discriminatory laws and practices, namely those that sought specifically to achieve the (then) ideal of spatial apartheid, with each racial and ethnic group being confined to its particular racial zone. These would then be those laws and practices which discriminated against persons on the basis of race in the exercise of rights in land in order to bring about that racial zoning. It does not, in my view, include any racially discriminatory law or practice whatsoever, regardless of the particular area of human activity where the discrimination had its impact. It was that particular class of laws which gave rise to the phenomenon of forced removals with their associated awful consequences. It is that phenomenon which the land restitution regime seeks to address.

[27] Apart from the historical origin, I must also consider the statutory context of the provision in question. Section 2(1)(a) of the Restitution Act essentially gives the content to a constitutional right contained in the Bill of Rights. Important themes or values which underlie both the 1993 and 1996 Constitutions are the desirability of reconciliation, reconstruction and the healing of past injustices, along with the need to put the country's unjust past behind us.⁶⁴ Recognition of the latter need

60 See, for example, the comments of Meer J in the *Dulabh* case supra n 23 at 1122A to B.

61 See the cut-off date for claims in section 2(1)(c) of the Restitution Act. See also Budlender, Latsky and Roux supra n 55 at 3A-5.

62 Ebrahim *The Soul of a Nation: Constitution Making in South Africa* (Oxford University Press, Cape Town 1998) at 193.

63 Section 25(7) is quoted in para [7] supra .

64 See the epilogue to the 1993 Constitution and the preamble to the 1996 Constitution.

requires acknowledgment of the fact that not every past injustice is capable of being remedied.⁶⁵ An interpretation of section 2(1)(a) which most effectively promotes these values or themes is therefore to be preferred.

[28] In determining the purpose underlying the Restitution Act, reference can also be made to some of the factors in section 33 of the Restitution Act. That section requires the Court “[i]n considering its decision in any particular matter” to have regard, amongst others, to the following factors:

- “(a) The desirability of providing for restitution of rights in land to any person or community dispossessed as a result of past racially discriminatory laws or practices;
- (b) the desirability of remedying past violations of human rights;
- (c) the requirements of equity and justice;
- (cA) if restoration of a right in land is claimed, the feasibility of such restoration;
- (d) the desirability of avoiding major social disruption;
-
- (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;”

These factors support my view of the purpose of section 2(1)(a) and the Restitution Act being to remedy a specific category of wrongs relating to the exercise of land rights.

[29] In my view there is also significance in the partial incorporation in the brief preamble to the Restitution Act of subsection (2) of section 9 (ie the equality clause) of the Constitution. The relevant part of the preamble reads:

“AND WHEREAS legislative measures designed to protect or advance persons, or categories or persons, disadvantaged by unfair discrimination may be taken to promote the achievement of equality;”.

That, in my view, points to the category of persons who are meant to be the primary (though not exclusive) beneficiaries of the restitution process.

65 The point is made by Mahomed DP in *Azanian Peoples Organisation (Azapo) and others v President of the Republic of South Africa and others* 1996 (4) SA 671 (CC) at 676G to H where he says:

“It was wisely appreciated by those involved in the . . . [constitutional] 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.*” [my emphasis]

[30] In interpreting section 2(1)(a) there are also certain observations to be made about the way it is worded. I have already referred to the fact that the date of 19 June 1913 clearly contemplates, as one of the laws which might give rise to claims, the Black Land Act of 1913. On the basis of the maxim *noscitur a sociis*,⁶⁶ that is a strong pointer to the type of laws which are envisaged as giving rise to a claim. As has been explained above, that law was one of the pillars in the statutory racial zoning of the country. That must be borne in mind in determining what other laws might be covered by the reference in section 2(1)(a) to “racially discriminatory laws.” A further application of that maxim requires that there must be consistency in the interpretation of racially discriminatory *laws* and racially discriminatory *practices*. That should, in my view, confine the practices covered to those which discriminate in respect of the exercise of land rights. The juxtaposition of “past racially discriminatory laws and practices” with the concept of dispossession of rights in land in section 2(1)(a), in my view, also points to such a limited class of such laws and practices. There is also a significance to be attached to the use of the words “as a result of”. This is dealt with in paragraphs [35] to [43] below.

Is the Group Areas Act a racially discriminatory law?

[31] Applying the above analysis to the first of the three questions referred to in paragraph [11] above, it seems to me that the Group Areas Act of 1950 is plainly the type of law which is contemplated by section 2(1)(a) of the Restitution Act. It was central to the racial zoning of primarily urban areas of South Africa.⁶⁷ It incorporated the concept of a “disqualified person”.⁶⁸ This included, for example, “in relation to immovable property, land or premises in any group area, a person who is not a member of the group specified in the relevant proclamation”. The definition of “group” began “either the white group, the coloured group or the native group referred to in section *two*. . .”. Section 2 then contained detailed descriptions of the different groups. Section 4 prohibited the occupation of a proclaimed group area by a disqualified person (except with a permit). Section 5 prohibited the acquisition of land in a proclaimed group area by a disqualified person (except with a permit). It was also one of the laws which caused people to be relocated against their will. Together with its successor, the Group Areas Act of 1966,⁶⁹ it caused enormous social upheaval and the types of infringement of human rights which accompanied forced removals. On a purposive interpretation, this Act falls squarely within the notion of a “racially discriminatory law” as contemplated by section 2(1)(a) of the Restitution Act. That, however, is not the end of the enquiry, as it is still a requirement

66 Hiemstra and Gonin *Trilingual Legal Dictionary* 3rd ed (Juta, Cape Town 1992) define this maxim at 243 as follows:

“the meaning of a word is inferred (known) from that of its companions (the accompanying words).”

67 See Robertson *supra* n 37 at 124.

68 Section 1(viii).

69 Act 36 of 1966.

that the dispossession of their rights in land was “*as a result of*” the Group Areas Act of 1950. This is dealt with in paragraphs [35] to [43] below.

Was the establishment of the school a racially discriminatory practice?

[32] Although the matter was not canvassed in argument, the only law which provided for the establishment of a racially exclusive school at the time appears to have been the Coloured Persons Education Act of 1963.⁷⁰ That Act allowed the Minister of Coloured Affairs to “establish, erect and maintain” a primary school.⁷¹ A primary school was specifically defined as “a school for the education of Coloured persons up to and including the sixth standard”.⁷² There was no suggestion that the decision to establish the school in this case was unlawful. We must therefore proceed on the basis that there was a decision of the Minister of Coloured Affairs to establish the primary school in question. It is this decision which must be tested for compliance with the term “racially discriminatory practice”, for it was after this decision that the dispossession complained of, took place.

[33] If regard is had to the definition of “racially discriminatory practice”⁷³ it would seem to me that such a decision would qualify as a “practice” or “act . . . by . . . [a] functionary . . . which exercised a public power or performed a public function in terms of any legislation”.⁷⁴ However, on a purposive interpretation of the term “racially discriminatory practice” along the lines which I have suggested, the discriminatory component of the practice was not directed at the exercise of land rights, either directly or indirectly. The discrimination was directed at the school’s prospective pupils who would have to be educated separately from other race groups. It would also have discriminated against any persons who wished to be educated at a school in the area but who were not of the right race group. That, in my view, is not the type of racially discriminatory practice which is contemplated by section 2(1)(a). If it is to be interpreted in accordance with its underlying purpose, it must be interpreted restrictively so as to exclude the type of racially discriminatory practice here referred to. I am reinforced in this view by the following considerations:

- (i) There is a clear purpose behind the inclusion of a “racially discriminatory practice” without extending it to the situation contended for in this case. It is quite possible that the State may have used a racially neutral law to dispossess a person of his or her rights in land, precisely because the State did not want a person of that race group exercising rights in land in the place concerned. It may as a result be impossible to show that the dispossession was as a

70 Act 47 of 1963.

71 Section 3(1)(a).

72 Section 1(xviii).

73 Supra para [7].

74 Definition of “racially discriminatory practice” at supra para [7].

result of a racially discriminatory law. The inclusion in section 2(1)(a) of the Restitution Act and section 25(7) of the Constitution of the concept of a racially discriminatory practice would, in such circumstances, provide a basis for a legitimate restitution claim.⁷⁵

- (ii) There is a presumption of statutory interpretation that a law does not give rise to absurd or anomalous results. As was argued on behalf of the applicants, if it were to be accepted that persons in the situation of the respondents are entitled to claim restitution, that casts the net of potential restitution claimants extraordinarily wide. The reality of pre-1994 South Africa was that virtually every dimension of government activity was regulated on a racial basis. There were not only separate primary schools, but there was separation at every conceivable level or type of education.⁷⁶ There were separate health institutions, sport facilities, municipal facilities, libraries, parks, public swimming baths and so on. The establishment of any such institution could invariably be traced directly or indirectly back to a law or practice which provided exclusively for a particular racial group. Expropriations or forced sales would always have accompanied the establishment of such institutions if the land was not already owned by the public authority concerned. On the respondents' version every one of these expropriations or forced sales would give rise to a restitution claim. This would include claims by members of the formerly advantaged white group who had to make way for the establishment of institutions for that group. Indeed, given the skewed provision of institutions and facilities in favour of the white group on generally more valuable urban land, that group might stand to benefit disproportionately well out of the restitution process. That is an absurd result which cannot be said to be a purpose which underlies the Constitution and the Restitution Act.
- (iii) The only limit on such claims would be via the application of the provisions of section 2(1A) of the Restitution Act. Section 2(1A) reads:

“(1A) 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,

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

75 Budlender, Latsky and Roux *supra* n 55 at 3A-18. Although this relates to the 1993 Constitution, the view expressed as to the purpose behind the relevant provision is equally applicable to the provision in section 2(1)(a) of the Restitution Act and section 25(7) of the 1996 Constitution.

76 See Church, Hosten and Van Blerk “Education” in Joubert (ed) 8 *LAWSA*, 1ed (Butterworths, Durban 1979) at 169ff.

This subsection would require, in each and every claim based on the establishment of a racially exclusive institution, an enquiry into whether or not just and equitable compensation was received at the time of the original dispossession. Disputes over the value to be attached to immovable property are notoriously complex, drawn out and expensive.⁷⁷ The situation would be aggravated by the fact that the enquiry would be a historical one. In the present case this would mean investigating market value, as well as all the other factors that section 25(3) of the Constitution refers to, with reference to circumstances prevailing in 1970, when the dispossession occurred. In many cases it could be much earlier than this. The cost of such proceedings is likely in many instances to exceed any deficiency in the original compensation which a claimant is able to prove. It could also place an extraordinary burden on the Commission on the Restitution of Land Rights and on this Court, with the focus of their activities becoming historical valuation enquiries. It also needs to be borne in mind that the law has always provided mechanisms for challenging the amount of compensation offered by the expropriating authority. To allow cases of the type under discussion would in many instances represent nothing more than giving the expropriatees a “second bite at the cherry” in respect of a long since settled expropriation. This too is an absurd result. It would represent a serious departure from the purpose behind the restitution process.

- (iv) With reference to the statutory context,⁷⁸ as I have indicated, the need to remedy past injustices is a value which underlies the Constitution. It is also expressly referred to in the first two factors listed in section 33 of the Restitution Act.⁷⁹ The injustice which this matter is based on is racial discrimination in the education sector. To grant a restitution remedy to the respondents in this matter does not go any way towards remedying the wrongs of racial discrimination in education. Nor does it remedy the type of wrongs to which I have referred in explaining the history of section 2(1)(a), namely the forced removals which took place to enforce the policy of racial zoning. On the other hand, where restitution is granted to a person who has been discriminated against in the exercise of his or her land rights, the remedy is directly linked with, and remedial of, the original injustice.
- (v) Paragraph (d) of the factors in section 33 of the Restitution Act suggests that it is an underlying principle of the Restitution Act that the restitution process should not lead to “major social disruption”. It would not be far fetched, in my view, to suggest that a restitution process which allowed a reopening of every dispossession which could be linked to the establishment of a racially discriminatory institution or facility could lead to “major social disruption”. This is all the more so when one considers that restoration of the property claimed is one of the possible remedies if a restitution claim is proved. Such an order could lead to closure of the institution or facility concerned. An interpretation of “racially

77 See, for example, *Davey v Minister of Agriculture* 1979 (1) SA 466 (N) at 477A; *Lornadown Investments (Pty) Ltd v Minister van Landbou* 1980 (2) SA 1 (A) at 7E.

78 *Supra* para [27] to [29].

79 Paragraphs 33(a) and (b).

discriminatory practice” which precludes such claims avoids the possibility of major social disruption.

[34] For the above reasons, I hold that the decision to establish a racially exclusive school on the property was not a racially discriminatory practice as contemplated by section 2(1)(a), read with section 1, of the Restitution Act and section 25(7) of the Constitution. On this basis it is not necessary for me to decide whether or not the dispossession of the property was “as a result of” the decision to establish a racially exclusive school. However, it remains necessary to establish whether the dispossession was “as a result of” the Group Areas Act of 1950.

Was the dispossession as a result of the Group Areas Act?

[35] The words “as a result of” in section 2(1)(a) of the Restitution Act represent a departure from the “under or for the purposes of furthering the objects of . . .” formulation of the 1993 Constitution. They must also be interpreted purposively in accordance with the analysis referred to in paragraphs [14] to [30] above. The same considerations would apply in so far as the historical origins and the statutory context are concerned as I have identified in relation to the other phrases in section 2(1)(a). As far as the particular words are concerned, “result” is defined in the New Shorter Oxford English Dictionary under note 4 as “[t]he effect, consequence, issue, or outcome of some action, process, or design.”⁸⁰

[36] The phrase “as a result of” and similar phrases in contracts and other statutes have received the attention of other courts in the past. In *Aswanestaal CC v South African Eagle Insurance Co Ltd*,⁸¹ the Cape Provincial Division interpreted the same words in a life insurance policy to mean “caused by” and as requiring the Court to identify the most immediate or direct cause.⁸² In *Commissioner for Inland Revenue v Shell Southern Africa Pension Fund*⁸³ the Court was concerned with a provision in the Income Tax Act⁸⁴ which rendered taxable “[a]ny lump sum benefit which becomes recoverable *in consequence of* or *following upon* the death of a member of a pension fund, provident fund or retirement annuity fund . . .”. Nicholas JA found that the words “in consequence of” and “following upon” meant “as a result of” and “resulting”, again requiring an enquiry into causation.⁸⁵ More

80 Brown *The New Shorter Oxford English Dictionary on Historical Principles* Vol 2 3 ed (Clarendon Press, Oxford 1993) at 2570.

81 1992 (1) SA 662 (C).

82 Ibid at 664H to 665A.

83 1984 (1) SA 672 (A).

84 Act 58 of 1962. The provision was contained in para 3 of the Second Schedule as it read before its amendment by section 47 of the Income Tax Act 94 of 1983.

85 *Commissioner for Inland Revenue v Shell Pension Fund* supra n 83 at 677H to 678H.

specifically it required the Court to identify “the intervening cause” and not just those causes having “the status of a merely historical antecedent or background feature”.⁸⁶

[37] Naturally it would be inappropriate simply to transpose an interpretation from one statute or contract directly into the Restitution Act. However, it is clear from these cases and the dictionary definition of “result”, as well as a proper consideration of the purpose of section 2(1)(a) of the Restitution Act, that the use of the words “as a result of” contemplates a causal connection being established between the dispossession complained of and a racially discriminatory law or practice. It has been recognised in relation to other branches of law that there are common themes in all legal enquiries into causation. In *Napier v Collett and another*⁸⁷ Grosskopf JA provided the following analysis:

“Despite the differences between various branches of the law, the basic problem of causation is the same throughout. The theoretical consequences of an act stretch into infinity. Some means must be found to limit legal responsibility for such consequences in a reasonable, practical and just manner . . .”⁸⁸

[38] The problem to which Grosskopf JA refers can also be stated from the perspective of a particular result (in this case, the dispossession). Such a result would usually have several antecedent events or conditions, without which the result would never have come about.⁸⁹ The difficulty is to identify which of these must be regarded, for purposes of a legal enquiry, not just as a necessary condition for a result, but the actual cause of it. In other fields of law, this problem has been resolved by separating the causation enquiry into two stages.⁹⁰ The first involves an enquiry into what has been termed “factual causation”. Generally, this involves the application of the “*conditio sine qua non*” or “but for” test. In other words, but for the act or omission identified as a potential cause, would the result have followed.⁹¹ If this test identifies the act or omission as a necessary condition for the result to have occurred, there is a second enquiry into “legal causation”. It is at this stage of the enquiry that the Court must isolate that event or condition which was sufficiently determinative of

86 Ibid at 679D, referring to *Iron and Steel Holding and Realisation Agency v Compensation Appeal Tribunal and Another* [1966] 1 All ER 769 G (QB) at 775D - G.

87 1995 (3) SA 140 (A).

88 Ibid at 143E to F.

89 See Hart and Honoré, *Causation in the Law* 2 ed (Clarendon Press, Oxford 1985) at 17 and 19.

90 See, for example, *Groenewald v Groenewald* 1998 (2) SA 1106 (SCA) at 1113C to I; *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) at 700E to I; *Tuck v Commissioner for Inland Revenue* 1988 (3) SA 819 (A) at 832G to 833B; *Tenza v Putco Ltd* 1998 (2) SA 330 (N) at 333F to 334D; *Ncoyo v Commissioner of Police, Ciskei and others* 1998 (1) SA 128 (CK) at 136G to 138H.

91 For criticism of this test, see Neethling, Potgieter and Visser *Law of Delict* 2 ed (Butterworths, Durban 1994) at 162 to 166. However, the two stage process has been applied so often by the Supreme Court of Appeal that it must be accepted as the law in those fields where it has been applied.

the result to be treated not just as a necessary condition, but as a legally recognised cause of the particular result. In order to achieve this, the courts (at least in the fields of criminal law and delict) adopt a flexible approach which draws on one or more of the recognised tests⁹² and on the dictates of reasonableness, policy, common sense and the facts of the particular case.⁹³

[39] Where the causal enquiry is required by the words of a statute, the process must, in the first place, be guided by the application of the principles of interpretation.⁹⁴ It may well be clear, simply on an application of the principles of interpretation, what the solution to a statutorily based causal enquiry is. Where the solution is not clear, provided that there is nothing which expressly or impliedly excludes it, the two stage enquiry can be employed in an appropriate way to resolve the matter. Given the confirmed status of the two stage enquiry as part of our common law, this is in accordance with the presumption of statutory interpretation to the effect that an enactment is in harmony with, and amends in as limited a way as possible, the common law and the existing statute law.⁹⁵ When it comes to the second leg of the enquiry (legal causation), the flexible approach which has been applied in criminal and delictual law would be circumscribed by the rules of statutory interpretation.

[40] Turning to the facts of this case, the only evidence regarding any causal impact of the Group Areas Act is that the area in which the school was later to be established was proclaimed a coloured group area with effect from 6 July 1960 in terms of that Act. Whether it was a necessary condition for a coloured school to be established that it should be in a coloured group area was not dealt with at all in the papers or in argument. I have not been able to find any express provision to this effect in the Coloured Persons Education Act.⁹⁶ It may well be that the effect of the prohibition on occupation of a group area by a disqualified person prevented a school for disqualified persons from being established there as a matter of law. If this is so, it would have meant that a coloured school could only be established in a coloured area. Certainly, this is likely to have been so as a matter of practical reality.

[41] Applying the law regarding causation, the result is clear whether one simply applies the principles of statutory interpretation or whether one follows the two stage enquiry. Starting with the former, one would usually be able to trace the establishment of racially exclusive institutions back, one way or another, to an original statute which provided for the racial zoning of the area in which

92 Those most commonly applied are the theory of adequate causation, the direct consequences theory, the fault theory and the reasonable foreseeability test. Neethling, Potgieter and Visser supra n 91 at 171 to 191.

93 *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 (4) SA 747 (A) at 764I to 765A; *Smit v Abrahams* 1994 (4) SA 1 (A) at 18E to H; *S v Mokgethi en andere* 1990 (1) SA 32 (A) at 39I to 41A; *Gibson v Berkowitz and another* 1996 (4) SA 1029 (W) at 1040G to 1041D.

94 Hart and Honoré supra n 89 at 103.

95 Devenish supra n 17 at 159 to 161.

96 Supra n 70.

the institution is established. If that was accepted as a basis for a valid claim, it would give rise to the same difficulties as those identified above in relation to a broad and literal interpretation of a racially discriminatory practice, including the potential multiplicity of historical-valuation-based claims.⁹⁷ For this reason, on the facts of this particular matter, and on a purposive analysis of section 2(1)(a), it cannot be said that the dispossession was “as a result of” the Group Areas Act of 1950.

[42] Alternatively, applying the two stage enquiry, no evidence was placed before us to show that, but for the Group Areas Act of 1950 or the declaration of the area concerned as a group area in terms of that Act, the respondents would not have been dispossessed. It may well be that in the absence of any racial zoning via the Group Areas Act or any of the Acts repealed by it, the demand for the education of children living in the area would in any event have led to the establishment of a school on the property. No evidence was placed before us to suggest otherwise. There was a half-hearted suggestion that the building of the racially exclusive school furthered the objects of the Group Areas Act. But that is no longer the test.⁹⁸

[43] Even if the declaration of the area as a coloured group area (and hence the Group Areas Act itself) was a necessary pre-condition for the decision to erect a school there and can therefore be said to survive the *conditio sine qua non* test, the application of the second stage of the enquiry eliminates both the Group Areas Act and the subsequent declaration as a group area as being legally cognisable causes of the dispossession. In my view, Mr Hiemstra correctly contended that the Group Areas Act of 1950 and the subsequent declaration of the area as a group area must be regarded as part of the conditions in which the dispossession took place and not as its cause. This result accords with common sense. A person in the respondents’ position who was asked “why did you have to sell your property?” would be far more likely to answer “because they decided to build a school there” than to say “because the area was declared a group area”, or “because of the Group Areas Act”. The Group Areas Act cannot be said to have been the determinative cause of the establishment of the school. The result is not unreasonable and it is in accordance with the policy underlying the Restitution Act and the Constitution as it has been explained above in analysing the purpose of the relevant provisions.

[44] The third question identified for decision must therefore also be answered against the respondents. The application succeeds. No order was sought by the applicants as to costs. Respondents sought an order as to costs together with their prayer for the dismissal of the application. No argument was presented to suggest that respondents should be entitled to costs even if the application succeeded. In my view, it would be inappropriate to make any costs award. I accordingly make the following order.

[45] The Court declares that:

97 *Supra* para [33] at (ii) and (iii).

98 This is the formulation of section 121(2)(b) of the 1993 Constitution which has been repealed.

- (i) neither the first nor the second respondent was, by virtue of the sale and transfer of Erf 36307, Cape Town to the Republic of South Africa, dispossessed of a right in land as a result of a racially discriminatory law or practice, as contemplated by section 2(1)(a) of the Restitution of Land Rights Act 22 of 1994 (as amended);
- (ii) the first and second respondents are precluded from claiming restitution in terms of the provisions of the Restitution of Land Rights Act 22 of 1994 (as amended) in respect of the sale referred to in paragraph (i).

JUDGE A DODSON

I agree

JUDGE Y S MEER

I agree

G GLOVER: ASSESSOR

Heard on : 26 November 1998

Handed down on : 10 February 1999

For the Applicants:

R C Hiemstra SC instructed by *The State Attorney*, Cape Town

For first and second Respondents :

W Parker of Parker Holt Incorporated, Cape Town