IN THE LAND CLAIMS COURT OF SOUTH AFRICA

CASE NUMBER 15/96

Ex Parte :

THE TWO COUNCILS, BEING THE NORTH CENTRAL AND THE SOUTH CENTRAL METROPOLITAN SUBSTRUCTURE COUNCILS OF THE DURBAN METROPOLITAN AREA **FIRST APPLICANT**

and

THE INNER WEST LOCAL COUNCIL OF THE DURBAN METROPOLITAN COUNCIL **SECOND APPLICANT**

and in the matter of an Application in terms of Section 34 of the Restitution of Land Rights Act 22 of 1994 for an Order that certain land not be restored to any claimant or prospective claimant

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JUDGMENT

MOLOTO J :

[1] This is an application in terms of Section 34 of the Restitution of Land Rights Act, No 22 of 1994, (hereinafter called the "Act") that before final determination of any land claim, the Court orders that the land in question or any right in it shall not be restored to any claimant or prospective claimant. The land in question is the area generally known as Cato Manor and measures 2 084,7 (two thousand and eighty four comma seven) hectares. That part of Cato Manor known as Ridgeview Quarries is excluded from the application. The area subject to the application is described in the papers as the Cato Manor Development Area.

[2] The Applicant was originally The Central Transitional Metropolitan Substructure Council for the Durban Metropolitan Area. However, an application was later granted for a substituted citation and description of the Applicant (on account of changes in the sphere of local government) as well as the joining of a second Applicant. Thus, the First Applicant became "the two Councils, being the North Central and the South Central Metropolitan Substructure Councils of the Durban Metropolitan Council", which in terms of Proclamation 80 of 1996 (KwaZulu-Natal) are both bodies corporate, but are constituted in such a manner that they are only capable of suing and being sued jointly and the Second Applicant, the Inner West Local Council of the Durban Metropolitan Council.

[3] The Respondents comprised forcibly removed members of the Cato Manor community or their descendants. At the end of the day, those opposing the application numbered some 511. All Respondents, but one, were represented by legal practitioners. Mr Paraw Seebran, the only unrepresented Respondent, demonstrated a thorough understanding of the proceedings and made a good impression on the Court with the conduct of his case.

[4] The following brief history of Cato Manor is provided in an annexure to the Regional Land Claims Commissioner's report filed in this matter :

> "Cato Manor was founded by George Cato (first mayor of Durban) in 1845. (He originally owned the farm and farmed it but later subdivided and sold it) By early 1928 the beginnings of shack developments were becoming evident, largely because of the increased movement of Indian immigrants in and around Durban. After the Second World War, with increased industrialisation and therefore urbanisation, thousands of African labourers were attracted to the cities. As a result of the lack of accommodation for them, shack farming in Cato Manor became a lucrative business for Indian landowners. Much of the land at this time was also being used for market gardening.
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> By the mid 1950's Cato Manor had an estimated population of 120 000 Africans and 40 000 Indians. The area stretched from the University of Natal as far as Westville, Mayville and Hillary. Overcrowding was rife and crime and disease widespread. Despite these problems the community was a well organised one. The residents established schools, religious institutions, old age and children's homes etc. They also developed their own political and welfare organisations.

In 1954, the Group Areas Board recommended that the area be proclaimed for white occupation. At this time the area was in fact rejected by the Durban City Council and white people in general on the basis that the poor condition of the area, and in particular the widespread presence of ecca shale made it unsuitable and expensive for white housing. There was also much opposition to the rezoning of the area from the Cato Manor residents themselves. The Natal Indian Congress branches of Mayville and Cato Manor organised mass meetings around the removal of people from this area.

Cato Manor was officially proclaimed a white area in 1958 (in terms of the Group Areas Act No 41 of 1950) and massive removals got under way. By 1964 the demolition of shacks in Cato Manor was completed. By 1965 the African community had been largely relocated to the new townships of KwaMashu, Lamontville and Umlazi, while most of the Indian community was moved to Chatsworth.

All properties were frozen for development and the land owners forced to sell to the Department of Community Development or the Durban City Council. In most areas compensation paid to those whose properties were expropriated was poor.

By 1968, Stella Hills, a section of Cato Manor had been developed by whites. The University of Natal has also bought almost the entire Second River complex. The Department of Community Development was, however, able to dispose of very little of the land and it was for this reason that in November 1979 about one fifth of Cato Manor was deproclaimed a white area and, in May 1980 was gazetted for Indian occupation once again. With this reproclamation the 500 Indian families still resident in the area faced many problems. The Department of Community Development wanted to move all residents out of the area in order to develop the area. There was no consultation with the people on the redevelopment plans. All the land had been expropriated with the result that the residents of Cato Manor were now tenants of the Department of Community Development."[1]

[5] The people who lost rights in land or their descendants have very strong ties to Cato Manor and have over the years agitated for the return to their roots. The restitution of land rights process in terms of the Act gave them hope of realising this dream. The respondents understandably perceived this application as a threat to their dream. The applicants sought an order in terms of section 34 of the Act because they have development plans for the area. The proposed development envisages the establishment of a virtual city in the area with a complete infrastructure such as residential and commercial areas, schools, hospitals, libraries, recreational

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[1] Extract from the Report of the Surplus People Project. Portions in brackets are my own insertions.

facilities, places of worship and so on. Fundamental to the plan is that the residences should be affordable. Various institutions (including an overseas institution) and communities have committed funds to the development by way of either investment or donation and it is one of the Government's leading Reconstruction and Development Programme projects. It is anticipated that the development will generate substantial employment opportunities for residents of the Greater Durban area and provide a significant boost for the regional economy. Parts of the area are occupied by informal settlers and it is part of the development plans to upgrade these settlements. The agent appointed by the Applicants to oversee this development is the Cato Manor Development Association, a company established in terms of section 21 of the Companies Act No 61 of 1973. (It is referred to in this judgment as the CMDA). It was the evidence of the CMDA's office bearers that if an order in terms of section 34 was not granted, the development would essentially fail and the bulk of the financing which has been made available would be withdrawn.

[6] Although the proceedings were launched by way of an application, by agreement the parties were allowed to lead oral evidence of certain witnesses to amplify the papers. The Applicant led the evidence of three of its witnesses, two of whom were senior office bearers of the CMDA. However, during the hearing the parties started negotiating a settlement and ultimately were able to reach agreement before any further evidence was led. It was indeed no mean feat that a settlement was reached given the large number of parties.

[7] Notwithstanding that the parties settled, the Court must independently be satisfied that the settlement agreement meets the requirements set out in Section 34(6) of the Act, before making such settlement agreement an order of Court. The Court was so satisfied and on 24 April 1997 made the settlement agreement an order of Court. It was indicated at the time that the Court would give its reasons for coming to the conclusion that the requirements of Section 34(6) have been met later. These follow.

[8] Section 34(5) of the Act provides that -

> "After hearing an application contemplated in subsection (1), the Court may -
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> (a) dismiss the application; or

(b) order that when any claim in respect of the land in question is finally determined, the rights in the land in question, or in part of the land, or certain rights in the land, shall not be restored to any claimant."

[9] Subsection (6) prescribes that the Court shall not make an order in terms of subsection (5)(b) unless it is satisfied that -

"(a) it is in the public interest that the rights in question should not be restored to any claimant; and

(b) the public or any substantial part thereof will suffer substantial prejudice unless an order is made in terms of subsection (5)(b) before the final determination of any claim."

[10] The settlement reached by the parties *in casu* contemplates the making of an order by the Court in terms of subsection (5)(b) that rights in part of the land, or certain rights in the land, will not be restored to any claimant. It is therefore essential that the Court be satisfied that the settlement agreement complies with subsection (6) before making the agreement an order of Court. The agreement and the order are set out at the end of the judgment in full. In broad terms, the agreement provides that the development as planned by the Applicants will proceed subject to the proviso that, where it can be shown that restoration is feasible within the Development Area, any Respondent who so wishes will still be able to pursue his or her claim for restoration. For those Respondents who wish to return to the area but do not insist on restoration or for whom restoration is not feasible, various mechanisms are provided for them to benefit from the development. Those Respondents who do not wish to return to the area may opt to confine their claims to the alternatives to restoration contemplated in the Act. The agreement was signed by the parties (or their representatives), the Regional Land Claims Commissioner and a representative of the Department of Land Affairs.

[11] In examining whether the settlement agreement complies with the requirements of subsection (6) of section 34, it is necessary to investigate the concept "public interest". This is a very elusive concept which is used to mean many differing (and sometimes conflicting) things but is rarely the subject of any attempt at clear definition . It is assumed to be generally understood and is not defined in the Act. No argument was placed before Court on the concept of public interest because the matter was settled. However, the Court conducted independent research into the meaning of

the concept. A number of interpretations have been gleaned from various authorities, amongst which, a few are mentioned hereunder :

[12] *The New Shorter Oxford English Dictionary*, Vol 2 1993 edition defines public interest simply as "the common welfare", which phrase is itself just as wide and situational as the phrase public interest.

[13] The phrase is used in a number of cases[2] in South African law without being defined. What is clear, however, is that in arriving at what is in the public interest the courts compare the deprivation of some private convenience with the benefit that is likely to result therefrom for the general public or part thereof. In this regard the court said the following in the *Clinical Centre*[3] case :

> "Looking at the subsection broadly, the intention seems to be that the Court shall consider the whole matter objectively, deciding in that way whether the requirements of the premises can be said to be 'reasonably necessary in the interest of the public', and then considering whether the private hardship which will be caused to the lessee is so severe as to outweigh the considerations of public interest".

[14] In a more recent case involving a review of the refusal by the Liquor Board to grant a liquor licence in a township of some 1939 inhabitants served by no other licensed bottle store, on the grounds *inter alia*, that there were 3 bottle stores in the town centre 2 - 3 kilometres away, Nicholson J said the following about the meaning of "public interest":

> "(a) It does not mean that the public whose interest is to be served is necessarily to be widely representative of the general public.
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> (b) It means that the public would be better served if the applicant were granted the licence than that the existing state of affairs was to continue.

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2 *Clinical Centre v Holdgates Motors Co* 1948(4) 481; *Strelitz & Another v Meise and Another* 1950(3) 827; *Barry v Smulowitz* 1950(4) 82; *Galanakis v Liquor Licensing Board of Rhodesia* 1974(2) SA (RA) 27; *Leicester Properties (Pty) Ltd v Farran* 1976 (1) SA 492 (D) and *Asko Beleggings v Voorsitter van die Drankraad* NO 1997(2) SA 57 (NKA).

3 1948(4) 481 at 489 - 490 above.

(c) It is not the national interest that is intended but that of the inhabitants in the areas for which the licence is sought or visitors to that area."[4]

[15] The learned author W du Plessis[5] also refers to a weighing of interests in determining the public interest, and adds that there is an objective as well as a subjective side to the test. She then continues :

> *"Die belange van die een individu word teenoor dié van 'n ander afgeweeg om te bepaal of enige regte aangetas is (subjektiewe sy). Hiermee word egter nie volstaan nie, want daar moet ook 'n objektiewe oordeel gevel word om te bepaal of die skending van die betrokke belange met die gemeenskap se oordeel strook of nie".*

The learned author then proceeds to state that it is not always possible to define the concept. She refers to Flathman's definition[6] of the public interest which is as follows :

> "a general commendatory concept used in selecting and justifying public policy. It has no general or descriptive meaning applicable to all policy decisions, but can be determined for particular cases."

She then mentions some special aspects which she uses to define the concept. These aspects are (i) state security; (ii) economic interests; (iii) individual interests as collective interests; (iv) legal interests; (v) administrative interests and (vi) strategic interests. After discussing each of these aspects the learned author offers the following definition of the "public interest":

> "Die versamelnaam vir 'n aantal histories uitgekristalliseerde, beskermingswaardige staatsveiligheids-, ekonomiese, strategiese, administratiewe, sosiale and regsbelange wat op 'n gegewe moment subjektief en objektief bepaalbaar is en in 'n gemeenskap die balans tussen die botsende belange van individue onderling en individue in verhouding tot die staat handhaaf."[7]

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4 *Maharaj v Chairman, Liquor Board* 1997(1) SA 273 at 281.

5 THRHR 1987 p 290 at 292.

6 Flathman *The Public Interest* (1966) p 82 at 293.

7 At p 298.

[16] Of the foreign authorities researched, two Australian cases deal with the concept in the area of development and restitution of land rights, which is what the present case is about. These cases approach the subject by balancing and adjusting conflicting interests. Australia passed the Native Title Act in 1993[8] whose major purpose is to "recognise and protect" native title. In terms of the said Act, any proposed act over land is suspended for two months to give native title holders or native title claimants an opportunity to make submissions regarding the proposed act and any effect it may have on their (native title holders' or claimants') interests. Negotiations would then take place between the developer and the Native Title claimants. If the negotiations are unsuccessful, then the case is heard by the Native Title Tribunal. On hearing the matter, the Tribunal may allow or refuse the doing of the act, or attach conditions to the doing thereof. Section 39 of the Act stipulates various factors for consideration in determining the effect of the proposed act on native title interests, including "any public interest in the proposed act proceeding".[9]

[17] The two cases deal with the application of the Native Title Act and both are concerned with applications for mining licences. The first involved applications WF96/3 and WF96/12 which were heard together because they involved the same tract of land, claimed by the Waljun people. The second consisted of applications WF96/1, WF96/5 and WF96/11 involving a piece of land claimed by the Koara people. For convenience, I will call the applications the Waljun case and Koara case respectively. In both cases the applicant, the government of Western Australia, sought the grant to various companies of mining leases over land claimed by the respective communities. In both cases the communities objected to the grant of the mining leases on the grounds that such mining operations would adversely affect the interests of the native title holders.

[18] The interests that stood to be so adversely affected were, among others, hunting over the land, the holding of cultural ceremonies and religious worship, as well as the secrecy around their places of worship.

[19] In balancing the public interest with the native title interests in the Waljun case, the Tribunal had the following to say : -

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8 Act 110 of 1993.

9 Section 39(e).

> "There can be a public interest in the act proceeding or the act not proceeding. In this criterion the Tribunal is not limited to economic considerations. For instance there might be a public interest in the act not proceeding if despite some economic benefits, the act was going to have a significant adverse effect on community relations because of the attitude of native parties to it or because it was going to result in significant damage to a sensitive environment."

> "It may be argued by reference to this criterion that there is a public interest in maintaining a viable mining industry and because a viable mining industry depends on extensive exploration, there is a public interest in the grant of each mining lease to be used for exploration purposes... It is not appropriate to speculate at this stage about all the issues which could be raised in this context, other than to note the fact that there are many matters that potentially could be considered as relevant under the public interest".[10]

[20] After considering all relevant factors, the Tribunal concluded that there were very insignificant native title interests, if any at all, that could be affected by the mining operations and ordered that those operations could proceed without conditions.

[21] The Koara case was decided against the government of Western Australia and in favour of the Koara people because it was found that substantial native title interests would be adversely affected were mining operations to be conducted without imposing conditions. The Tribunal accepted the evidence of the native title party to the effect that the Koara people had always enjoyed unrestricted access to the land and used the area for hunting, gathering and conducting ceremonies. They were concerned with maintaining access to and use of their land for these traditional purposes. With regard to public interest, the Tribunal held :

> "The section 39 public interest criterion requires us to take into account the public interest in the protection of native title and also the evidence of the public interest in the continuity of exploration and mining".[11]

[22] An important consideration in balancing public interest with private interest, and perhaps apposite to the case before us, is the following statement from the Koara case :

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[10] At 67.

[11] At p 36.

> "Mineral exploration and production is a key part of the Western Australian economy and a major contributor to Western Australian and Australian export income and to state and federal revenue. The mining industry generates significant employment in other sectors of the Western Australian economy and its future depends on the discovery of new resources to replace those exploited."[12]

This, said the Tribunal, was an important public interest consideration.

[23] The Tribunal determined that the mining leases could be granted subject to conditions which gave some consideration to the Koara peoples' concerns at the stage when actual mining operations were contemplated.[13]

[24] In summary these conditions were to the following effect:

(a) The Koara people were to be guaranteed continued access to and use of the land subject to provisions which avoided interference with mining operations and guaranteed safety.

(b) The native title parties were to give the grantee parties notice of sites of religious significance within the mining area. The native title parties were then required to conduct site surveys and clearance (this was to ensure the secrecy fundamental to the religion). They were to mark these sites on maps and hand them over to the grantees (at the grantees expense). No exploration or mining was then to be permitted on these sites.

(c) The grantees were to give the native title parties notice of proposed mining. The native title parties were then to notify the grantees within a set period of their desire to commence good faith negotiations over matters of concern to them arising out of the proposed mining operations. These were not to be limited to the considerations raised by section 39 of the Act but were to include possible socio-economic benefits to the native title parties in respect of the mining operations.[14]

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12 Ibid

13 At 39

14 At 40 - 41

The tribunal's determination reflects a balancing of interests and has a number of parallels in the agreement reached between the parties in the case before us.

[25] In determining what was in the public interest in this matter, it was taken as almost axiomatic that, given the history of dispossession in Cato Manor and the resultant devastation and hardship suffered by the removed community, restoration would be in the public interest. Blanket restoration in the area would, however, have necessitated a refusal of the section 34 application and the resultant loss of the development. So, against the advantages to the public interest of restoration there had to be weighed and balanced the advantages to the public interest of the development. Put another way, and in the words of section 34(6)(b), "the public or any substantial part thereof" should stand to "suffer substantial prejudice unless" the section 34 order is granted. The advantages of the development include (a) the provision of affordable housing for the disadvantaged communities of Greater Durban near places of potential employment; (b) the opportunities for employment as a result of the development; (c) the upgrading of informal settlements; (d) foreign investment; (e) economic upliftment of the Greater Durban area with the possibility of spilling over into the entire KwaZulu-Natal area; (f) obviating potential violent strife between the informally settled communities and land claimants.

[26] There is no doubt that both restoration and the proposed development are in the public interest and that any arrangement which accommodates both, with the consent of all the parties, would be eminently in the public interest. The settlement agreement signed by the parties, accommodating as it does, the idea of restoration where this is feasible and development in which those respondents who do not get restoration are given a stake, is just such an arrangement. I am therefore satisfied that the settlement is in the public interest.

[27] Finally, I reiterate that the meaning to be given to the concept of public interest in section 34 was not argued before us. Whilst I was satisfied that the settlement in this matter was, in the particular circumstances, in the public interest, this judgment is not intended to be conclusive as to the meaning to be ascribed to the term.

[28] The order which was made by the Court and the terms of the agreement which it incorporated are as follows (the annexures to the agreement are not included) :

"**CONSENT ORDER**

1 AN ORDER IS HEREBY GRANTED

1.1 making the terms and conditions contained in the agreement annexed hereto and marked "A" an Order of Court;

1.2 in terms of paragraph 1 of Notice of Motion in respect of the area as defined in the agreement annexed hereto and marked "A", subject to the terms and conditions as contained in annexure "A" hereto;

1.3 directing that each party shall bear its or his or her own costs in this application, including all costs reserved in this matter on previous occasions.

2 It is recorded:-

2.1 that the respondents contend that Section 34 of the Restitution of Land Rights Act, No 22 of 1994 is a wholly inappropriate remedy and that the Legislature ought to have, at the very least, taken into account the processes and mechanisms as provided for in annexure "A" hereto when drafting the said Act.

2.2 that notwithstanding the provisions of paragraph 1.2 of this Order the Applicants hereby waive paragraph 1.2 of this Order in respect of the land which is the subject matter of a respondent's claim for restoration as referred to in annexure "A" hereto and which claim for restoration is:-

2.2.1 agreed or found to be feasible in terms of annexure "A" hereto;

2.2.2 determined by the Minister as being feasible (if necessary); and

2.2.3 the Court determines such claim to be a valid claim for restoration.

3 It is directed that this Order shall not be construed as being a bar to any respondent forming or joining any body or group of persons which seeks at some future date to challenge the constitutional validity of Section 34 of the Act."

"**MEMORANDUM OF AGREEMENT**

entered into between

THE NORTH CENTRAL LOCAL COUNCIL

and

THE SOUTH CENTRAL LOCAL COUNCIL

and

THE INNER WEST LOCAL COUNCIL

and

THE PARTICIPANTS

and

THE REGIONAL LAND CLAIMS COMMISSIONER FOR THE PROVINCE OF KWAZULU-NATAL

and

THE DEPARTMENT OF LAND AFFAIRS

1. **PREAMBLE**

Noting that an application in terms of section 34 of the Act is before the Court in respect of the area, and noting the applicant's and the participants' concern that section 34 is a wholly inappropriate remedy for the problems encountered in the area, and noting further that the participants would have preferred to challenge the constitutional validity of section 34 of the Act, the applicant and the participants have nonetheless resolved to settle their differences with this agreement.

2 **DEFINITIONS**

2.1 In this agreement and unless inconsistent with the context:

2.1.1 headings to clauses shall not serve as a means of interpretation of any such clause;

2.1.2 words importing the singular shall be deemed also to import the plural and vice versa;

2.1.3 any word not defined in this agreement shall have the meaning assigned to it in the Act.

2.2 The following words and expressions shall, unless inconsistent with the context, have the meanings assigned to them hereunder:

2.2.1	"Act"	the Restitution of Land Rights Act 22 of 1994;
2.2.2	"applicant"	the North Central Local Council, the South Central Local Council and the Inner West Local Council, and their agents for the purposes of developing the area;
2.2.3	"area"	the Cato Manor Development Area depicted on the plan annexed to the Applicant's replying affidavit in case number LCC 15/96;
2.2.4	"allocations policy"	the allocations policy, as amended from time to time, annexed to the Applicant's replying affidavit in case number LCC 15/96;
2.2.5	"claimant"	a person (excluding a participant) who has lodged a claim in respect of the area in terms of section 10 of the Act;

2.2.6	"CMDA"	Cato Manor Development Association;
2.2.7	"Court"	the Land Claims Court established in terms of section 22 of the Act;
2.2.8	"day"	a day shall include business days but shall exclude Saturdays, Sundays and public holidays;
2.2.9	"DLA"	the Department of Land Affairs;
2.2.10	"effective date"	the date on which the last signing of the parties signs this agreement;
2.2.11	"feasible"	shall have its ordinary meaning and shall include but not necessarily be limited to the concept of feasibility as set out in the Act, provided that: (a) the Structure Plan, the Precinct Plans, the Layout Plans and the Implementational Strategy of the CMDA shall be considered as relevant urban development plans in terms of section 15(6)(b) of the Act; and (b) the aforesaid plans shall not be regarded as immutable. Feasibility shall have a corresponding meaning.
2.2.12	"the Minister"	the Minister of Land Affairs;
2.2.13	"participant"	a person whose name and identity number appears on annexure “A” hereto and in respect of whom a land claim has been lodged with the RLCC in terms of the Act;
2.2.14	"the parties"	the Applicant, the participants, the RLCC and the DLA;
2.2.15	"restitution"	shall have the meaning as contemplated in the Act save that it shall not include restoration as provided for in this agreement and alternative land within the area as provided for in this agreement;
2.2.16	"restoration"	the transfer to the participant of the land (or a lesser portion thereof) which is the basis of the participant’s claim lodged with the RLCC;

2.2.17	"RLCC"	the Regional Land Claims Commissioner for the Province of KwaZulu-Natal appointed in terms of the Act or an official designated by the RLCC;
2.2.18	"section 34 order"	the order sought in the notice of motion filed in the Court under case number LCC 15/96;
2.2.19	"work programme"	the work programme annexed hereto marked "B".

3 **SECTION 34**

3.1 The parties consent to an order in terms of section 34 of the Act as sought in the notice of motion being granted and in accordance with the terms set forth in the "Consent Order" annexed hereto marked "X".

3.2 The participants shall with effect from the effective date withdraw their opposition to the application under case number LCC 15/96.

3.3 Notwithstanding paragraph 3.1 above the Applicant hereby waives the Order contemplated in paragraph 3.1 in respect of the land which is the subject matter of a participant's claim for restoration and which claim for restoration is:

3.3.1 agreed or found to be feasible in terms of this agreement;

3.3.2 determined by the Minister as being feasible; and

3.3.3 the Court determines such a claim to be a valid claim for restoration.

3.4 Notwithstanding the aforegoing, the parties acknowledge that the processes and benefits conferred by this agreement shall apply in respect of all the participants.

4 **THE FLOWCHART**

The basic outline of the process and benefits referred to above will be diagrammatically represented in a flowchart which will be made available together with the other documentation referred to in paragraph 5.2 below.

5 **THE INITIAL PROCESS**

5.1 Within 10 (ten) days of the effective date the RLCC shall:

5.1.1 together with the applicant and the DLA, begin to identify all reasonable restitution alternatives that might be available to claimants;

5.1.2 provide the applicant with the relevant claim documentation submitted to the RLCC by each of the participants;

5.1.3 obtain from the DLA information regarding the formula to be used by it in awarding compensation to claimants and land owners.

5.2 Within 10 (ten) days of the effective date, the applicant shall provide the RLCC and the legal representatives of the participants with the following information and documentation:

5.2.1 a report on land available for the alternative land process referred to in clause 8 of the agreement;

5.2.2 a report on other opportunities that could be accessed in terms of the allocations policy;

5.2.3 a map identifying broadly the land parcels where restoration is considered not to be feasible and where development is considered not to be possible.

5.3 Within 10 (ten) days of the effective date, the participants shall supply the RLCC with all missing claim information requested by the RLCC to enable the RLCC to process the said claims.

5.4 The RLCC shall within 25 (twenty five) days of the effective date interview all the participants at which interview each of the participants shall:

5.4.1 receive a detailed and informed explanation as to the restitution alternatives available to such participant;

5.4.2 receive a detailed explanation of the processes set out in this agreement, and how his or her claim will be handled depending on what alternative he or she chooses;

5.4.3 be advised that he or she is entitled to be legally represented, or otherwise assisted, throughout the said process;

5.4.4 make an election before the RLCC, which election shall be final, as to whether he or she chooses restoration, restitution or alternative land within the area;

PROVIDED THAT:

5.4.4.1 if any participant is in doubt about his or her choice, he or she shall be entitled to choose restoration and thereafter change his or her choice, without penalty, to one or other of the alternatives;

5.4.4.2 a participant who chooses restoration or alternative land within the area may at any time change his or her mind and choose restitution.

5.5 Unless good cause is shown by a participant as to why he or she failed to attend an interview, any participant who fails to make himself or herself available for an interview within the specified time period he or she shall automatically be deemed to have elected the restitution route

5.6 Once all the participants have been interviewed the RLCC shall process all the remaining claimants through the interview procedure outlined in paragraph 5.4 above save that none of the remaining claimants shall be entitled to elect the restoration option unless the RLCC, in consultation with the DLA, is of the opinion that restoration is feasible, that opinion to be based on such mapping and documentation on the question of feasibility as the applicant may provide to the RLCC from time to time.

6 THE RESTITUTION PROCESS

6.1 Those participants who select the restitution option shall thereafter have their claims processed in accordance with the provisions of the Act.

6.2 The RLCC shall forward to the applicant details of those participants whose claims have been processed in terms of the Act and who wish to take advantage of the allocations policy.

6.3 Those participants whose claims have been rejected after being processed in terms of the Act shall have no further rights in terms of this agreement and their names shall be removed from the list of participants.

7 THE RESTORATION PROCESS

7.1 The RLCC shall within 5 (five) days of the conclusion of the interview process outlined in clause 5.4 above provide the applicant with a list of full names, contact addresses and contact telephone numbers of all participants who have chosen the restoration option.

7.2 In addition, the RLCC shall simultaneously provide the applicant with a map which spatially locates, to the original cadastral boundaries or as close thereto as possible, the land in respect of which restoration is claimed.

7.3 Upon receipt of the list and map referred to above, the applicant shall within 5 (five) days divide the restoration participants into categories A and B and shall thereafter prioritise the participants within each category for processing in terms of this agreement, where:

7.3.1 "Category A" shall consist of claims by participants to land which has been developed since 4 December 1996, or which will be developed by the applicant within 6 months (six months) of the effective date in accordance with the work programme; and

7.3.2 "Category B" shall consist of all other claims by the participants;

Provided that in the event of the RLCC or DLA being in default of any of the time periods referred to in this agreement, then the said period of default shall be added to the period of 6 (six) months referred to in paragraph 7.3.1 above and the applicant shall be entitled to move participants in category B affected by such period to category A.

7.4 Within 10 (ten) days of providing the RLCC with the categorised lists referred to above, the applicant shall begin providing the initial assessments to all participants referred to in category A as well as to the RLCC, in the order of priority within category A.

7.5 The applicant shall :

7.5.1 thereafter begin providing initial assessments to all participants referred to in category B as well as to the RLCC, in order of priority within category B;

7.5.2 thereafter begin providing initial assessments to all claimants in respect of whom the RLCC has indicated that restoration may be feasible in terms of 5.6 above, all of which shall be categorised as a list known as "Category C".

7.6 The initial assessment shall contain the following information:

7.6.1 details as to land ownership, existing development, structure plan implications, affected projects in the work programme and any other relevant information and documentation which might be available;

7.6.2 the opinion of the applicant as to whether restoration is feasible or not, together with reasons if the opinion is that restoration is not feasible.

7.7 Within 10 (ten) days of receipt of the prioritised categorised lists (categories A and B) the RLCC shall provide the applicant and the respective participants with an assessment as to the latest date by when referral to the Court shall have been achieved with regard to the processing of the relevant claims.

7.8 In the event of the initial assessment indicating that restoration is feasible, in the opinion of the applicant, the applicant shall ensure that the relevant property is recorded on the relevant precinct plan as being reserved, subject to the terms of this agreement, for restoration and shall ensure, subject to the terms of this agreement, that such property is not developed by it or its agents.

7.9 In the event of the initial assessment indicating that restoration is feasible in the opinion of the applicant, the RLCC shall process such restoration claim in accordance with the provisions of the Act and shall use his or her best endeavours to ensure that the claim is processed to the stage when the matter is referred to the Court within the period assessed by him or her in terms of clause 7.7 above. In addition the RLCC shall:

7.9.1 endeavour to procure from the Minister a certificate of feasibility in terms of section 15 of the Act within a period of 30 (thirty) days from the date of the provision of his or her aforesaid response in terms of paragraph 7.7;

7.9.2 within 20 (twenty) days of receipt of a certificate in terms of section 15 refer the matter to the Court for determination in terms of section 14 of the Act.

7.10 Should the Minister certify that restoration is not feasible, the participant shall then have his or her claim dealt with in terms of the restitution or alternative processes outlined in paragraphs 6 and 8 respectively.

7.11 Those participants whose claims have been rejected after being processed in terms of the Act shall have no further rights in terms of this agreement and their names shall be removed from the list of participants.

7.12 Should the Court find that the claim is valid but that the participant is nevertheless not entitled to restoration, the claim of such participant shall fall to be dealt with in terms of the restitution process outlined above.

7.13 Should the initial assessment indicate that in the opinion of the applicant restoration is not feasible in respect of categories A and B, the RLCC shall immediately upon receipt of the initial assessment initiate the mediation process referred to below.

7.14 Should the initial assessment indicate that restoration is not feasible in respect of claims launched by claimants referred to in paragraph 7.5.2 above, the applicant shall consult with the RLCC and thereafter call the claimant to a meeting to explain the reasons for non-feasibility, and such claimant shall not be entitled to the benefits conferred by paragraphs 8, 9, 10 and 11 of this agreement.

7.15 Should the process of mediation result in the parties to the mediation agreeing that restoration is either:

7.15.1 feasible, the claim of the participant shall be dealt with in terms of clause 7.8 and 7.9 above, in which event the time period referred to in paragraph 7.9.1 shall begin to run from the date of such agreement; or

7.15.2 not feasible, the claim of the participant shall be dealt with in terms of clause 6 above or clause 8 below, in which event the participant shall not be entitled to claim restoration thereafter.

7.16 Should the process of mediation not resolve the dispute regarding the feasibility of restoration, the matter shall be dealt with in accordance with the provisions of this agreement relating to arbitration.

8 ALTERNATIVE LAND PROCESS

8.1 The applicant shall within 5 (five) days of the effective date provide the RLCC with the types of land uses that will be delivered in terms of the development of the area to enable the RLCC to conduct the initial interviews referred to above and to identify:

8.1.1 claimants who choose to participate as a group in order to access the land uses referred to above;

8.1.2 claimants who wish to approach the Minister for the designation of alternative state-owned land.

8.2 The Minister when considering the availability of alternative state owned land for designation shall be requested by the DLA to first consider the availability of alternative state owned land in the area and only thereafter consider the availability of alternative state owned land outside the area.

8.3 Within 5 (five) days of concluding the initial interviews, the RLCC shall provide:

8.3.1 the applicant with particulars of all claimants who wish to exercise their claim by participating in a group option and particulars of the type of land use envisaged;

8.3.2 the applicant and the DLA with particulars of all claimants who acknowledge that restoration is not feasible and who wish to have alternative state owned land designated by way of settlement of their claims.

8.4 The applicant shall within 10 (ten) days of receipt of the information referred to in clause 8.3 above provide the DLA with a report on the availability of land within the area for acquisition by the DLA for the purposes of designation as alternative state owned land.

8.5 The applicant shall conclude an agreement with the DLA for the supply of such alternative state-owned land within the area as it is able to supply for designation by the Minister in terms of this agreement.

8.6 Claims for alternative state owned land shall be processed in accordance with the provisions of the Act and settled in due course by the DLA.

9 **MEDIATION**

9.1 Mediation contemplated in terms of paragraph 7.13 above shall be compulsory and shall be concluded within 10 (ten) days of the date of such mediation commencing.

9.2 The RLCC shall appoint a mediator from a panel established by the DLA.

9.3 The RLCC shall facilitate a process whereby any mediators are briefed on at least the following: the history of Cato Manor, the claims process and the development of Cato Manor.

9.4 Notwithstanding the definition of restoration contained in paragraph 2 of this agreement for the purposes of mediation only, the parties shall be obliged to consider restitution of an alternative piece of land provided that a substantial portion of the said alternative piece of land coincides with the original land which was the subject matter of the participant's restoration claim.

10 **ARBITRATION**

10.1 At the conclusion of an unsuccessful mediation, or upon the expiry of the period of 10 (ten) days allowed for mediation (whichever is the earlier), the mediator shall within 5 (five) days prepare a statement of case to be placed before the arbitrators and forward the said statement of case to each of the parties to the arbitration.

10.2 The statement of case shall provide as much detail as in the opinion of the mediator is necessary to enable the arbitrators to make a decision.

10.3 Within 5 (five) days of receipt of the mediator's statement of case, the respective parties to the arbitration shall provide the arbitrators with 3 (three) copies and the other party to the arbitration with 1 (one) copy of an indexed bundle of documents such party considers relevant to the arbitration together with a brief synopsis of the argument they will advance at the arbitration and no party shall be entitled at the arbitration hearing to rely on any document not contained in the said bundle except in circumstances deemed exceptional by the arbitrators.

10.4 Parties to the arbitration may present evidence by way of affidavit, which affidavit/s shall be included in the bundle of documents referred to in the previous sub-clause.

10.5 The arbitrators shall convene an arbitration hearing at the next available date subsequent to the last arbitration having been set-down, and inform both parties thereof within 10 (ten) days of receipt of the documentation referred to above.

10.6 No witnesses may be called by either party at the arbitration hearing save that the arbitrators shall have the power to:

10.6.1 call for such evidence and for such additional documentation as they in their sole discretion deem necessary;

10.6.2 give leave to a party to call witnesses if to do so is necessary for the fair and proper determination of the issue.

10.7 The Arbitration Act, 42 of 1965, shall apply to the arbitration unless inconsistent with this agreement and save that the provisions of section 14(1)(a), sub-paragraphs (iii), (iv) and (v) of section 14(1)(b), and section 35 of the Arbitration Act shall not apply.

10.8 The arbitrators shall make a ruling within 3 (three) days of the hearing and shall provide written reasons therefor within 10 (ten) days thereafter, and the findings shall be made available to the parties to this agreement.

10.9 The findings of the arbitrators shall be final and binding on the parties to such arbitration and shall not be subject to appeal.

10.10 The arbitrators shall consist of a panel of 3 (three) persons appointed in the following manner:

10.10.1 a selection committee of 4 (four) persons consisting of Clive Forster, Garth Seneque, a person nominated by Mr Paraw Seebran and the participants' legal representatives (excluding the Campus Law Clinic) and a person nominated by DLA (or alternates nominated by each of those persons) shall identify, within 30 days of the effective date, three lists of persons from which arbitration panels could be constituted;

10.10.2 of the lists referred to above, the first shall be a list compiled by the DLA and which shall be a list of persons employed by or on contract to the DLA, the second shall be a list of persons with relevant skills, which in the opinion of the selection committee or the majority of them, qualify such persons as "project economists", and the third list shall be of persons drawn from either practising civil engineers and/or practising town planners who in the opinion of the selection committee, or the majority of them, are possessed of relevant skills which qualify them to sit on the arbitration panel;

10.10.3 in constituting any particular panel of arbitrators the DLA representative on the selection committee shall choose one person from the DLA list, and Clive Forster, Garth Seneque and remaining selection committee member shall choose one person from each of the other two lists provided that if the "project economist" is a town planner or civil engineer, the third member of the arbitration panel shall be selected as far as possible from the other discipline.

10.11 Once the arbitrators have delivered their finding, the claim shall be dealt with as follows:

10.11.1 if feasible, the claim of the participant shall be dealt with in terms of clause 7.9 above, and the time limits referred to in paragraph 7.9.1 shall begin to run from the date of such finding; or

10.11.2 if not feasible, the claim of the participant shall be dealt with in terms of clause 6 above, in which event such participant shall no longer be entitled to claim restoration.

10.12 All questions of costs relating to the arbitration except the costs of the parties to the arbitration shall be borne by the Department of Land Affairs.

10.13 The DLA will, in consultation with the RLCC, make available sufficient funds for the appointment by the RLCC of legal representation for deserving and/or needy participants in the arbitration process. Subject to that qualification, the costs of the respective parties to the arbitration shall be borne by the parties themselves. The arbitrators shall not have power to order costs against a party.

10.14 Where the claim of a restoration participant which has been the subject of an arbitration is subsequently found by the Court or the RLCC to be frivolous and/or vexatious and/or fraudulent, such participant shall bear and be liable for all the costs of the arbitration including the costs of other party or parties to the arbitration, such costs to be on the High Court Scale and agreed or taxed by the High Court.

10.15 The applicant shall perform the functions of the Registrar of the arbitration panel.

10.16 In the event of any of Clive Forster, Garth Seneque or any of the other nominees referred to in clause 10.10.1 above not being nominated in the first place, or being unable to perform their duties set out in clause 10.10.1 and not having nominated an alternative, then :

10.16.1 in the event of Clive Forster being unavailable, he shall be replaced by the Executive Director, Housing of the Durban Transitional Metropolitan Council;

10.16.2 in the event of Garth Seneque being unavailable, he shall be replaced by a person nominated by the RLCC;

10.16.3 in the event of the representative of the DLA being unavailable, he or she shall be replaced by a person nominated by the DLA;

10.16.4 in the event of the other representative being unavailable, he or she shall be replaced by another person nominated by Mr Paraw Seebran and the participants' legal representatives (excluding the Campus Law Clinic) within 5 (five) days failing which the RLCC shall nominate such other representative;

10.16.5 in the event of Mr Paraw Seebran and the participants' legal representatives (excluding the Campus Law Clinic) failing to nominate their member of the selection committee in the first place, the RLCC shall nominate such member.

10.17 The applicant shall bear the onus of proving that restoration is not feasible at any arbitration.

11 FUTURE DEVELOPMENT

11.1 The Applicant undertakes that no land which is the subject of the section 34 order shall be developed by the Applicant or its agents prior to the dates for the various projects as set out in the work programme.

11.2 The Applicant undertakes that from the effective date to the date of the Minister providing a certificate referred to above no development shall take place on any property being the subject of a claim by a participant seeking restoration where such participant falls into category B as set out above, subject to the terms of this agreement.

11.3 With regard to the participants in category A, the Applicant undertakes to use its best endeavours to ensure that any development which does take place over the property being the subject of a claim by a participant seeking restoration accommodates such participant: Provided that such efforts by the applicant shall include engaging in a dialogue with the participant concerned and may entail rescheduling the work programme where practical in the opinion of the applicant.

11.4 In the event that despite the undertaking in the preceding paragraph, development does proceed on the relevant land parcel, the claim in question shall proceed to mediation, and arbitration if needs be, and in considering the question of feasibility the arbitration panel shall be obliged to consider whether or not it was feasible to effect restoration of the land in question as at 4 December 1996.

11.5 Pending the mediation/arbitration process referred to in paragraph 11.4 above, the claim of the affected participant shall be dealt with as follows:

11.5.1 the claim shall firstly be placed in a category of claims awaiting possible consideration as a claim for alternative land;

11.5.2 the applicant shall identify, in consultation with the affected participant, an equivalent portion of land elsewhere in the area and hold such land available for restitution as alternative land and undertakes not to develop such land until either the arbitration panel finds that restoration was not feasible or the claim is finalized, whichever is the earlier;

11.5.3 if the arbitration panel concludes that restoration was not feasible, then the claim of the affected participant falls to be dealt with in terms of the restitution process, and the identification of the alternative land and the undertaking given in terms of paragraph 11.5.2 above fall away;

11.5.4 if the arbitration panel concludes that restoration was feasible, the alternative land identified in paragraph 11.5.2 above shall be made available to the DLA in terms of paragraph 8.5 above and for designation by the DLA as alternative land for the participant in question;

11.6 The Applicant undertakes that no development will take place by it or its agents for a period of 90 days on any land (excluding any land parcel referred to in paragraph 11.4 above) for which:

11.6.1 it provides a preliminary assessment indicating restoration is feasible provided that the 90 day period shall be calculated from the date of such assessment;

11.6.2 the mediation or arbitration results in an agreement or ruling that restoration is feasible provided that the 90 day period shall be calculated from such agreement or ruling;

Provided that if through no fault on the part of a participant the processes contemplated in this agreement are not completed within the said 90 day period, the period shall be extended by the additional number of days that are taken to complete such processes.

12 SOCIAL PROCESS

12.1 Structure Plan:

As part of the public consultation process required in terms of the Town Planning Ordinance No. 27 (1949) past and present residents shall be regarded as interested and affected parties, and:

12.1.1 The applicant shall in all the notices in the public media advertising the structure plan, ensure that claimants are included as interested parties and shall ensure that appropriate briefing and information sessions are conducted in English and Zulu;

12.1.2 The claimants' comments and input on the structure plan shall be recorded by the applicant and incorporated in the planning as far as is practical and appropriate;

12.1.3 Follow-up sessions may be held where the claimants require time to develop their comments and input.

12.1.4 The applicant shall use its best endeavours to incorporate historical, cultural and religious sites into a tourist route representing and reflecting the history of Cato Manor;

12.1.5 The applicant shall use its best endeavours to develop an historical and cultural museum representing and reflecting the history of Cato Manor.

12.1.6 The trustees of existing religious institutions in Cato Manor shall be consulted by the applicant in respect of the above;

12.1.7 Interested former residents shall be constructively engaged by the applicant in respect of the positioning and conceptualization of the tourist route and the museum.

12.2 Precinct Plans:

12.2.1 All historical, religious and cultural sites with buildings on them shall be incorporated into the precinct plans wherever possible;

12.2.2 Should organised formations of claimants emerge, the applicant shall engage them in a consultative process at the structure plan or precinct plan levels, whichever is appropriate;

12.2.3 The applicant shall take steps to, where practical, integrate claimants into the existing development committees. Where this is not practical, the applicant shall facilitate an engagement between the said development committees and claimants.

12.3 Detailed layout:

12.3.1 The detailed layout shall incorporate all sites of religious, historical and cultural significance which are identified in the structure and precinct plan processes;

12.3.2 Existing structures of historical or architectural interest shall be incorporated in the planning as far as is practical.

13 **UNDERTAKING BY DLA**

13.1 The DLA shall ensure that the RLCC has sufficient resources to enable him or her to comply with the terms of this agreement.

13.2 The DLA undertakes, to its best endeavours and within its budgetary constraints, to meet its obligations in terms of this agreement.

14 **DOMICILIUM CITANDI ET EXECUTANDI**

14.1 For the purpose of this agreement the parties choose their respective *domicilium citandi et executandi* as set out below:

14.1.1	"the Applicant"	c/o the CMDA, 1st floor, Highway House, 83 Jan Smuts Highway, Durban;
14.1.2	"the CMDA"	the CMDA, 1st floor, Highway House, 83 Jan Smuts Highway, Durban;
14.1.3	"the RLCC"	Suites 4 and 5, 20 Otto Street, Pietermaritzburg;
14.1.4	"the participants"	the addresses supplied by them in annexure "A" hereto;
14.1.5	"the DLA"	184 Jacob Maré Street, Pretoria.

14.2 Written notice of any change in *domicilium citandi et executandi* shall be delivered by hand or sent by prepaid registered post to the intended recipients.

14.3 Every notice to be given in terms of this agreement shall be in writing and shall be-

14.3.1 delivered by hand to the *domicilium citandi et executandi* of the intended recipient in which event it shall be presumed to have been served and the intended recipient to have been informed of the contents of such notice when such notice is so delivered; or

14.3.2 posted by prepaid registered post to the *domicilium citandi et executandi* or the last known postal address of the intended recipient in which event it shall be presumed to have been served and the intended recipient to have been informed of the contents of such notice on the seventh day thereafter.

15 **VARIATIONS**

No variation, modification or waiver of any provision of this agreement or consent to any departure therefrom (including this clause) shall in any way be of any force or effect unless confirmed in writing and signed by the affected parties and then such variation, modification, waiver or consent shall be effective only in the specific instance and for the purpose and to the extent for which it was made or given.

16 **WAIVER**

16.1 The waiver (whether express or implied) by any party of any breach of the terms or conditions of this agreement by another party shall not prejudice any remedy of the waiving party in respect of any continuing or other breach of the terms and conditions hereof.

16.2 No favour, delay or relaxation or indulgence on the part of any party in exercising any power or right conferred on such party in terms of this agreement shall operate as a waiver of such power or right nor shall any single or partial exercise of any such power or right preclude any other or further exercises thereof or the exercise of any other power or right under this agreement.

17 **CESSION**

No participant may cede, assign or pledge any of its rights and/or obligations in terms of this agreement to any other person without the prior written consent of the Applicant, which consent shall not be unreasonably withheld.

18 **WHOLE AGREEMENT**

This agreement constitutes the whole agreement between the parties in relation to its subject matter and supersedes all prior agreements and no documentation, representation, warranty or agreement not contained herein shall be of any force between the parties.

19 **COSTS**

Each party shall bear their own costs of the action in the Land Claims Court under Case number 15/96."

JUDGE J MOLOTO

I agree

_____

JUDGE A DODSON

Dated : _____

Mr C Frank, the assessor, agreed.