

IN THE LAND CLAIMS COURT OF SOUTH AFRICA

Heard at **RANDBURG** on 20 - 28 January 2000
before **Bam P** and **Gildenhuis J**

CASE NUMBER: LCC3/98

Decided on: 28 February 2000

In the matter of:

DAVID DANIËL JACOBS

(On behalf of the September family descendants)

Plaintiff

and

THE DEPARTMENT OF LAND AFFAIRS

Defendant

In re: The Farm UAP 28A

JUDGMENT

GILDENHUYS J:

The case before the Court

[1] In this case, members of the September family apply for the restitution of rights in land held in respect of a farm known as UAP 28A, situated near the town of Upington. I will refer to this property as “the farm”. The claim is brought under section 2(1) of the Restitution of Land Rights Act¹ I will refer to this Act as the Restitution Act. In terms of the Restitution Act restitution of a right in land means the restoration of that right, or equitable redress.² Equitable redress includes the granting of an appropriate right in alternative state-owned land, or the payment of compensation.³ The claimants indicated that their claim is limited to the payment of compensation.

[2] Two claim forms were filed on behalf of the claimants. There is a claim form dated 23 February 1996 signed by one D D Jacobs in which the claimant is described as “descendants of Abraham

1 Act 22 of 1994, as amended.

2 Described as such in the definition of “restitution of a right in land” contained in section 1 of the Restitution Act.

3 Described as such in the definition of “equitable redress” contained in section 1 of the Restitution Act.

September represented by David Jacobs”. There is also a claim form dated December 1997 signed by one A J Jacobs where the claimant is described as “descendants of Abraham September and/or Elizabeth September represented by David Jacobs alternatively myself”. According to Mr de Jager, who appeared on behalf of the claimants, he appears in this matter on behalf of the descendants of the late Abraham en Elizabeth September. The identity of the claimants, the capacity in which they act, and particularly the authority of Mr D D Jacobs and Mr A J Jacobs to lodge the land claim, are in dispute.

[3] The Regional Land Claims Commissioner for the Northern and Western Cape investigated the land claim. He put together a report and on 19 January 1998 referred the claim to this Court in terms of section 14(1)(d) of the Restitution Act. Pursuant to a pre-trial conference which took place on 5 May 1998 and in terms of rule 30(9)(g)(iii) of the Land Claims Court Rules, the claimant and the respondent prepared and signed a statement of agreed and disputed facts. After this document was signed, the Department of Land Affairs requested certain particulars on 8 March 1999, which particulars were later furnished by the claimants.

[4] On 14 December 1999, the Department of Land Affairs delivered a notice that it would apply for the prior adjudication of certain points in *in limine* in terms of Rule 57(1). This application was brought on the basis that the parties agree that:

- “1 die uiteensetting van ooreengekome feite en feite in geskil . . . as grondslag dien vir die beregting van hierdie punte **in limine**; en
- 2 vir doeleindes van . . . beregting die blootgelegde dokumente en fotostate daarvan (uitgesonderd die dokumentasie wat deel vorm van die deskundige kennisgewings) van toepassing op die plaas UAP-aangeleentheid deur die partye gebruik kan word en dat daardie dokumente is wat dit voorgee om te wees (behoudens dat daar ’n dispuut bestaan oor van die ondertekening van sekere dokumente soos beweer deur die deskundiges BESTER namens die Eiser);”⁴

[5] The claimants in this case also applied for the restitution of rights in land in respect of another property, known as Erf 38, Upington. That land claim has also been referred to this Court by the

4 Translated into English, it reads:

The statement of agreed facts and facts in dispute . . . serves as a foundation for the adjudication of these points in *in limine*;

for purposes of . . . adjudication, the discovered documents and photostats thereof (excluding the documentation which forms part of the expert notices) applicable to the UAP farm matter may be used by the parties and those documents are what they purport to be (except that a dispute exists over the signing of certain documents submitted by the expert BESTER on behalf of the plaintiff).

Regional Land Claims Commissioner. In that case, the Department of Land Affairs also raised a number of points *in limine*. The points *in limine* in that case and the points *in limine* in this case were consecutively argued before us. Together with this judgment, we will also give judgment in the Erf 38 claim.

The facts

[6] The farm UAP 28A was granted to Abraham September on perpetual quitrent on 22 November 1892. Abraham September was married to Elizabeth September in community of property. Seven children born out of the marriage between Abraham and Elizabeth September were alive when Abraham September died on 5 July 1898. The seven children included three sons, named Gert, Niklaas and Abraham (junior).

[7] Abraham and Elizabeth September made a joint will, dated 5 October 1896. The material terms of the will included a provision that the survivor would remain in full and undisturbed possession of all the first dying's property and that after the death of the survivor, the farm was bequeathed to the three sons, Gert, Niklaas and Abraham (junior), subject to the condition that not one of them may during his lifetime sell or alienate his portion of the farm. The will also included a condition that not one of the sons may, during his lifetime and without the consent of the others, let or alienate his portion of the farm.⁵ After the death of Abraham September, Elizabeth September was appointed executor under the will.

[8] During October 1906 Elizabeth September agreed to transfer the farm in full and free property to her three sons, but subject to the conditions and stipulations set forth in the will. She furthermore declared that the transfer was out of love and affection which she had towards them in consequence of their having maintained and supported her to that date. She stated that in consequence of her age and bodily weakness she had no intention of further remaining in the enjoyment of the property. She signed a solemn declaration to this effect before the assistant commissioner of Upington.

5 A translation into English of the relevant portion of the will reads:

Proceeding now to the election of heirs we, Testator and Testatrix declare that the survivor of us shall remain in full and undisturbed possession of all the goods to be left by the first dying, both movable and immovable, actions and credits, nothing whatsoever excepted. After the death of the survivor of us we bequeath our farm, Oehab, with undivided grazing veldt to our three sons, Gert, Niklaas, and Abraham, subject to the following stipulations: - No one of them shall during their life sell or otherwise alienate his portion of the farm. During his lifetime no one shall, without the consent of all, let the share of his farm or alienate it for debt or otherwise.

[9] On 16 October 1906 Elizabeth September granted a power of attorney signed in the presence of two witnesses, being one Coller (the assistant commissioner for Upington) and one Schröder (her attorney) in order to pass transfer of the property to her three sons. Three separate deeds of transfer were registered on 15 July 1907, giving each of the sons an undivided third share of the farm.

[10] On 17 August 1907 two of the sons signed, and the third son (Abraham junior) ostensibly also signed, a power of attorney in order to pass transfer of the farm to one William Robert Brittanicus Thorne. I will refer to him as “Thorne”. A deed of transfer was registered on 10 September 1907 in favour of the said Thorne. During October 1911 Thorne transferred the farm to WJ and MG Holmes.

[11] Elizabeth September and some of her family members remained in possession of the farm after the transfer to Thorne. In 1909 Thorne brought proceedings for an interdict against Elizabeth September and her sons Gert, Niklaas and Abraham junior, enforcing his rights as owner of the farm against them and asking the court for a definition of Elizabeth September’s right to stay on the farm. Although the summons was properly served, not one of the four defendants appeared in court. The case was disposed of on an unopposed basis, after evidence was given by Thorne and other witnesses. The court defined the rights of Elizabeth September to stay on the farm, and the deed of transfer was endorsed accordingly.

[12] Elizabeth September exercised her right to remain in possession of the farm (as defined by the court) until her death on 1 April 1918. None of the three sons, during their lifetime, nor any of their descendants, endeavoured by way of legal action to dispute Thorne’s or any of his successors’ rights to ownership of the farm. Furthermore, there was never any legal action relating to any alleged unlawful conduct on the part of Thorne, the attorneys, any state official or the successors in title to Thorne.

The disputes

[13] The parties agreed that certain facts are in dispute. The following are relevant to the issues now before the Court:

- “2.1 Whether ABRAHAM SEPTEMBER (jnr) indeed signed the power of attorney for the transfer of the property in favour of THORNE;
- 2.2 Whether ABRAHAM SEPTEMBER (jnr) consented to the transfer of his one third undivided share in the property to THORNE;

- 2.3 Whether the conditions of the will were adhered to in the transfer of the property from ELIZABETH SEPTEMBER to the three sons;
- 2.4 Whether THORNE could and indeed did become owner of the property concerned;
- 2.6 Whether ELIZABETH SEPTEMBER, the said three sons or any other ancestor of the claimants possessed any rights in the property since June 1913 (apart from the Cape Provincial Division Court order of 1910);
- 2.8 Whether the events in this case can be attributed to racial (*sic*) discriminatory laws or racially discriminatory practices as envisaged in Act 22 of 1994.”⁶

These disputes emanate, to some extent, from allegations by the claimants that the power of attorney given by Elizabeth September to pass transfer of the farm to the three sons did not reflect her intention,⁷ and also that the signature of Abraham September junior on the power of attorney which authorised the transfer of the farm to Thorne, is a forgery.

[14] Having regard to the facts in dispute, the Department of Land Affairs informed the claimant that it will apply to argue certain points *in limine*.⁸ These points can be summarised as follows:

6 I retain the numbering used in the document recording the agreement.

7 In their further particulars, the claimants alleged,

“... dat oordrag vanaf Elizabeth September aan die drie seuns valslik bewerkstellig moes word as *condictio sine qua non* vir valse oordrag vanaf hulle na Thorne.”

It was not stated what comprised the falsehood in the transfer by Elizabeth September to her sons. In particulars given by the claimants as to when the dispossession occurred, it was alleged that the power of attorney purportedly signed by Elizabeth September in 1906 was falsified. See below n 46. This seems to conflict with the agreed fact that Elizabeth September granted the power of attorney and signed it in the presence of two witnesses. See above par [9].

8 Mr Olivier, for the Department of Land Affairs, formulated the four points in Afrikaans as follows:

“2 Namens Applikant hierin sal geargumenteer word dat -

- 2.1 die gesamentlike testament van ABRAHAM en ELIZABETH SEPTEMBER gedateer 5 Oktober 1896 vervreemding van die plaas UAP deur die drie seuns (GERT, NIKLAAS en ABRAHAM junior) onderworpe aan hulle moeder ELIZABETH se gebruiksreg, aan THORNE veroorloof het;
- 2.2 Indien paragraaf 2.1 wel bevind word, die beamptes van die staat, in besonder die Meester van die Hooggeregshof te Kimberley en die Registrateur van Aktes te Vryburg, geen plig gehad het om die oordrag van die eiendom nie te laat plaasvind nie; en
- 2.3 Eiser nie ~~en~~ eis in terme van Wet 22 van 1994 het nie.

3 Daar sal voorts namens die Applikant hierin geargumenteer word dat -

- 3.1 die Agbare Hof nie die bevoegde en gepaste forum is om die geskille vermeld in paragrawe 2.1 tot 2.6 van die voormelde uiteensetting van feite in dispuut te bereg nie; en
- 3.2 die Eiser se eis gevolglik nie ontvanklik is in terme van voormelde Wet 22 van 1994 nie.

4 Indien nogtans bevind word dat hierdie Agbare Hof die bevoegde en gepaste forum is (wat nie hier toegee word nie) sal namens die Applikant hierin geargumenteer word dat -

- 4.1 selfs indien bevind word dat die oorgang van die eiendom vanaf ELIZABETH as gevolg

- Firstly, that because the joint will authorised the alienation of the farm by the three sons to Thorne, the government officials concerned had no duty to prevent the transfer.
- Secondly, that this Court is not the proper forum to adjudicate on the validity of the transfers to the three sons and thereafter to Thorne.
- Thirdly, if the transfer of the farm to the sons should be invalid, the joint estate of Abraham and Elizabeth September is the dispossessed person, and the claimants do not have the requisite *locus standi* to bring the restitution claim.
- Fourthly, any dispossession of a right in land which might have occurred, was not the result of past racially discriminatory practices.

[15] The points *in limine* were argued before us during the week of 24 January 2000. This judgment deals with the issues so argued.

First point *in limine*

Did the government officials have a duty to prevent the transfer?

[16] Under the joint will of Abraham and Elizabeth September, the farm was bequeathed to their three sons, subject to two overlapping restrictions.⁹ The first restriction was that none of the three sons may, during his lifetime, sell or otherwise alienate his portion of the farm. The second restriction was that none of the three sons may, during his lifetime, without the consent of the others, let or alienate his portion of the farm, for debt or otherwise. The first restriction, seen in isolation, may well constitute a

van bedrog geskied het (dit wil sê dat paragrawe 2.1-2.5 van die voormelde uiteensetting van feite in dispuut ten gunste van eiser geag sou word), die gesamentlike boedel van ABRAHAM en ELIZABETH SEPTEMBER van die regte ontnem is soos bedoel in die voormelde Wet:

- 4.2 Eisers gevolglik nie **locus standi** in die onderhawige aangeleentheid het nie; en
- 4.3 Eiser se eis derhalwe nie ontvanklik in terme van Wet 22 van 1994 is nie.

- 5 Dis sal voorts namens Applikant geargumenteer word dat -
 - 5.1 enige ontneming van ~~en~~ reg in grond (wat steeds betwis word) in elk geval nie as gevolg van praktyke wat op grond van ras gediskrimineer het, soos bedoel in die voormelde Wet, geskied het nie; en
 - 5.2 Eiser gevolglik nie ~~en~~ eis in terme van daardie Wet het nie.”

I retain the numbering used in the notice of application.

9 A translation into English of the relevant terms of the will is contained above in n 5.

nudum praeceptum, in the sense that it is not imposed in favour of any person.¹⁰ If, however, the will is read as a whole, it is clear that the testators intended to allow the sons to alienate the farm during their lifetime, provided all three sons agreed. In this case, the power of attorney authorising the transfer of the farm to Thorne appears to be signed by all three sons. If it was so signed, it would constitute reciprocal consent by each son to the transfer by the others. If the transfer by the sons to Thorne was permissible under the will, so Mr Olivier (for the Department of Land Affairs) submitted, the officials in the office of the Master of the Supreme Court at Kimberley and the officials in the office of the Registrar of the Deeds at Vryburg had no duty to prevent the transfer. I agree that, taking into account only the terms of the will and accepting the documents filed with the Registrar of Deeds at face value, the transfer of the farm to Thorne (subject to Elizabeth September's rights under the will) was permissible. The officials had no duty to stop it.¹¹ The claim was, however, brought on a different basis, namely fraudulent conduct on the part of the officials. I will deal with that hereunder.

Second point in limine

May this Court adjudicate on the validity of the transfers to the sons and to Thorne?

[17] The claimants allege that the transfers of the farm, firstly to the three sons and thereafter to Thorne, were not only incompatible with the provisions of the will, but also tainted by fraud. They rely on alleged occurrences. Firstly, the transfer of the farm to the three sons was implemented through falsification. Secondly, the signature of one of the sons (Abraham September junior) on the power of attorney in terms whereof the farm was transferred to Thorne, was forged. The claimants implicate the government officials in these frauds, and allege that their actions or neglect caused the loss of the land rights.

10 See Steyn *The Law of Wills in South Africa* (Juta, 1948) at 338:

“When no person is specified to whom, upon the breach of the prohibition, the property must go, or in whose favour the prohibition is made, the prohibition is nude (*nudum*), a *nudumpraeceptum*, and of no force and effect. This is so because a testator is presumed to have intended his heir or legatee to have all the rights of ownership inclusive of the right of alienation: if the testator limits this freedom it can only be because he intended someone else to have the *dominium*, but, as this other person is not indicated, the words of prohibition must be regarded as *pro non scripto*.”

11 If the legal requirements for a transfer of land are complied with, the officials concerned must register the transfer. It is not subject to their discretion. See *Boltman v The Kotze Community Trust* LCC5/99, 23 July 1999, [1999] JOL 5230; internet website address: <http://www.law.wits.ac.za/1999/boltmansum.html> at par [29].

[18] One of the points in dispute is whether Thorne could and did become owner of the farm. If any signatures on the powers of attorney were falsified, Thorne's title and the title of all those who subsequently acquired the farm, may be questionable. Mr Olivier pointed out that over the last almost hundred years, no legal action was taken to set aside any of those transfers. This could indicate that the parties concerned have acquiesced in the passing of ownership to Thorne.¹² An assault on the validity of any of the titles may well be barred at this stage. As I understand the claimants' case, they are not asking me to set aside any of the transfer deeds on account of the alleged fraud. Such a remedy would be a common law remedy, outside the powers of this Court.¹³

[19] If the alienation of the farm to Thorne constitutes a dispossession resulting from a racially discriminatory practice, within the meaning which those terms have in the Restitution Act, the Court will, provided the other requirements of the Restitution Act are met, be in a position to grant restitution. It will not be necessary to set the transfers aside, if they are invalid. The right to restitution derives from the Constitution,¹⁴ and is not dependent upon the exhaustion of any civil remedies which the claimants may have. Evidence of the alleged fraud would be permissible, not for the purpose of setting aside the transfers, but for the purpose of bringing the claim within the ambit of the Restitution Act, if that is possible. I will revert to this at a later stage.

Third point in limine

Do the claimants before this Court have *locus standi* to bring the restitution claim?

12 If a person with knowledge of the facts acts upon an instrument tainted by fraud, he is said to have elected not to resile from that instrument: see *Extel Industrial (Pty) Ltd and another v Crown Mills (Pty) Ltd* 1999 (2) 719 (SCA) at 733 E-G; *Uni-Erections v Continental Engineering Co Ltd* 1981 (1) SA 240 (W) at 248 E-F; *de Beer v Coetzer NO* 1914 TPD 308 at 314-315.

13 The function of this Court under the Restitution Act is to adjudicate on restitution claims. If the Court should decide to grant restitution, it may only grant the relief permitted under the Restitution Act. That does not include the granting of relief under the common law (such as setting aside transfer deeds) to persons who lost their land through fraud, even if the fraud was racially orientated.

14 Section 25(7) of Act 108 of 1996.

[20] The claimants base their claim on the loss to the September family of their rights in the farm. That loss, so Mr Olivier submitted, occurred when the farm was transferred to Thorne.¹⁵ Immediately prior to the transfer, the farm was registered in the name of the three sons. The sons are therefore (according to this construction) the “persons dispossessed of a right in land”. The claimants before this Court are the descendants of the late Abraham September. Those descendants include descendants of the three sons. The descendants of the three sons fall within the category of persons described in section 2(1)(c)(i) of the Restitution Act, and as such they have *locus standi* to bring this claim. It is possible that some of the descendants represented by Mr de Jager (for the claimants) may not have *locus standi*, but some of them do. Exactly which of them do, will have to be determined at a later stage.¹⁶

[21] The allegation that the farm was transferred to the three sons pursuant to a falsified power of attorney does not, in my view, affect the issue, at least not until the resultant deed of transfer is set aside by a competent court. Whether such a court would be prepared to do so at this late stage is in my view doubtful, particularly because the transfer was passed to transferees entitled thereto under the provisions of the will. A power of attorney properly signed by Elizabeth September would not have resulted in the deed of transfer to the three sons being any different. If the transfer of the farm to the three sons is indeed void, the dispossessed persons would be the estate of the late Abraham September (for an undivided half share) and Elizabeth September (for the other undivided half share).¹⁷ Until such time as the transfer is set aside by a competent court, I must treat it as valid.¹⁸ If it is valid, the dispossessed persons are the three sons. Their descendants fall under section 2(1)(c) of the Restitution Act, and have *locus standi* to bring the restitution claim.

Fourth point in limine

Was the dispossession the result of past racially discriminatory practices?

15 The claimants dispute that date, and allege that the loss occurred over a period of time. I deal with that contention in par [26] to [30] hereunder.

16 Such a determination will have to take full cognisance of the points raised by Mr Olivier relating to which claimants authorised the lodging of a claim in terms of section 2(1)(e) of the Restitution Act, and which of them authorised these proceedings.

17 See the discussion on the dispossession of a deceased estate in my judgment in *Jacobs v the Department of Land Affairs*; in re *Erf 38*, LCC120/99, to be delivered simultaneously with this judgment.

18 *Frye's (Pty) Ltd v Ries* 1957 (3) SA 575 (A) at 582 A-C.

[22] The question whether any dispossession of a right in land from the claimants' forebears was the result of past racially discriminatory practices,¹⁹ has three components. The first is whether the actions relied upon were practices within the meaning given to that term in the Restitution Act. The second is whether those practices were the cause of the dispossession. The third is whether those practices were racially discriminatory. If the answer to any of the three components is negative, the restitution claim will not comply with the requirements of section 2(1) of the Restitution Act. I will consider each of the components separately. The question put to me does not require a decision as to whether the alleged dispossession²⁰ is in fact a dispossession within the meaning which that term has under the Restitution Act.²¹

First component of the fourth point in limine

Are the actions complained of “practices”?

[23] The Restitution Act gives a wider meaning to “practice” than its ordinary dictionary meaning. The term “racially discriminatory practice” is defined in the Restitution Act²² as follows:-

“racially discriminatory practices” means racially discriminatory practices, acts or omissions, direct or indirect, by -

- (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.”

[24] A practice is:

19 Mr de Jager, for the claimants, indicated that the claimants do not rely on past discriminatory laws.

20 The dispossession on which the claimants rely is the loss of their land rights
“ten gunste van lede van die sogenoemde ‘Blanke’ groep.”

21 Meer J, in a judgment (with which I concurred) in the case of *Dulabh and Another v Department of Land Affairs*, 1997 (4) SA 1108 (LCC) at 1119F-1120A, analysed the meaning of the term “dispossession” as used in the Restitution Act, and concluded:

“The literature on dispossession pertaining to the context of land reform tends to contemplate dispossession in relation to ethnic groups that have suffered a particular kind of deprivation: the confiscation and denigration of their resources and culture under imperialism and colonial exploitation. The meaning and context of the word “dispossession” as discussed above, embracing both individual and community dispossessions is, I believe, compatible with the spirit of the Interim Constitution and the (Restitution) Act.”

22 Section 1.

“the habitual doing or carrying out of something; usual or customary action or performance; . . . (*law*) an established method of legal procedure”²³

In *Marievale Consolidated Mines v President of the Industrial Court and Others*²⁴ Goldstone J (as he then was) held that the term “labour practice” in the definition of “unfair labour practice”-

“...relates to a customary or recognised device, scheme or action adopted in the labour field..”

[25] The Restitution Act extended the ordinary meaning of “practice” by including racially discriminatory acts or omissions in the definition of “racially discriminatory practices.”²⁵ The fraudulent actions through which the claimants allege their forebears were dispossessed seem to fall within the meaning of the words “acts” or “omissions”, as contained in the definition. By including “acts” and “omissions” in the definition, the requirement of habituality inherent in “practice” was done away with. I might add that the wide ambit of meaning of “acts or omissions” in the definition seems to make the inclusion of “practices” unnecessary. I cannot conceive of any “practice” which would not at the same time be an “act” or “omission”.

Second component of the fourth point *in limine*

Was the dispossession “the result of” past racially discriminatory practices?

[26] The claimants identify the dispossession on which they rely as follows: their forebears were dispossessed of the farm through, amongst others, fraudulent actions which were condoned or approved of by officials or the Master and/or the Deeds Office.²⁶

[27] Mr de Jager, for the claimants, submitted that the “dispossession” on which the claimants rely is a sequence of events commencing with the falsification of Elizabeth September’s signature on the

23 Shorter Oxford Dictionary (Oxford University Press, 1992) at 231F.

24 1986 (2) SA 485 (T) at 498B-C.

25 Contained in section 1 of the Restitution Act.

26 The claimants put it as follows in their papers:

“dat hul voorgeslag . . . van gemelde plaas onteien (is) uit hoofde van, onder andere, bedrieglike handelinge wat deur amptenare van die Meester en/of die Aktekantoor gekondoneer of goedgekeur is.”

By “onteiening” is obviously not meant expropriation, but dispossession.

power of attorney in 1906 and ending with the eviction of the family members from the farm in 1922. Judge Meer, in her judgment in *Dulabh and Another v Department of Land Affairs*,²⁷ pointed out that, according to Jowitt's *Dictionary of English Law*, "dispossession" means "ouster", and according to Black's *Legal Dictionary* it is "a wrong that carries with it the notion of possession". In the *Trilingual Legal Dictionary*,²⁸ "dispossession" is translated into Afrikaans as "ontvreemding", which in my view aptly describes the concept. Dispossession of a right in land comprises the loss of such right. That cannot be a gradual process. A particular moment in time must arrive from when the dispossessed person no longer has the right. If the dispossessed right on which the claimants rely is a right of ownership in the farm, the dispossession thereof is unrelated to the dispossession of any occupational rights through the eviction in 1922. It would appear to me that there might be two separate dispossessions in this matter, the first being the loss of *dominium* in the farm in 1906 and the second being the loss of possession in 1922.²⁹ In my view, the two cannot be compressed into a single act of dispossession.

[28] In terms of the Restitution Act, the "dispossession" must be the "result of past racially discriminatory laws or practices". The claimants rely on "discriminatory practices". The "discriminatory practices" are stated to be the alleged fraudulent conduct of the government officials in the Master's office and in the Deeds Office, which conduct made it possible for transfer of the farm to pass to Thorne. To sustain a restitution claim, the conduct must be both the factual and legal cause of the dispossession.³⁰ As pointed out by Dodson J in *The Minister of Land Affairs and Another v Slamdien and Others*³¹, the Court must identify "the most immediate or direct cause" or the "determinative cause", and not just those causes which have "the status of a merely historical antecedent or background feature".

27 Above n 21 at 1119C.

28 Hiemstra and Gonin (ed) 3rd ed (Juta, 1992).

29 The rights in land of which the family members were deprived could conceivably have arisen from their continuous occupation of the farm for more than ten years. See the definition of "right in land" in section 1 of the Restitution Act. I make no decision on that issue.

30 On factual and legal causation see for example *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) at 700 E-J.

31 [1999] 1 All SA 608 (LCC) at 628c.

[29] Mr de Jager, for the claimants, informed me that the claimants will want to lead oral evidence relating to the alleged fraudulent conduct which, in his submission, caused the dispossession. Such evidence could possibly indicate (as Mr de Jager said it would) that the government officials took part in a fraudulent scheme to deprive the September family of ownership of their land, and that scheme might possibly be the determinative cause of the loss of the dominium in the land. I make no decision on this aspect. If, however, the government officials were guilty of no more than negligence in allowing the transfer to pass, I doubt whether that negligence on its own can constitute the “determinative cause” of the loss of the land.

[30] The eviction of the family members from the farm during 1922 after the death of Elizabeth September cannot, in my view, be seen as the direct result of any fraudulent conduct on the part of government officials at the time when the farm was transferred to Thorne. The determinative cause of that eviction is the actions of the then owner of the farm to enforce his ownership, the occupational rights of Elizabeth September having terminated at her death. Although the then owner might not have had any rights but for the alleged fraudulent conduct, such conduct is not hereby elevated to the determinative cause which gave rise to the eviction.

Third component of the fourth point *in limine*

Do the actions complained of constitute “racially discriminatory” practices?

[31] The right to restitution of land rights was first raised in the 1991 White Paper on Land Reform, where reference was made to restoring land taken away under “racially based land measures”. These “land measures” were, collectively, envisaged as being apartheid land law.³²

[32] The right to claim restitution of a right in land was constitutionally entrenched for the first time in section 121(2) of the Interim Constitution.³³ The section reads as follows:

“(2) A person or a community shall be entitled to claim restitution of a right in land from the state if -

32 Roux, in his commentary on the Restitution Act, contained in Budlender et al (ed) *Juta's New Land Law* (Juta, Cape Town 1998) at 3A-17.

33 The Constitution of the Republic of South Africa Act, Act 200 of 1993.

- (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.”

The dispossession concerned must be 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) of the Interim Constitution*. Roux comments that:

“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.”³⁴

[33] In the Final Constitution³⁵ the right to claim restitution is set out in section 25(7) as follows:

“25(7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.”

The Act of Parliament envisaged in the Final Constitution is the Restitution Act.

[34] To fall within the definition of a racially discriminatory practice, the practice concerned must in the first instance be “discriminatory”. The second preamble to the Restitution Act gives some indication of what the legislature might have intended by referring to a “discriminatory” practice. The preamble reads as follows:

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

Unfair discrimination would therefore be discrimination which infringes the dictates of equality. In terms of the Constitution³⁶

“Equality includes the full and equal enjoyment of all rights and freedoms.”

34 Above n 32 at 3A-18.

35 The Constitution of the Republic of South Africa Act, No 108 of 1996.

36 Act 108 of 1996, section 9(2).

The Human Rights Committee established under the International Covenant on Civil and Political Rights noted:

“The term ‘discrimination’ is used in the Covenant and should be understood to imply any distinction, exclusion, restriction or reference which is based on any ground such as race, . . . which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons and an equal footing of all rights and freedoms.”³⁷

A “discriminatory” practice would thus be a practice which denies to persons the full and equal enjoyment of rights and freedoms.³⁸ This interpretation accords with section 121(2) of the Interim Constitution, which refers to the prohibition of racial discrimination contained in section 8(2) of that Constitution. Section 8 is the equality clause.

[35] In the second instance, the practice must be “racially discriminatory”. Article 1.1 of the International Convention on the Elimination of all Forms of Racial Discrimination (1966) defines “racial discrimination” as follows:

“In this convention, the term ‘racial discrimination’ shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.”³⁹

In essence, racial discrimination is the denial of racial equality.⁴⁰ The restitution process is aimed at reversing those inequalities.⁴¹

36 General Comment 18(37). See Davis “Equality and Equal Protection” in van Wyk et al *Rights and Constitutionalism* (Juta, 1994) at 201. I have taken the text from there.

38 It was stated by the American academic Fiss in “Groups and the Equal Protection Clause” McCrudden (ed) *Anti-Discrimination Law* (Dartmouth, 1991) at 69-70:

“The antidiscrimination principle also invokes the metaphor of blindness - as in ‘colour blindness’. The overarching obligation is to treat similar persons similarly, declaring certain individual characteristics - such as colour - irrelevant.”

38 See Mtshaulana et al (ed) *Documents on International Law* (Juta, 1996) on 210. I have taken the text from there.

40 “The most pernicious feature of racial prejudice and discrimination is their underlying premise that members of some racial groups are less worthy than members of others. The antidiscrimination principle holds that this assumption is fallacious because race has no moral salience.” Brest “In Defense of the Antidiscrimination Principle” in *Anti-Discrimination Law* (above n 37) at 50.

41 *Slamdien* above n 30 at 621e-f.

[36] In reply to a question by the State Attorney (acting for the Department of Land Affairs) as to “(p)recisely what is the ‘racially discriminatory practice’ on which the claimants rely?”

the claimants (through their legal representatives) stated:

“Die Eisers steun op handeling en/of versuime deur funksionaris en/of amptenare van die Meester en/of die Registrateur van Aktes te Vryburg, wat hetsy opsetlik hetsy nalatig, met ene Thone en/of Holmes saamgespan het om op ’n bedrieglike en onregmatige wyse die afstammeling van wyle Abraham en Elizabeth September van hul eiendom, te wete die Plaas UAP, te ontnem. Die gemelde amptenare se spesifieke identiteit is tans nie aan die Eisers bekend nie.

Die Eisers beweer dat hul voorgeslag is van gemelde plaas onteien uit hoofde van, onder andere, bedrieglike handeling wat deur amptenare van die Meester en/of die Akteskantoor gekondoneer of goedgekeur is. Gemelde amptenare was verteenwoordigers van die Staat. Die amptenare is lede van die sogenaemde ‘Blanke’ groep. Die Eisers voer aan dat die Staat nie sodanige onteiening sou gedoog het indien die Eisers se voorgeslagte op daardie stadium lede van die ‘Blanke’ groep was nie.”⁴²

[37] It was common cause that the legislation under which the Master of the Supreme Court and the Registrar of Deeds operated at the time, was not racially discriminatory legislation. In essence, the claimants say that government officials, acting under these laws, conspired with certain white persons (who were not government officials) to deprive their ancestors in a fraudulent manner of their land.⁴³ The fraud and the resultant deprivation of land, so the claimants allege, would not have happened if their ancestors were white.

[38] The practice on which the claimants rely as constituting a “racially discriminatory practice” would, if true, constitute criminal conduct on the part of the government officials concerned. A particular practice may be racially discriminatory and may, at the same time, also constitute criminal conduct. Criminal conduct aimed at a racial group which is considered to have easy victims, will not automatically convert that conduct into a racially discriminatory practice under the Restitution Act. Before that can

42 In English, it reads:

The plaintiffs rely on acts or omissions by functionaries or officials in the office of the Master and/or the Registrar of Deeds at Vryburg, who acted intentionally or negligently, together with one Thorne and one Holmes in a fraudulent and illegal manner to deprive the heirs of the deceased Abraham and Elizabeth September of their property, namely the farm UAP. The specific identity of the above-mentioned officials is still unknown to the Plaintiffs.

The Plaintiffs allege that their forebears were dispossessed of the above-mentioned farm by virtue of amongst others, fraudulent action which was condoned or approved by officials of the Master and/or the Deeds Office. The mentioned officials are representatives of the State. The officials are members of the so-called “White” group. The Plaintiffs submit that the State would not have permitted the dispossession if the plaintiffs’ ascendants had at that time been members of the “white” group.

43 In this case, of the farm UAP.

happen, the practice must fall within the ambit of the meaning which the term “racially discriminatory practice” bears in the Restitution Act.

[39] When making his submissions on the meaning of “racially discriminatory practice”, Mr Olivier, for the Department of Land Affairs, strongly relied on a *dictum* in the *Slamdien* case, where Dodson J held that a purposive interpretation of the Restitution Act -

“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 their 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 the 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.”⁴⁴

This accords with the history of the legislation providing for land restitution, which indicates a clear purpose of rectifying the destructive results of past apartheid land law.

[40] To be a “racially discriminatory” practice, the practice

- must involve an official of a department of state or administration in the national, provincial or local sphere of government, or any other functionary or official of an institution which exercised a public power or performed a public function in terms of any legislation;⁴⁵
- must be committed while the official or functionary concerned is acting or purporting to act within the scope of his power of authority;
- must constitute a denial of racial equality which would be inconsistent with the equality provisions of the Constitution, had those provisions been in force at the time; and
- such denial of racial equality must be aimed at achieving the (then) ideal of spatial apartheid.

44 Above n 30 at page 622g-623a.

45 See the definition of “racially discriminatory practices” quoted above in par [23].

[41] In this case, officials in the office of the Master and in the office of the Registrar of Deeds were involved in one or more of the transfers. If the claimants should succeed in proving, after having presented oral evidence, that these officials fraudulently accepted documents and acted upon them in allowing the transfers to pass, knowing full well that the documents were falsified, they would, by so acting, be purporting to act within the scope of their authority, albeit in contravention of the laws they were administering.

[42] The alleged fraudulent acts or omissions on the part of the officials in causing or allowing transfer of the farm to be passed on falsified documents or in a deceitful manner, might constitute a denial of racial equality by the officials concerned if it can be shown that such acts or omissions would not have taken place if the September family were white.⁴⁶ The facts agreed by the parties and the papers before me do not support such a conclusion. It might be established by the oral evidence which Mr de Jager indicated he would want to present to the Court.

[43] Any denial of racial equality which there might have been on the part of the officials was not aimed, and was not alleged to have been aimed, at promoting or implementing the then ideals of spatial apartheid; its purpose was to enable Thorne or Holmes to get hold of the farm in an unlawful manner. The last of the requirements for a “racially discriminatory practice”, which I have set out above, has therefore not been met.

Did any dispossession occur after 19 June 1913?

[44] When asked when the alleged dispossession occurred, the claimants (through their legal representatives) replied that the acts or omissions on which they rely originated in a forged power of attorney which purports to have been signed by the late Elizabeth September in 1906 and which

⁴⁶ This might be the case if the September family were selected as victims because their rights were not as well protected as the rights of white people.

continued up to and until approximately 1922, when members of the police forcibly drove away the family from the farm.⁴⁷

[45] In terms of section 2(1)(e), claimants are only entitled to restitution of a right in land if the dispossession occurred after 19 June 1913. The transfer of the farm to Thorne occurred before that date. The ejectment of family members from the farm occurred during 1922. Although it was raised in argument that the claim (or part of the claim) might be precluded by section 2(1)(e) of the Restitution Act because the dispossession occurred prior to 19 June 1913, this issue is not one of the issues submitted for decision as a point *in limine*.⁴⁸ I will therefore not decide this issue.

Conclusion

[46] Mr de Jager, for the claimants, pointed out that the present proceedings are trial proceedings, not motion proceedings. The points *in limine* are similar to points which might be taken on exception. He indicated that, should I find against him, he would want an opportunity to amend the pleadings, to present the case on a different basis, and to lead oral evidence.⁴⁹ My findings on the points *in limine* are confined to the case made out by the claimants in the papers before the Court. It is conceivable that the claimants may achieve success if they present their claim on some other footing, or bolster it by further evidence. In my view, such an opportunity ought not to be denied to them.⁵⁰

47 In the papers before the Court, it was stated as follows:

“Eisers voer aan dat die handeling en/of versuim waarop hulle steun sy oorsprong het in 'n vervalsde prokurasie wat voorgee deur wyle Elizabeth September geteken te wees in 1906 en voortgeduur het tot en met ongeveer 1922 toe lede van die polisie die familie gewelddadig van die plaas verdryf het”

48 See par [14] above.

49 Mr Olivier submitted that all possible evidence is already before the Court in the form of documents, and that Mr de Jager cannot possibly add anything by leading oral evidence. I am not convinced that oral evidence, even if presented only to give perspective to the documents already submitted, cannot be of some assistance.

50 In land restitution cases, the Court has an investigative function. The proceedings are not of the same adversarial nature as ordinary litigation. See section 32(3)(b) of the Restitution Act.

[47] None of the parties asked for a cost order. Accordingly, none is made.

[48] For the reasons set out above, I decide the points *in limine* raised by the Department of Land Affairs as follows:

- (1) Taking into account only the terms of the will and accepting the documents filed with the Registrar of Deeds at face value, the transfer of the farm to Thorne was permissible. The government officials had no duty to prevent it.
- (2) This Court has no jurisdiction to amend or to declare void on the grounds of forgery or fraud any of the title deeds under which the farm UAP 28A was held.
- (3) Those of the claimants who are descendants of Gert September, Niklaas September or Abraham September junior and who comply with section 2(1)(c) of the Restitution of Land Rights Act have, subject to section 2(4) of that Act, *locus standi* to bring a restitution claim on the basis as set out in the pleadings and particulars before the Court.
- (4) The dispossession of the ownership rights in the farm UAP in 1906 and the dispossession of any rights of possession in 1922, as described in the pleadings and particulars before the Court, are not dispossessions which resulted from any racially discriminatory practices, as envisaged in the Restitution of Land Rights Act.

JUDGE A GILDENHUYS

I agree

JUDGE PRESIDENT F BAM

For the claimant:

Adv P de Jager SC instructed by *D P du Plessis Attorneys, Pretoria*

For the respondent:

Adv W H Olivier SC and *Adv Y Claassen* instructed by *State Attorney, Pretoria*