IN THE LAND CLAIMS COURT OF SOUTH AFRICA

Held at **RANDBURG** on 25 October 1999 **CASE NUMBER**: LCC116/98
before **Gildenhuys J**
Decided on: 30 November 1999

In the case of:

THE FORMER HIGHLANDS RESIDENTS

concerning

THE AREA FORMERLY KNOWN AS THE HIGHLANDS (NOW NEWLANDS EXTENSION 2), DISTRICT OF PRETORIA

In the action between:

ALFRED SONNY	First Plaintiff
GHADITJA SULIMAN [born SONNY]	Second Plaintiff
JOYCE SONNY	Third Plaintiff
MITCHELL SONNY	Fourth Plaintiff
ULANDIE SONNY	Fifth Plaintiff
GLORIA SONNY	Sixth Plaintiff
GAIL SONNY	Seventh Plaintiff
JUDITH SONNY	Eighth Plaintiff
URIEL SONNY	Ninth Plaintiff

and

THE DEPARTMENT OF LAND AFFAIRS	Defendant

JUDGMENT

GILDENHUYS J:

General background

[1] A large number of claimants lodged claims for restitution under the Restitution of Land Rights Act ("the Restitution Act"),[1] following upon the dispossession of properties in the former township of The Highlands, district of Pretoria. The Regional Land Claims Commissioner for Gauteng and North West Province investigated the claims. She referred them to this Court as a group, under section 14(1) of the Restitution Act. The claimants do not claim actual restoration of the dispossessed properties but equitable redress in the form of monetary compensation.

[2] After the claims were referred to this Court, the Department of Land Affairs indicated that it wished to participate in the action. The claimants filed statements of claim and the Department of Land Affairs filed responses. For purposes of convenience, the claims were processed together and will, at the main hearing, be heard together. Several pre-trial conferences took place between the parties in order to identify and limit the issues in dispute. During these conferences, certain questions of law were identified which, if adjudicated upon prior to the main hearing, would facilitate the preparation for the main hearing and shorten the proceedings.[2] Some of those issues already came before this Court and I have given judgments on them.[3]

The facts

[3] This judgment concerns a claim by the descendants of the late Abraham Sonny. Nine members of the Sonny family lodged restitution claims. They alleged that their forebear, Abraham Sonny, was dispossessed of the property known as Lot 36 in The Highlands. The facts of the Sonny claims raise questions of law which are also pertinent to many of the other claims.

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1 Act No 22 of 1994, as amended.

2 This is provided for under Rule 57 of the Land Claims Court Rules.

3 On 17 September 1999 I gave a judgment on issues of law in a claim by the descendants of the late Christinah Madelina Mostert and on a claim by the descendants of the late Jacob Golliath. Together with this matter, I also heard a claim involving legal and factual issues, instituted by a descendant of the late Martha Muller. I sat with an assessor, Mr S Goldblatt. I will hand down a judgment in the Muller claim simultaneously with this judgment. Because this judgment involves questions of law, the decision is mine only. See section 28(4)(i) of the Restitution Act.

[4] For purposes of having the questions of law decided and for those purposes only, the Sonny claimants and the Department of Land Affairs agreed to certain facts, which I summarise hereunder:

- Abraham Sonny was the registered owner of Lot 36 in The Highlands. On or about 6 May 1961, Abraham Sonny sold the property to the City Council of Pretoria for a purchase price of R350 000. Thereafter he transferred the property to the Council against payment of the purchase price.
- The transaction between Abraham Sonny and the Council dispossessed Abraham Sonny of his ownership of the property, as contemplated in section 2(1) of the Restitution Act. The open market value of the property at the date of the sale was more than the purchase price.
- The law under which the Council acquired the property was the Group Areas Development Act,[4] which was a racially discriminatory law as defined in section 1 of the Restitution Act.
- Abraham Sonny had four children, being a first child now deceased, a second child now deceased, the first plaintiff (Alfred Sonny) and the second plaintiff (Ghaditja Suliman, born Sonny). The first deceased child had one son, the third plaintiff (Joyce Sonny). The second deceased child had six children, the fourth to ninth plaintiffs (Mitchell Sonny, Ulandie Sonny, Gloria Sonny, Gail Sonny, Judith Sonny and Uriel Sonny).
- The second to ninth plaintiffs submitted claims under the Restitution Act prior to 31 December 1998. The first plaintiff did not submit such a claim and withdrew as plaintiff.
- The second to ninth plaintiffs are entitled to equitable redress in the form of financial compensation, because the consideration received by the said Abraham Sonny at the time of the dispossession of his right in land was not just and equitable. For purposes

4 Act No 69 of 1955.

of argument on the question of law, the amount of under-compensation was agreed at R36 000.

- The amount of R36 000 would have been awarded by way of equitable redress to all nine plaintiffs, if the first plaintiff had also timeously lodged a claim.

The questions of law

[5] Based on the above facts, the legal representatives of the parties formulated the following questions of law for decision by this Court:

- Are living direct descendants who are entitled to restitution but have not lodged claims, to be taken into account when equitable redress in the form of compensation is assessed and/or divided amongst the direct descendants who are entitled to restitution and have lodged claims in terms of section 10 of the Restitution Act?

AND

- Is section 2(4) of the Restitution Act to be interpreted on the basis that the full amount of R36 000,00 is to be divided by lines of succession amongst the second to ninth plaintiff?

OR

- Is section 2(4) of the Restitution Act to be interpreted on the basis that only a proportion of the amount of R36 000,00 is to be divided amongst the second to ninth plaintiffs, even though the first plaintiff did not lodge a claim in terms of section 10 of that Act?

[6] The plaintiffs submitted that on a proper application of the Restitution Act, the second and third plaintiffs should be awarded R12 000 each and the other plaintiffs R2 000 each, giving a total of R36 000. The defendant, on the other hand, submitted that the second and third plaintiff should be awarded R9 000 each, and the other plaintiffs R1 500 each, giving a total of R27 000. If the defendant is correct in its interpretation, the *fiscus* would benefit by R9 000.

The applicable legal provisions

[7] The claimants base their right to restitution on section 2(1) of the Restitution Act. The subsection reads as follows:

> "(1) A person shall be entitled to restitution of a right in land if -
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> (a) he or she is a person dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices; or
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> (b) . . . . . ; or
>
> (c) he or she is the direct descendant of a person referred to in paragraph (a) who has died without lodging a claim . . . ; or
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> (d) . . . . . .; and
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> (e) the claim for such restitution was lodged not later than 31 December 1998."

"Restitution of a right in land" is defined in the Restitution Act as meaning -

> "(a) the restoration of a right in land; or
>
> (b) equitable redress;"

"Restoration of a right in land" is defined in the Restitution Act as meaning -

> ". . . the return of a right in land or a portion of land dispossessed after 19 June 1913 as a result of past racially discriminatory laws or practices;"

"Equitable redress" is defined in the Restitution Act as meaning -

> " . . . any equitable redress, other than the restoration of a right in land, arising from the dispossession of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices, including-
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> (a) the granting of an appropriate right in alternative state-owned land;
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> (b) the payment of compensation;"

[8] The right to restitution was originally contained in section 121(2) of the Interim Constitution,[5] and is now contained in section 25(6) of the Final Constitution.[6] Both constitutions award the right to a person who, or a community which, was dispossessed. Neither constitution refers to direct descendants nor is there a reference to an apportionment of the restitution proceeds. The Restitution Act, as it read before the 1999 amendment,[7] expanded the categories of claimants to include direct descendants of a dispossessed person,[8] but was silent on the apportionment of the restitution proceeds amongst several direct descendants. The 1999 amendment introduced a provision that the restitution proceeds must be divided by lines of succession. [9] There never was, and still is no explicit provision on whether the restitution proceeds must be reduced if only some direct descendants have lodged claims.

[9] The power of the Court to award restitution is contained in section 35(1) of the Restitution Act. The relevant portions read as follows:

> "The Court may order -
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> (a) the restoration of land, a portion of land or any right in land in respect of which the claim or any other claim is made to the claimant or award any land, a portion of or a right in land to the claimant in full or in partial settlement of the claim and, where necessary, the prior acquisition or expropriation of the land, portion of land or right in land: . . .
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> (b) . . . . . ;
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> (c) the State to pay the claimant compensation;
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> (d) . . . . . ;
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> (e) the grant to the claimant of any alternative relief."

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5 Act 200 of 1993.

6 Act 108 of 1996.

7 Effected by the Land Restitution and Reform Laws Amendment Act 18 of 1999.

8 Section 2(1) of the Restitution Act (before the 1999 amendment) awarded the right to claim restitution to "a person or community dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices or a direct descendant of such a person. . ."

9 Section 2(4), quoted in full in par [15] below.

Section 33 lists a number of factors to which the Court must have regard when considering its decision in any particular matter. One of these factors is the requirements of equity and justice.[10]

Interpreting the Restitution Act

[10] The Court must exercise its powers to order restitution within the confines of the Restitution Act, duly interpreted by using all relevant norms of interpretation (the presumptions and other intra-textual and extra-textual aids).[11] Where the language of a statute leaves a gap to be filled, the Court must fill that gap.[12] In doing so, it must reconstruct the thinking contained in the statute,[13] consider the practical implications [14] and come up with a solution which conforms with the

10 Section 33(c).

11 See du Plessis, "Die Teoretiese Grondslae van Wetsuitleg" in *Petere Fontes: L C Steyn Gedenkbundel*, Joubert (ed), published by Vereniging Hugo de Groot, at 39-43.

12 "We do not sit here to pull the language of Parliament and of Ministers to pieces and make nonsense of it. That is an easy thing to do, and it is a thing to which lawyers are too often prone. We sit here to find out the intention of Parliament and of Ministers and carry it out, and we do this better by filling in the gaps and making sense of the enactment than by opening it up to destructive analysis." per Denning LJ in *Magor and St Mellons Rural District Council v Newport Corporation* 1950 2 All ER 1226 (CA) 1236A.

13 du Plessis "Statute Law and Interpretation" in Joubert (ed) *Law of South Africa* (LAWSA) Vol 25 par 272 note 5, refers to von Savigny *Systems des heutigen römishen Rechts*, Vol I 213, who describes statutory interpretation as "*(r)econtruction des dem Gesetze inwohnenden Gedankens*" (reconstruction of the thought residing within the statute).

14 "Where alternative constructions are equally open, that alternative is to be chosen which will be consistent with the smooth working of the system which the statute purports to be regulating; and that alternative is to be rejected which will introduce uncertainty, friction or confusion into the working of the system." Per Lord Shaw in *Shannon Realties Ltd v Ville de St Michel* 1924 AC 185 at 192-3. This passage was quoted with approval by Botha JA in *Sekretaris van Binnelandse Inkomste v Lourens Erasmus (Edms) Bpk* 1966 (4) SA 434 (A) at 443 B-C and cited by Trengove J in *Paramount Furnishes v Lesar's Shoe Store* 1970 (3) SA 361 (T) at 366B-C.

purpose of the statute [15] and with the spirit, purport and objects of the Bill of Rights,[16] while also serving the requirements of justice and equity.[17]

[11] The purpose of statutory interpretation is to give meaning to legislative text. The Constitutional Court, in interpreting the fundamental rights enshrined in chapter 3 of the constitution, adopted -

> ". . . an approach which, whilst paying due regard to the language which has been used, is 'generous' and 'purposive' and gives expression to the underlying values of the constitution."[18]

This Court has, in the past, followed the same approach in interpreting the Restitution Act.[19]

[12] The so-called purposive approach has been presented by some academic writers as containing a new methodology of interpretation. Prof Botha described it as follows:

> "Because the legislative function is a *purposive activity*, 'intention' must become part of the functional framework of the purpose of the legislation. This means that 'intention' must be determined objectively; the subjective criteria related to the 'intention' of the legislature (the composite body) must be replaced by 'intention' (legislative purpose) in the objective sense, ie the purpose or object of legislation (in other words, what did the legislature 'intend' to achieve with the legislation?). In terms of the purpose-oriented approach, the purpose of the legislation is the prevailing factor in interpretation. The context of the legislation, as well as social and political policy decisions, are taken into account to establish the purpose

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15 "The purposive approach as elucidated in the decisions of the Constitutional Court and this Court requires that one must:

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

Per Dodson J in *Minister of Land Affairs v Slamdien and Others* [1999] 1 All SA 608 (LCC) at 616f-617a.

16 Section 39(2) of the Constitution, Act 108 of 1996.

17 ". . . both justice and equitable considerations are to be taken into account by a court which is interpreting a statute or other legislative enactment." van Zyl "The significance of the concepts 'justice' and 'equity' in law and legal thought" Vol 105 part II (May 1988) South African Law Journal at 279.

18 *S v Makwanyane and Another* 1995 (3) SA 391 (CC) at 403D (per Chaskalson P). See also *S v Zuma and Others* 1995 (2) SA 642 (CC) at 650H-651I.

19 *Dulabh and Another v Department of Land Affairs* 1997 (4) SA 1108 (LCC) at 1123I-1124B; *Minister of Land Affairs and Another v Slamdien and Others* above n 15 at 615b-617d.

> of the legislation. The court may modify or adapt the initial meaning of the text to harmonise it with the purpose of the legislation."[20]

Important as the purpose of legislation may be, elevating it to the prevailing factor of interpretation will not, in my view, always provide the key to unlock meaning. Professor de Ville criticized the approach put forward by Professor Botha, and pointed out:

> "The reason for elevating purpose to a privileged position seems to lie in Botha's apparent belief that, like the thoughts of an author, purpose is something external to language which exists in pure and perfect form. This pre-existing purpose is then achieved through the imperfect medium of language, in the form of a statutory provision. Such a statutory provision will often not give an exact reflection of the legislature's purpose (owing to the tainted nature of language). The task of the interpreter is then to find the single correct meaning of the text through discovering the purpose. But can purpose be accorded this privileged status? In order for 'purpose' to exist, it has to be constructed in and through language and (according to Botha) by making use of the aids and presumptions of interpretation (which are themselves expressed in language and therefore also 'imperfect' media). . . . Purpose has to be constructed from that which a court decides is relevant. Although purpose can therefore play a role in determining the meaning of a statutory provision (but only after the purpose has itself been ascertained), it cannot serve as a fixed determinant of meaning, leading to a correct interpretation. There is simply no single, correct meaning to any statutory provision."[21]

[13] The Restitution Act does not, in explicit terms, provide an answer to the questions of law on which I must pronounce. There is no section stating which of the two possible interpretations must prevail. [22] I will have to fill the gap.[23] In doing so, I must use all norms of interpretation, and not build on the foundation of only one of them.[24] The particular emphasis given by the Constitutional Court and also by this Court to the purpose of legislation in determining its meaning does not, in my view, exclude

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20 Botha "*Statutory interpretation: an introduction for students*", 3rd ed (1988) at 31.

21 de Ville "Meaning and statutory interpretation" *Tydskrif vir Hedendaagse Romein-Hollandse Reg*, Vol 62 no 3 (August 1999) at 377-378.

22 "Where a purely textual appraisal of a provision in a statute yields two alternative constructions, regard may properly be had, in considering which is the true construction, to the consequence involved in preferring one or the other, and that construction should be adopted which is more consonant with, and is better calculated to give effect to, the intention of the enactment, and if that is not clear the more equitable interpretation should be preferred." Kellaway, *Principles of Legal Interpretation* (Butterworths, Durban, 1998) at 339.

23 " . . . when an apparent *casus omissus* appears in a statute (and the purpose and/or intention of the legislature is clear) and to omit it from the statutory provision would have the effect of defeating the clear purpose of the enactment or render it nugatory, the gap should be filled provided there is no conflict in so doing with the common law. Kellaway, above n 22 at 125-123.

24 "There are no firm foundations in interpretation. The intention of the legislature, the clarity of the text and the purpose of the enactment cannot provide such a foundation. Without leaving the text, the courts should show a willingness to use the norms of interpretation to transform society in accordance with the ideals of the Constitution (as interpreted)." de Ville, above n 21 at 389.

other norms of interpretation. This is especially so where the purpose of the legislation presents no strong pointers to a specific solution.

The thinking behind the legislative provisions providing for restitution

[14] Section 2(4) of the Restitution Act provides -

> "If there is more than one direct descendant who have lodged claims for and are entitled to restitution, the right or equitable redress in question shall be divided not according to the number of individuals but by lines of succession."[25]

The wording makes it clear that "the right in question" must be divided and that the division is amongst the "direct descendants who have lodged claims". If it was the intention of the legislature that the right to be divided between the direct descendants who have lodged claims must first be reduced to exclude portions which would have gone to direct descendants who have not lodged claims, I would have expected the subsection to have expressed that intention. The wording of the section seems to indicate that there must be restitution of the entire dispossessed right and that any apportionment must only be between those direct descendants who have lodged claims.

[15] Section 2(4) applies to a situation where there are two or more direct descendants who have lodged claims. If two or more direct descendants would have been entitled to lodge claims but only one of them did lodge a claim, the section would not apply. The absence of a provision that the right in land must not be restored in full if there are other descendants who have not lodged claims, points to an intention that the single claimant must be awarded the entire right.

Practical implications of the different solutions

[16] Should it be required to apportion a right in land between descendants who have lodged claims and descendants who have not lodged claims, a complete family tree showing all the direct descendants of the dispossessed person will be necessary. It will only be possible to determine which direct descendants are entitled to restitution, and to work out the lines of succession, when such a family tree is available. It will not always be easy, or even possible to put such a family tree together.

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25 The subsection was inserted by Act No 18 of 1999 (above n 7), and is deemed to have come into operation on 2 December 1994.

Dispossessions which occurred as long ago as 1913 could give rise to restitution claims. I can envisage situations where direct descendants wish to claim but are unable to provide a family tree, because they might have lost contact with some branches of their family. Those branches may have emigrated from South Africa or got lost in the masses of people uprooted through the implementation of the social engineering policies of the past. Even if a family tree can be put together, the proof thereof may present insurmountable difficulties. Checking the family trees to make sure that it is accurate and complete, could be an enormous burden for the Department of Land Affairs.[26] I need only mention that hearings of The Highlands claims had to be postponed several times because of the inability of claimants who claim as descendants of a dispossessed person, to obtain certificates from the Registrar of Births, Marriages and Deaths at the Department of Home Affairs to prove their relationship with the dispossessed person.

[17] The restoration of a portion of a right in land could also be problematic. The right concerned will, in many cases, be ownership. In the present case, if the interpretation put forward by the defendant is correct, and on the assumption that the plaintiffs had claimed actual restoration of the property taken, the plaintiffs who have lodged claims would be entitled to restoration of only 75% of the property. Does that mean that they must be awarded a 75% undivided share in the property? If so, what happens to the other 25%? Does the present owner retain it? Or must the property be physically subdivided? This may, in the case of a single residence, be problematic.
Or must the entire property be restored and the plaintiffs asked to pay for the portion which would have gone to the descendants who did not lodge claims? [27] The plaintiffs may not be able to afford this and it may not be what they want. Or would the end result be that restoration is not feasible? The plaintiffs will then have to be satisfied with equitable redress, which may not be their preference. Every one of these alternatives could be undesirable. Their existence can only lead to uncertainty and confusion.

[18] The legislature must have been aware of such difficulties when drafting the Restitution Act, and would have included provisions to address them, if the intention was to reduce the restitution proceeds by the shares which would have gone to descendants who did not lodge claims. The absence of such

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26 Claimants might be tempted to omit some branches of the family, because the omission would increase their own share in the restitution proceeds.

27 This might be permissible under section 35(2)(b) of the Restitution Act.

provisions makes me doubt whether the legislature had any such reduction in mind. It will be unwise to introduce it by way of judicial interpretation.[28]

The purpose of the restitution provisions in the Constitution and the Restitution Act

[19] The injustice which the Constitution and the Restitution Act set out to remedy, is the original dispossession of the relevant right in land. Where the lapse of time makes it impossible to give restitution to the person originally dispossessed, the Restitution Act requires restitution to be given to that person's descendants. If circumstances make actual restoration of the land unfeasible, equitable redress must be provided. Restitution is given to the descendants because it is the best substitute where restitution to the originally dispossessed person is no longer possible, just as equitable redress is the best substitute where restoration of the land is not feasible. It is noteworthy that neither the Interim nor the Final Constitution provides for the restitution of a dispossessed right in land to the descendants of a dispossessed person. It is a refinement introduced by the Restitution Act to implement the purpose of the constitutional requirement that the State must remedy the wrong caused by the dispossession. Professor AJ van der Walt stated:

> "The process of restitution is, therefore, aimed at claims against the state rather than between individuals or groups. It is also aimed at land claims based upon specific historic dispossessions in terms of the apartheid land laws since 1913, the date when the first Land Act was introduced. From this it is clear that the restitution is a limited process aimed at rectifying a specific set of historic injustices, and not all land-related claims and problems in general."[29]

[20] Mr Grobler, for the defendant, pointed out that the words "restitution" and "redress" have the connotation of repairing or compensating a past wrong. He submitted that there should be parity

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28 Similar difficulties present themselves in Germany, where a claimant for restitution may be a natural person, a juristic person or a business entity, provided they have been dispossessed. In addition, an heir may also claim. Scollo-Lavizzari, in a dissertation for a LLM degree submitted to the University of Cape Town in January 1996 under the title *Restitution of Land Rights in an Administrative Law Environment*: *The German and South African Procedures Compared*, pointed out (p35, fn 233)

> "The inclusion of heirs, be they testamentary or intestate heirs of dispossessed persons, encompasses legatees. Sometimes fierce litigation has ensued around the proper interpretation of sec 2 with regard to the law of inheritance. The legal difficulties are almost infinite because the proper law, mostly East or West German law governing the devolution of deceased estates, has to be determined. East and West German law of inheritance is Roman Law based."

29 van der Walt "Land reform in South Africa since 1990 - an Overview", Vol 10 no 1 *S A Public Law* (1995) at 20.

between the individual wrong sustained and the compensation awarded. He referred to a remark of Dodson J in *Minister of Land Affairs and Another v Slamdien and Others*: [30]

> "On the other hand, where restitution is granted to a person who has been discriminated against in the exercise of his or her land rights, the remedy is directly linked with, and remedial of, the original injustice."

In the case of claims by descendants of a dispossessed person, the wrong was to their ascendant, not to them. The purpose of restitution to them is to redress the original injustice to their forebear. It is not to compensate a loss which they may or may not have suffered. Mr Grobler further submitted that it would be unfair to the *fiscus* to allow a descendant who has timeously lodged a claim, to receive a windfall just because another descendant did not lodge a claim. The converse to this argument is also true: why must the *fiscus* receive a windfall because one or more of the descendants of a dispossessed person failed to lodge a claim. I will revert to this later.

[21] Two academic writers on land reform, Professor Daniel Visser and Dr Theunis Roux, argued that the obligation to restore must be seen as emanating from unjust enrichment.[31] I need not decide whether this is correct or not. I do, however, accept the notion that restitution must be viewed from the perspective of what was taken away, and not from the perspective of what each recipient should get. This means that all rights which were unjustly taken away must be restored. Restitution has an emotional connotation, being the purge of a wrong committed through the dispossession of land for racist purposes. Justice Albie Sachs declared, in his work on human rights:

> "The emotional significance of such a restoration of rights would be enormous. Forced removals were the most recent vivid symbols of the subordination of property law to racist principles. They were amongst the most cruel representations of how the land question was tied up with the sovereignty question. They had no economic, social or farming rationale other than to conform to the schemes of apartheid."[32]

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30 Above n 15 at 627.

31 Visser and Roux "Giving back the country: South Africa's Restitution of Land Rights Act, 1994 in context" contained in Rwelamira and Werle (ed) *Confronting Past Injustices* (Butterworths Durban, 1996) at 101:

> "It is, we believe, useful to attempt to make sense of any new principle or process within a legal system by asking how it fits into the existing structure of the law as a whole. In the case of the restitution of land or other real property, we want to argue that it should be seen as an instance of unjust enrichment."

32 Sachs *Protecting Human Rights in a New South Africa* (Oxford University Press, Cape Town, 1991) at 129.

In my view, the purpose of the Constitution and of the Restitution Act will not be fully achieved if restitution is reduced by holding back portions which would have gone to descendants who failed to lodge claims. Such partial restitution would leave some of the injustice unremedied.

The requirements of equity and justice

[22] The precepts of equity and justice may elucidate legislative intent, because the legislature is presumed not to have contemplated an unjust or inequitable result.[33] In cases where it is evident that the legislature did not intend to prescribe for a particular factual situation, but to leave it to the Court to work out a solution as the circumstances of every particular case may require, justice and equity will guide the court in making an appropriate order.[34] Justice and equity are elusive concepts. What is equitable to one person or institution may be inequitable to another.[35] Ralph A Newman remarked:

> "Equity plays a strange role in the structure of law; separate from, and yet a part of the legal norms. The relationship between law and equity in modern times has never been clearly established, and the nature of equity remains shrouded in mystery. The search for the meaning of justice which began in the corridors of the Academy at Athens is still an unfinished story. Much of the uncertainty which surrounds the meaning of equity is due to the fact that law must balance the interests of the individual against the interests of society, and each set of interests is differently affected by moral codes . . ."[36]

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33 "Daar is die vermoede dat, tensy die teen deel blyk, die Wetgewer nie ŉn onbillike, onregverdige of onredelike resultaat beoog nie" Per Basson J in *Noord-Westelike Koöperatiewe Landboumaatskappy Bpk v Die Meester en Andere* 1982 (4) SA 486 (NCD) at 494H.

34 Wide discretionary powers have been bestowed upon the court by sections 33 and 35 of the Restitution Act. See particularly section 33(c).

35 "Concepts such as justice, equity, good faith and *boni mores* contain strongly subjective elements when they pertain to a particular person or a specified group of people. What is meant by these concepts depends on, and is inextricably linked to, the personal circumstances of the particular person or group of persons. It has equally strong links, however, with the surrounding circumstances and with general considerations relating to these concepts in the particular society to which the person or group of persons belongs. Such considerations require to be assessed, alongside the relevant personal circumstances and surrounding circumstances, as objectively as possible in resolving any conflict in which the person or group of persons may be involved. The means to achieve this end, it would appear, is to apply the (objective) criterion of 'right reason' (ratio recta) or reasonableness." van Zyl, above n 17 at 290.

36 van Zyl above n 17 at 276, referred to this *dictum*, and I have borrowed it from him. It comes from Newman *Equity in the World's Legal Systems.* A reference to that work is contained in footnote 22 of Van Zyl's article.

[23] The elusiveness of the concepts of equity and justice can be illustrated by the following notional example:

- Assume two persons, each of whom was dispossessed of a separate property. Their spouses died before the dispossessions. Both dispossessed person died before the Restitution Act came into force. Each left two children, who in turn have no issue. In the case of the first family, one of the children died before the Restitution Act was promulgated. In the case of the second family, one of the children died after the Restitution Act was promulgated, but without having lodged a claim. The surviving child in both families lodged a claim.
- On the interpretation suggested by Mr Grobler, the surviving child in the first family will receive the full restitution proceeds. In the second family, the surviving child will receive only half of the restitution proceeds, because the deceased child failed to lodge a claim.
- Even if an adjustment to that interpretation is made so that the restitution proceeds due to the surviving child in the second family will only be reduced if the sibling who failed to lodge a claim remained alive until 31 December 1998, the difference between the two positions still lies in the reason for the absence of a competing claim. In the one case the reason is a death. In the other case the reason is a failure to lodge a claim. That difference does not, in my view, constitute a sufficiently equitable and rational basis for discriminating.
- Another option might be to reduce the restitution proceeds proportionately, not only for a failure to lodge a claim, but also for each line of succession which has fallen away because descendants have died without leaving issue. This offends against one's sense of equity, and will be difficult to reconcile with the provisions of the Restitution Act. It will also compound the practical difficulties which I have referred to: one will have to search not only for surviving descendants who have failed to lodge claims, but also for lines of descent which have fallen away.

The different scenarios in my notional example all indicate that the requirements of equity and justice support, rather than conflict with, an interpretation of the Restitution Act that the full proceeds of restitution must be awarded to those descendants who have lodged claims, undiminished by any apportionment in respect of descendants who have not lodged claims.

[24] South Africa is not a rich country. The cost of restitution of rights in land as envisaged in the Restitution Act will be substantial. A significant saving can be achieved by apportioning claims to eliminate, in favour of the *fiscus*, the portions which would have gone to descendants who failed to lodge claims. Descendants who did lodge claims, so Mr Grobler argued, will not be prejudiced because they will not be receiving less than what they would have got if their co-descendants had also lodged claims. Such an approach would, however, conflict with the interpretation which I have given to the Restitution Act, and also with the precepts of equity and justice, as I have endeavoured to illustrate by my notional example.

[25] In Germany, in cases where a dispossessed person is deceased, the right to restitution devolves upon the heirs. If one heir renounces the inheritance, his or her share goes to the other heirs. It is not forfeited to the State.[37] The legislature in South Africa awarded the right to claim restitution of a right in land taken from a person who subsequently died, to the direct descendants. Perhaps this was done to avoid the difficulties experienced in Germany through restitution to heirs. By selecting descendants instead of heirs, I do not think the legislature intended to open up circumstances which would curtail the legal obligation on the State to make full restitution of a dispossessed right. If the Restitution Act needs to be interpreted as requiring full restitution, the Court must order full restitution. There is no discretion to reduce it only because all eligible descendants did not lodge claims. The heavy financial burden which full restitution may place on the *fiscus* does not allow the Court to reduce that burden. Such a reduction would have to be effected by constitutional or legislative amendment.[38]

Conclusion

[26] The above considerations, taken together, brings me to the conclusion that where restitution is claimed by one or more direct descendants of a dispossessed person, the Restitution Act envisages full restitution of the dispossessed right, undiminished by any apportionment in respect of descendants who have not lodged claims. The inevitability of this conclusion is particularly apparent in cases where the restitution claim is for the actual restoration of the dispossessed land. There is no reason why a claim

37 See above n 28.

38 The legislature did limit the financial burden on the *fiscus* by excluding pre-1913 dispossessions from the restitution process.

for equitable redress should be treated differently. I must add that this conclusion does not detract from any discretion which the Court might otherwise have under section 35 to vary the extent of restitution awarded to a particular descendant who lodged a claim, provided it is not done because another descendant has failed to lodge a claim.

[27] For the reasons stated above, I decide the questions of law which were put to me, as follows:-

(a) Living descendants who are entitled to restitution but who have not lodged claims, must not be taken into account when equitable redress in the form of compensation is assessed or divided amongst the direct descendants who are entitled to restitution and who have lodged claims in terms of section 10 of the Restitution Act.

(b) *In casu,* section 2(4) of the Restitution Act must be interpreted on the basis that the full notional amount of R36 000 is to be divided by the lines of succession amongst the second to ninth plaintiffs.

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JUDGE A GILDENHUYS

For the Claimants:
Mr G N Moshoana, of *Mohlaba and Moshoana Inc, Pretoria*.

For the Department of Land Affairs:
Mr G L Grobler SC, with him *Ms S K Hassim*, instructed by *the State Attorney, Pretoria*.