IN THE LAND CLAIMS COURT OF SOUTH AFRICA

Heard at **RANDBURG** on 31 Jan 2000 - 11 Feb 2000 **CASE NUMBER**: LCC116/98
before **Gildenhuys J** and **Goldblatt S (assessor)**

Decided on: 10 March 2000

THE FORMER HIGHLANDS RESIDENTS
concerning **THE AREA FORMERLY KNOWN AS THE HIGHLANDS (now NEWLANDS EXTENSION 2) DISTRICT OF PRETORIA**

In the matter between:

ASH AND OTHERS Claimants

and

THE DEPARTMENT OF LAND AFFAIRS Respondent

JUDGMENT

GILDENHUYS J:

General background

[1] This case concerns about forty claims for the restitution of land rights under the Restitution of Land Rights Act.[1] I will refer to this Act as the Restitution Act. The claims pertain to the dispossession of erven in the former township of The Highlands, district of Pretoria. At the time of dispossession, the former township fell within an area designated to be an area for future occupation and ownership by persons of the so-called white group under the then applicable Group Areas legislation. The Regional Land Claims Commissioner for Gauteng and North West Province investigated the claims. She referred them all to this Court, 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.

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1 Act No 22 of 1994, as amended.

[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.

[3] Preliminary hearings were held in respect of some of the claims. On 17 September 1999, I handed down a judgment [2] in which I held:

- that certain intervening claimants (Magamana, Thuketana and Rikhotso) in claim 2 do not have a right to restitution, because they did not lodge their claims with the Commission by 31 December 1998, as required by section 2(1)(e) of the Restitution Act; and
- that the descendants of the late Jacob Golliath (in claim 17), the descendants of the late George Cornelis Veldman (in claim 21) and the descendants of the late Austin Augeal (in claim 34) do not, as descendants, have a right to restitution, because it was the estates of the respective three persons that were dispossessed, not the three persons themselves. After that judgment, the claimants in those three cases amended their particulars of claim. I revert to the amended claims in these three cases hereunder.[3]

On 30 November 1999, I handed down a judgment[4] in which I dismissed a claim by Sylvia Naidoo (claim 9) on the basis that the property concerned was not dispossessed as a result of past racially discriminatory laws or practices. On the same day I handed down a further judgment,[5] in which I dealt with the assessment and division of equitable redress where some living descendants of a dispossessed person have lodged restitution claims, and others have not.

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2 *The Former Highlands Residents concerning the area formerly known as the Highlands (now Newlands Extension 2), District of Pretoria*, LCC 116/98, 17 September 1999, internet website address : http://www.law.wits.ac.za/lcc/1999/highlandssum.html.

3 Par [5] to [10] below

4 *Former Highlands Residents concerning the area formerly known as the Highlands (now Newlands Extension 2), District of Pretoria: In re Sylvia Naidoo v Department of Land Affairs*, LCC 116/98, 30 November 1999, internet website address http://www.law.wits.ac.za/lcc/1999/naidoosum.html.

5 *Former Highlands Residents concerning the area formerly known as the Highlands (now Newlands Extension 2), District of Pretoria: In re Sonny and Others v Department of Land Affairs* [2000] 1 All SA 157 (LCC).

[4] The remaining claims were, at the final hearing, heard together. Several conferences took place between the parties in order to identify and limit the issues in dispute. During these conferences, agreements were reached which substantially limited those issues. I am grateful to the parties for engaging in the conferences and thereby limiting, to a very material extent, the duration of the trial.

The Golliath claim (claim 17), Veldman claim (claim 21) and Augeal claim (claim 34)

[5] In claim 17, the claimants are Mary Shongwe, Toby Martha Golliath, Stephanus Golliath, M S Margadie and Leah Golliath. The subject property is portion 1 of lot 54. It was dispossessed on 5 October 1962. At the time of dispossession, it was an undistributed property within the estate of the late Jacob Golliath. The deceased having left no will, the claimants bring their amended claim in their capacity as the alleged intestate heirs of the deceased. There is no claim by the executor

[6] In claim 21, the claimants are David Veldman, A Veldman, H M Thomas (born Veldman), M S M Nation (born Veldman), J S Veldman and S Makhambeni. The subject property is lot 43. It was sold to the City Council of Pretoria on 6 November 1963. The sale is alleged to be a dispossession. At the time of that dispossession, Erf 43 was an undistributed property within the estate of the late George Cornelius Veldman. He died without leaving a will. The first distribution account in the estate, which was signed on 16 November 1959, shows that the widow of the deceased, Sanna Veldman, would have inherited the property. Sanna Veldman is not one of the claimants. After the property was sold by the estate to the Pretoria City Council, the first distribution account was replaced by a different distribution account in terms whereof the cash proceeds of the sale were distributed amongst the heirs. The claimants bring their amended claim as alleged intestate heirs. The first liquidation account shows that they would not have inherited the property. They did not lose any right to claim the property from the estate.

[7] In claim 34, the claimant is Deborah Augeal. The subject property is lot 31. It was sold to the city Council of Pretoria on 12 February 1963. The sale is alleged to be a dispossession. At the time of dispossession, lot 31 was an undistributed property within the estate of the late Austin

Augeal. The deceased left no will. The claimant claims in her capacity as the intestate heir of the deceased. The distribution account filed in the estate shows her to be the surviving spouse and intestate heir. The account also shows substantial debts in the estate. The subject property would in any event have had to be sold if it had not been dispossessed by the City Council, in order to satisfy those debts. The claimant would therefore not have inherited the property, but only the remainder of the proceeds, after the debts had been paid. She did not lose any right to claim the property from the estate.

[8] In the circumstances which gave rise to claims 17, 21 and 34, it might have been possible for a claim to succeed if it had been brought on one of the following two bases:

- if the executor of the deceased estate had brought the claim, which did not happen; or
- if the claim was based on the frustration of the claimant's right to claim the property from the estate, if such a right would have existed had it not been for the dispossession.

In their amended statements of claim, the claimants based their claims merely on them being heirs in the estates.

[9] Mr Grobler, for the Department of Land Affairs, indicated that the decision of the Land Claims Court in the matter of *Dulabh and Others v The Department of Land Affairs*[6] might serve as authority for the second possibility. As was pointed out in the recent case of *Jacobs v The Department of Land Affairs*,[7] this particular point was not argued in the *Dulabh* case. The facts in the *Dulabh* case were also somewhat different.[8] I do not consider the *Dulabh* case to be

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6 [1997] 3 All SA 635 (LCC); 1997 (4) SA 1108 (LCC).

7 LCC120/99, 28 February 2000, internet website address: http://www.law.wits.ac.za/lcc/2000/12099sum.html.

8 The difference was pointed out in par [42] of the *Jacobs* judgment (above n 7) as follows:

> "In die *Dulabh*-saak was dit spesifiek die reg van Pali Vassen om die eiendom van die boedel te vorder wat deur die destydse Groepsgebiedwet (artikel 23) van haar weggeneem was deur haar binne die kategorie van 'n diskwalifiseerde persoon (wat nie 'n eiendom mag erf nie) te laat val.

authority for the validity of the second possible basis. None of the plaintiffs in their amended statements of claim founded their claims on the frustration of a right to claim an inherited property from an estate. I therefore need not decide the point.

[10] Mr Moshoana, for the claimants, indicated that the claimants in claims 17, 21 and 34 will not be proceeding with their claims on the pleadings as they presently stand. He asked for these claims to be referred back to the Commission, or to be postponed *sine die*. I do not understand what such a course of action will achieve. The function of the court in this case is to determine whether any of the claimants have a right to restitution under the Restitution Act. In claim 17, the claimants have shown no such right on the pleadings as they stand. They could possibly have a valid restitution claim if a right to claim an inherited property from an estate is a right in land,[9] and if that right, through its frustration, was dispossessed from the claimants. Such a claim (if it exists) would have to be properly formulated.[10] The claimants ought to be given an opportunity to apply for an appropriate amendment to their statement of claim, if they should be so advised. In claims 21 and 34, the claimants did not show that they would have inherited the properties concerned. They have no right to claim them from the estates. Those claims should be dismissed.

The Keppler claim (claim 7)

[11] Joseph Stephanus Keppler and Frederika Jafta (born Keppler) instituted a restitution claim on the basis that they are descendants of the late Dolly Keppler. Dolly Keppler was, during her lifetime, dispossessed of lot 87, The Highlands. The Department of Land Affairs admitted that Dolly Keppler was the owner of lot 87, that she was dispossessed of that property as a result of past racially discriminatory laws or practices, and that the claim was duly and timeously lodged in terms of section 10 of the Restitution Act. Apart from disputing the *quantum* of the claim, the Department of Land Affairs opposes the claim in that it contends that the claimants have not

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Die onderskeid tussen 'n ontneming van 'n eiendom en 'n ontneming van 'n reg om 'n erfenis te vorder, was egter nie in die *Dulabh*-saak getref nie.

9 It must be a "right in land" within the meaning which that term has in the Restitution Act. See, the definition of "right in land" in section 1.

10 The possible existence of such a claim was discussed in the *Jacobs* judgment (above n 7) in par [39] - [43].

proved that they are direct descendants of the late Dolly Keppler.[11] Both Joseph Stephanus Keppler and Frederika Jafta gave oral evidence at the trial.

[12] Joseph Stephanus Keppler was born in 1928. He was a confused witness, debilitated by old age. His memory was bad. He remembered the name of his mother as "Dolly". He could not give the names of some other family members. He said he was a small boy when his sister Frederika was born. He was not present at her birth. He knew Frederika was his sister, because his mother told him so.

[13] Frederika Jafta is a spruce 57 year old lady. She testified that Dolly Keppler was her mother. Dolly Keppler was born in 1911. She knows Dolly Keppler was her mother, because she was raised by her, and because her brothers told her so. Her mother had three sons (including Joseph Stephanus) and two daughters (including herself). She and her brother are the only two still alive. Her mother was unmarried. She said that they never "had a father".[12] This statement is important, because it could explain some unsatisfactory aspects of her evidence. No birth certificates for her or for her brother could be obtained from the authorities. She thought that she might have had a birth certificate at some stage, but said that she had lost it. Under cross-examination she conceded, in the light of a letter from the Department of Home Affairs to her attorney to the effect that her birth was never registered, that she might never have had a birth certificate. In an application which she made for an identity document when she was 37 years old, she inserted as the names of her parents Hendrik Keppler (as father) and Ruth Keppler (as mother).These persons, she said in evidence, are not really her parents but her maternal grandparents. She said that she filled in the wrong names at the suggestion of her mother, to conceal the fact that she was born out of wedlock. She also gave her place of birth as "The Highlands", while it is actually Schoemansville. She could not explain the incorrect place of birth. She testified that her maternal grandfather was born in 1872, and that her maternal grandmother was more or less of the same age as her maternal grandfather.

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11 An application to substitute claimants and to continue on an amended statement of claim, was withdrawn during the trial. This claim was heard on the original statement of claim.

12 In her own words : "Ons het nie 'n pa gehad nie."

[14] After Joseph Stephanus Keppler and Frederika Jafta gave evidence, a baptismal certificate was handed in as an exhibit. The certificate purported to relate to Joseph Stephanus Keppler. The certificate was admitted in evidence as being what it purports to be, but not as constituting proof of its contents. The certificate show Lodewyk and Dolly Keppler to be the parents of "Stephanus Josef Jacobox". The certificate was not identified or dealt with by any witness. I do not know whether it does in fact relate to Joseph Stephanus Keppler. Accordingly, it does not carry any evidentiary weight.

[15] This Court is entitled to admit hearsay evidence.[13] It will not do so indiscriminately. Proof of descendancy in restitution claims is very important, and the Court will insist on the best available evidence. Where official documents (such as birth certificates) are unavailable, other (secondary) evidence may be given.[14] As in the case of proof of a marriage,[15] evidence of repute may be presented and must carry weight.

[16] The evidence on parentage which the courts have in the past required for the late registration of a birth, can serve as an indication of the nature and extent of evidence which must be presented to this Court, in the absence of a birth certificate, to establish ancestry for purposes

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13 Section 30(1) and 30(2)(a) of the Restitution Act.

14 Tapper *Cross and Tapper on Evidence* (Butterworths, London, 1999) at page 803-4 states the law in Great Britain to be as follows:

> "There are four methods of proving birth. Far and away the most usual at the present day is the production of a certified copy of an entry in the register of births which may be received as evidence of the facts stated under the exception to the rule against hearsay relating to statements in public documents. The court will require some evidence identifying the person whose birth is in question with the person referred to in the birth certificate. This might take the form of a direct statement by the person in question if he were testifying to the date or place of birth, though the evidence is at best hearsay and at worst pure guesswork. It could also be provided by someone who was present at the birth, or by the informant to the Registrar; but, more often than not, the evidence of identity will be supplied by an affidavit in which the deponent, usually a member of the family of the person whose birth is in question, will depose to his or her belief that the person is or was the same person as the one referred to in the exhibited birth certificate. The testimony of someone present at the birth to that fact, its place or date is a second and separate method of proving these matters. They may also be proved, in civil proceedings, by statements admissible by virtue of the Civil Evidence Act 1968, and, in criminal proceedings, under exceptions to the hearsay rule relating to the declaration of deceased persons, or perhaps under the provisions of Part II of the Criminal Justice Act 1988."

15 See *Fitzgerald v Green* 1911 EDL 432 at 454.

of land restitution claims. In the case of *Ex parte Pillay and Pillay*,[16] the Court granted an order for the registration of the births of the two applicants, aged 44 and 47 respectively, after the death of their parents. The report does not indicate what evidence was placed before the Court. In *Ex parte Ingel*[17] the applicant obtained an order for the registration of his birth, on evidence which Millin J summarised as follows:

> "In support of his statement that he was born at Johannesburg on the 3rd October, 1899, the applicant produces affidavits to that effect by Samuel Michael Ingel, his father, and by Ethel Friedman (born Moskow) who says she is the applicant's cousin and was present at his birth. The applicant's mother is deceased, and it appears there are no other persons alive who can testify to the date and place of his birth. The applicant explains that his birth was not registered at the time because his parents were ignorant of the law requiring registration of births."[18]

In *Ex parte Herring*[19] an order for the registration of the births of two children was granted on evidence given by their mother and the submission of two baptismal certificates, duly certified as true extracts from the register of baptisms kept in Matatiele.

[17] Where insufficient evidence was presented, the Court refused the applications for the late registration of a birth. In *Ex parte Lottering*[20] the applicant applied for an order directing the Registrar of Births to enter his birth in the Register of Births, and to issue a birth certificate. The facts, as set out in the judgment of Solomon J, were as follows:

> "The applicant's mother, whose maiden name was Scheepers, was married three times. After the death of her first husband she married a man named Lottering, who was the father of the applicant. This marriage was dissolved by order of Court on a date not in evidence, but it must have been when the applicant was very young, for he never knew his father. In 1907 or 1908 the applicant's mother married a man named Robinson. She was ashamed of the divorce and never disclosed it to the applicant, who always assumed that Robinson was his natural father, and for that reason has always passed under the name of Hendrik Frederik Robinson. I accept the *bona fides* of the mistake, although the petition does not explain how the applicant, who was ten or eleven years of age when his mother married Robinson, failed to realise that Robinson was only his step-father. Robinson died in 1921, and the applicant's mother died in 1930. The applicant's first task is to prove the date of his birth. No evidence is available except that

16 1934 GWLD 107.

17 1939 WLD 369

18 *Ingel* above n 17 at 370.

19 1929 CPD 420.

20 1936 WLD 29.

> of his maternal uncle, P R Scheepers, and an entry in the family Bible owned by his mother. This Bible, which I have examined, contains a number of entries in regard to Mrs. Robinson, her husbands, and her children. The accuracy of more than one of these is open to question. The material entry is that which is sufficiently identified as relating to the applicant, and gives the date of his birth as the 2nd September, 1897. P R Scheepers says that he was living with the applicant's mother at the time and that the entry is correct. His affidavit is so drawn as to suggest that his evidence is based upon the entry. I doubt if it has independent value. No further evidence is available to the applicant. He states that the baptismal registers belonging to the church in Fordsburg in which he was baptised were lost during the Anglo-Boer War."[21]

The evidence was considered insufficient and of doubtful admissibility and the application was refused

[18] In the case of *Ex parte Essop Hassim*[22] the applicant applied for an order for the registration of his birth. His evidence was to the effect that his mother and father were both dead and that he was born on 7 July, 1907. His father had told him the date of his birth. He had endeavoured to find other evidence of his birth. All he could obtain was the evidence of one Katie Brandt, which was to the effect that she was present at his birth 4 or 5 years after the Boer war. She had met the applicant 10 years previously and asked him if he was the son of Abdul Hassim. Bok J considered the evidence to be insufficient for reasons which he set out as follows:

> "The applicant states that his father had told him that he was born on a certain date. It is doubtful if that evidence is admissible, but even if the Court could accept it, I don't think it should carry any weight in an application of this nature. For the rest, there is only the evidence of Katie Brandt that she assisted the midwife. Applicant says he met her about 10 years ago on the Kimberley Market Square and she then asked him whether he was not the son of Abdul Hassim. She does not even know her own age and I think it is asking too much of the Court to expect it to accept that kind of evidence. Before the Court can grant this application there must be satisfactory evidence. I am not satisfied with the evidence adduced, but I am prepared to allow the application to be renewed on the present papers together with any further evidence that may be obtained."[23]

[19] The evidence submitted in the Keppler claim is no stronger than the evidence given in the *Lottering* and *Hassim* cases, where orders were refused. In my view, the claimants did not present sufficient evidence to enable me to find that Joseph Keppler and Frederika Jafta are the son and daughter respectively of Dolly Keppler. Although I can possibly attribute the incorrect particulars in the application for an identity document which Frederika Jafta signed, to a desire to conceal the

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21 *Lottering* above n 20 at 30.

22 1937 GWLD 6

23 *Hassim* above n 22.

fact that she was born out of wedlock, that aspect of her evidence remains unsatisfactory, and it must affect the weight of her evidence as a whole.

[20] Because this is a novel matter and of great importance to the two claimants, I will not dismiss their claim but I will (as was done in the *Hassim* case) allow them to apply for leave to submit any further evidence that may be obtained.

The remaining claims

[21] The claimants[24] all claim restitution in the form of monetary compensation. Section 2 of the Restitution Act deals with entitlement to restitution. The relevant sub-sections read as follows:

> "(1) A person shall be entitled to restitution of a right in land if -
>
> (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
>
> (b) it is a deceased estate dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices; or
>
> (c) he or she is the direct descendant of a person referred to in paragraph (a) who has died without lodging a claim and has no ascendant who -
>
> (i) is a direct descendant of a person referred to in paragraph (a); and
> (ii) has lodged a claim for the restitution of a right in land; or
>
> (d) it is a community or part of a community dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices; and
>
> (e) the claim for such restitution was lodged not later than 31 December 1998.
>
> (2) No person shall be entitled to restitution of a right in land if -
>
> (a) just and equitable compensation in section 25(3) of the Constitution; or
>
> (b) any other consideration which is just and equitable,
>
> calculated at the time of any dispossession of such right, was received in respect of such dispossession.
>
> (3)

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24 The remaining claimants do not include the claimants in claims 9 (dismissed), 17, 21 and 34 (dealt with above); 15, 29, 30 and 41 (settled); 35 (a duplication of 36); and 39 (withdrawn).

(4) 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."

[22] Claim 1 (Andrew Ash) was brought by a person who was himself dispossessed of a right in land, which brings the claim within the confines of section 2(1)(a). The others were brought by descendants of persons who were dispossessed, but died without lodging a claim. Those claims come within the confines of section 2(1)(c). In most of the cases there were originally more than one descendant of the dispossessed person who have lodged claims.[25] I have, in a previous judgment in this matter, held that where more than one direct descendant is entitled to claim, and only some of them have lodged claims, restitution must be made in full to those who did lodge claims.[26] In almost all of the claims where there were more than one claimant, all of the claimants except one withdrew their claims. This leaves only one claimant per claim for each of the remaining claims, making it unnecessary for me to apportion the restitution proceeds.[27] I understand the families have made their own arrangements for dividing whatever compensation may be awarded to the single remaining claimant.

[23] The Department of Land Affairs conceded that the dispossessions on which the claims still pending before the Court are based, resulted from past racially discriminatory laws or practices, as required in terms of section 2(1) of the Restitution Act. I have previously held that the dispossession relied upon in claim 9 (Sylvia Naidoo) did not result from past racially discriminatory laws or practices.[28] That claim is no longer before the Court. The Department of Land Affairs accepts, save where I have indicated otherwise in this judgment, that the remaining claimants qualify to engage in the claim process under section 2(1)(a), or under section 2(1)(c) read with section 2(1)(a)

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25 Section 2(1)(c)(i) and (ii) and section 2(4) must be applied to those claims.

26 *Former Highlands (in re Sonny)* above n 5

27 In terms of my previous judgment (n 5 above), the entire restitution proceeds must go to the single remaining claimant.

28 See above n 2

[24] This brings me to the requirements of section 2(2) of the Restitution Act. In terms of that sub-section, no person is entitled to restitution of a right in land if just and equitable compensation as contemplated in section 25(3) of the Constitution, or any other consideration which is just and equitable, calculated at the time of dispossession, was received in respect of such dispossession. In respect of each of the remaining claims, this Court must determine whether just and equitable compensation was received at the time of dispossession.[29] If the compensation received is not considered to be just and equitable, this Court must determine the amount of compensation now payable, having regard to the amount of compensation already received in respect of the dispossession [30] and to changes over time in the value of money.[31]

The concept of just and equitable compensation

[25] Section 25(3) of the Constitution [32] reads as follows:

> "The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including -
>
> (a) the current use of the property;
> (b) the history of the acquisition and use of the property;
> (c) the market value of the property;
> (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
> (e) the purpose of the expropriation."

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29 Section 22(1)(c)(B) of the Restitution Act.

30 Section 33(c)(A) of the Restitution Act.

31 Section 33(c)(C) of the Restitution Act.

32 Act 108 of 1996

[26] The compensation *formula* in section 25(3) is new in South Africa. Directions for its interpretation and implementation may be sought from international and foreign law.[33] The Constitutional Court, in the 1996 *Constitution Certification* case,[34] held:

> "An examination of international conventions and foreign constitutions suggests that a wide range of criteria for expropriation and the payment of compensation exists. Often the criteria for determining the amount of compensation are not mentioned in the constitutions at all. Where the nature of the compensation is mentioned, a variety of adjectives is used including 'fair', 'adequate', 'full', 'equitable and appropriate' and 'just'. Another approach adopted is to provide that the amount of compensation should seek to obtain an equitable balance between the public interest and the interests of those affected."[35]

Some guidance can be obtained from *formulae* applicable in other jurisdictions, although even they provide no certain answers.[36] I will now proceed to examine how *criteria* for the determination of compensation in countries which have constitutional prerequisites for the expropriation of property that are similar to ours, have been developed and applied.[37]

[27] The Fifth Amendment to the Constitution of the United States of America provides that no person shall:

> "No person shall be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."[38]

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33 Section 39(1)(b) and (c) of the 1996 Constitution.

34 *In re: Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) 1996 (10) BCLR 1253 (CC)

35 *Certification* above n 34 at 799A-C and 1288 -E respectively.

36 Eisenberg "Different Constitutional Formulations of Compensation Clauses" (1993) 9 *SA Journal of Human Rights* at 412:

> "An analysis of the international case law and the literature indicates that the meaning of different formulae can't be predicted with absolute certainty"

37 In other countries, expropriation is sometimes called "condemnation" (particularly in the United States of America), "compulsory purchase" (particularly in Great Britain) or "resumption" (particularly in Australia).

38 Van der Walt *Constitutional Property Clauses* (Juta, Cape Town 1999) at 398.

The Supreme Court has fashioned the following rules for interpreting "just compensation" in relation to expropriations by the Federal Government:

> "1 There is no rigid rule for determining what compensation is just under all circumstances and in all cases, nor any fixed rule requiring payment in any particular way.
>
> 2 Fair market value is normally accepted as a just standard.
>
> 3 The ascertainment of what compensation is 'just', is a judicial function that can not be preempted by Congress.
>
> 4 Just compensation relates to the value of the property on the date of taking; and if that value reflects the price that could have been obtained in a negotiated sale, it does not matter if the owner paid more or less for the property . . ."[39]

[28] In Switzerland, the Constitution[40] provides:

> "In cases of expropriation and restriction of ownership equivalent to expropriation, fair compensation shall be paid" [41]

This means, according to van der Walt, the following:

> "Article 22 ter (3) requires full compensation (*volle Entschädigung*) for expropriation, and consequently the general principle is that the compensation has to place the expropriatee in the same position in which she would have been in the absence of expropriation. The compensation sum is made up of the market value of the expropriated property, and any possible loss of value resulting from a partial or from a material expropriation, and compensation for consequential damage and losses."[42]

[29] In Malaysia, Article 13.2 of the *Federal Malaysian Constitution* provides:

> "No law shall provide for compulsory acquisition or use of property without adequate compensation" [43]

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39 Sullivan, "Eminent Domain in the United States : An overview of Federal Condemnation" contained in *Compensation for Expropriation: a Comparative Study* Erasmus (ed) (published by Jason Reese in association with the United Kingdom National Committee of Comparative Law, Oxford, 1990) Vol 1 page 168

40 Article 22ter(3) of the Federal Constitution of the Swiss Confederation 1874 (*Bundesverfassung der Schweizerischen Eidgenossensschaft 29 May 1874).* Article 22ter was inserted in 1969.

41 The translation is taken from *Constitutional Property Clauses* (above n 37) at 359.

42 *Constitutional Property Clauses* above n 37 at 373.

43 The text is taken from the chapter by Khublall, "Compulsory Purchase and Compensation in Singapore and Malaysia" in *Compensation for Expropriation* above n 38 Vol 2 page 2.

Laws in Malaysia dealing with expropriation refer to "market value" as the basic compensation norm.[44]

[30] The Commonwealth of Australia Constitution[45] provides that :

> "The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to . . . . acquisition of property on just terms from any State or persons for any purpose in respect of which the Parliament has the power to make laws."

The Constitution aims to ensure that statutes authorising expropriations provide fair and just standards of compensation.[46] According to Brown:

> "The compensation provisions in each of the resumption statutes reflect a legislative intention to provide for the payment of fair and just compensation to a dispossessed landowner"[47]

> "The underlying there in the compensating provisions of the land acquisition statutes is to ensure that a dispossessed landowner is no worse off and no better off as a result of his eviction . . . The current statutes recognise that the estimated sale value of the land may not be sufficient to ensure that the owner does not incur other losses."[48]

Van der Walt describes the interpretation given to "just terms" by the Courts as follows:[49]

> "According to case law, 'just terms' is not synonymous with full compensation, but a measure that has to be determined probably for each case individually, with reference to fairness in view of both the interest of the individual affected and the community interest. The market value of the property, described as the price which a reasonably willing purchase would be prepared to pay rather than lose the purchase, or which a reasonably willing vendor would be willing to accept and a reasonably willing purchaser would be prepared to pay at the date of purchase is still regarded as an underlying principle for the determination of just terms, but factors such as the value of the property for the owner and the results of the loss must also be taken into account."

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44 Khublall (above n 42) at 11.

45 Section 51 (xxxi) of the Commonwealth of Australia Constitution Act 1900 (UK) : the test is taken from *Constitutional Property Clauses* (above n 37) at 39.

46 Brown and Hogg "The Law of Resumption in Australia" in *Compensation for Expropriation* (above, n 38) at 291

47 *Land Acquisition* 3rd ed (Butterworths Australia, 1991) at 7.

48 *Land Acquisition*, above n 46, at 81.

49 *Constitutional Property Clauses* (above n 37) at 58 - 59.

[31] The Basic Law for the Federal Republic of Germany 1949 requires the compensation which becomes payable upon expropriation:

> "... reflect a fair balance between the public interest and the interest of those affected"[50]

Prof Schmidt-Aßmann[51] points out:

> "This rule addresses itself to the lawmaker"

He then proceeds to state:

> "But the legislator is not obliged to authorize payment of the full market value or even to fix compensation at the full value of the loss suffered if 'fairness' would require otherwise. Also, the interests of the community and of any entity which may ultimately have to pay the compensation must be given due consideration. Components of value which have been created by public initiative should not be compensated. On the other hand, the more that the value results from efforts of the expropriatee, the more the expropriator is obliged to pay full compensation. In addition, the constitutional mandate to pay fair compensation is not limited to losses that have already accrued at the date that compensation is assessed - subsequent losses are also compensable especially if the compensation does not reach the level of full market value. A law that fails to observe these principles may be held unconstitutional."[52]

According to van der Walt:

> "The determination whether compensation as provided for indeed creates a fair balance between the public interest and the individual interest, as required by article 14.3, is made with reference to the fundamental purpose of the property guarantee, and therefore involves a weighing of all relevant factors and circumstances in view of the proportionality principle. The market value of the property and the financial loss of the owner have to be considered to establish the fair balance, but they are (sic) have to be weighed against the other interests (including the public interest) and circumstances, and do not determine the nature or measure of payment on their own."[53]

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50 Article 14.3 of the "Grundgesetz für die Bundes Republik Deutschland". The translation appear in *Constitutional Property Clauses* above n 37 at 121.

51 "Expropriation in the Federal Republic of Germany" contained in *Compensation for Expropriation* above n 38 at 88

52 *Expropriation in the Federal Republic of Germany* above n 50.

53 *Constitutional Property Clauses*, above n 37 at 151.

[32] In analysing section 25(3) of the South African Constitution, Budlender[54] referred to the European Convention on Human Rights, and stated:

> "Article 1 of Protocol 1 to the European Convention on Human Rights does not expressly require compensation for expropriation. However, the European Court of Human Rights has held that the taking of property without payment of an amount 'reasonably related to its value' would normally constitute a disproportionate interference with property rights, which could not be considered justifiable under Article1. However, Article 1 'does not guarantee a right to full compensation in all circumstances. Legitimate objectives of 'public interest', such as pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less than reimbursement of the full economic value."[55]

He then concludes as follows

> "Section 25(3) requires that the compensation and the time and manner of payment must reflect 'an equitable balance between the public interest and the interests of those affected'. This makes it clear that the calculation of 'just and equitable' compensation involves a balancing of interests. Regard must be had to 'all relevant circumstances', including those specified."[56]

[33] In an article on the property clause in the South African Interim Constitution (1993), Murray[57] pointed out that:

> "In other jurisdictions the expression 'just and equitable' compensation has been interpreted to mean market value compensation."[58]

This is probably the reason why the requirement of an "equitable balance between the public interest and the interests of those affected" was built into the 1996 Constitution, allowing:

> "... for market value in some instances and for less than market value in those cases where the interests of the parties have to be balanced against available State resources. In the end the standard relies on

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54 Budlender et al *Juta's New Land Law* (Juta, Cape Town 1998).

55 *Juta's New Land Law* above n 53 at 1-51.

56 *Juta's New Land Law* above n 53 at 1-65.

57 Murray "Interpreting the property clause in the Constitution Act of 1993" (1995) 10 *SA Public Law* 107 at 128

58 Murray above n 56 at 128.

principles of fairness and legitimate expectation to assess the requirements of compensation in each particular case."[59]

[34] The position in other countries indicate a central role for market value in the determination of compensation. Except for factor (d) (which is about the extent of state investment and subsidy), it is the only factor listed in section 25(3) of the Constitution which is readily quantifiable. That makes it pivotal to the determination of compensation. The interests of an expropriatee require a full indemnity, which may lift the compensation to above market value by also redressing items such as financial loss.[60] Similarly, the public interest may reduce the compensation to an amount which is less than market value

[35] In my view the equitable balance required by the Constitution for the determination of just and equitable compensation will in most cases best be achieved by first determining the market value of the property and thereafter by subtracting from or adding to the amount of the market value, as other relevant circumstances may require. Therefore I will start off in this case by determining the market value of the dispossessed erven. Thereafter I will consider whether, on the evidence or in law, that amount must be adjusted upwards or downwards in order to determine just and equitable compensation.

The Pointe Gourde principle

[36] When making an objective determination of the market value which the properties have had at the time of dispossession, it will still be necessary, in fairness, to make some assumptions. In this particular case, the affect which the scheme underlying the Group Areas legislation might have had on the market value of the properties, must be thought away. The properties were

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59 Murray, above n 56 at 129.

60 This is provided for in the Expropriation Act 63 of 1975.

dispossessed to achieve the objective of spatial apartheid underlying that scheme.[61] It is a rule in most countries that in assessing compensation, any increase or decrease in the market value of the dispossessed land arising from the carrying out, or the proposal to carry out, the purpose for which the land was dispossessed, must be disregarded.[62] The principle is sometimes referred to as the *Pointe Gourde* principle, after the decision by the Privy Council in the matter of *Pointe Gourde Quarrying & Transport Co Ltd v Sub-intendent of Crown Lands (Trinidad)*.[63] Although it originated from judicial decisions, the principle is often incorporated in expropriation legislation.[64] In South Africa it is incorporated in section 12(5)(f) of the Expropriation Act.[65] Section 12(5)(f) read as follows:

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61 In the case of *Kerksay Investments (Pty) Ltd v Randburg Town Council* 1997 (1) SA 511 (T) at 522H, van Dijkhorst J said:

> "It is not fair that the expropriatee be compensated on the basis of the deflated value of his property which is rendered valueless by the (prospect of the) scheme itself. By these rules the Legislature seeks to arrive at just compensation which cannot always be the equivalent of the market value of the property taken."

62 A list of cases where the principle was applied in Great Britain is contained in the *Kerksay Investment* case (above n 60) at 523C-E.

Todd *The Law of Expropriation and Compensation in Canada*, 2nd ed (Carswell, Toronto 1992) described the principle (at 158) as

> "a common law rule to prevent injustice to either party."

McDermott and Woulfe *Compulsory Purchase and Compensation in Ireland: Law and Practice* [Butterworth (Ireland) Ltd. Dublin 1992] described it (at 205) as

> "a judicial, as distinct from a statutory rule for the assessment of the market value of the land acquired. It requires that no regard be had to any increase or decrease in value of the land attributable to the scheme underlying the acquisition."

63 [1947] AC 565 (PC)

64 See, for example, the position in the Netherlands, as described by Schenk et al *Onteigening* 2nd ed (Kluwer-Deventer, 1986) at 69:

> "Een belangrijke, door de rechtspraak opgestelde regel is, dat op de waardering geen invloed mag hebben, noch in positieve, noch in negatieve sin, het geen de onteiegenaar in het kader van het plan en het werk waarvoor onteigend wordt op het onteigende of in de omgeving daarvan zelf aanlegt; evenmin mogen dat hebben de plannen voor dat werk."

65 Act 63 of 1975

> "(f) any enhancement or depreciation, before or after the date of notice, in the value of the property in question, which may be due to the purpose for which or in connection with which the property is being expropriated or is to be used, or which is a consequence of any work or act which the State may carry out or perform or already has carried out or performed or intends to carry out or perform in connection with such purpose, shall not be taken into account;"

Although the compensation principles of the Expropriation Act are not applicable in this case, regard may be had to those principles insofar as they may assist in determining "just and equitable compensation".

[37] The manner in which the *Point Gourde* principle must be applied, has been described by Lord Denning MR in the case of *Myers v Malton Ceynes Development Corporation* [66] as follows:

> "In assessing the value, it is important to consider what would have happened if there had been no scheme . . . the valuer must cast aside his knowledge of what has in fact happened . . . due to the scheme. He must ignore the developments which will in all probability take place in the future . . . owing to the scheme. Instead, he must let his imagination take flight to the clouds. He must conjure up a land of make-believe, where there has not been, nor will be, a brave new town, but where there is to be supposed the old order of things continuing . . ."

A similar description is contained in *Wards Construction (Medway) Ltd v Barclays Bank PLC and Kent County Council* [67] where Nourse LJ held:

> "In order correctly to apply the *Pointe Gourde* principle it is necessary, first, to identify the scheme and, secondly, its consequences. The valuer must then value the land by imagining the state of affairs, usually called 'the no-scheme world', which would have existed if there had been no scheme."[68]

[38] In this case, the practical and legal restrictions placed by the provisions of the Group Areas legislation on the free marketability of the properties and their effect on the value of the properties, must be thought away. Those restrictions relate to the purpose for which the land was

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66 (1974) 230 EG 1275; 27 (1974) Property and Compensation Reports (C A, England) 518 at 527.

67 68 (1994) Property and Compensation Reports (CA, England) at 391.

68 *Wards* above n 66 at 396

ultimately taken.[69] Similar restrictions were also thought away in *Khumalo v Potgieter*, a land reform matter in which this Court was called upon to determine compensation.[70]

The subject properties

[39] The township of the Highlands was established in 1905 on a portion of the farm Garsfontein, some seven kilometers to the south east of the central business district of Pretoria. It consisted of 99 erven, with a standard erf size of 2 522 square metres.[71] The design of the township was antiquated. Roads were provided on a grid iron pattern, irrespective of contours. There is a watercourse running north to south through the township. This watercourse was ignored in the layout of the township. Seventeen erven lay across this watercourse. Most roads were narrower than demanded by modern town planning standards. Some roads had unacceptably steep slopes. Other roads had no slopes at all, resulting in drainage and transport problems.

[40] A number of erven were zoned for business purposes. Despite the zoning, there were very few businesses. Other erven were zoned for flats. There were no flats. The majority of the erven

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69 See the Australian decision of *Housing Commission (NSW) v San Sebastian (Pty) Ltd* (1978) 140 CLR 196 at 205-6. This quote is taken from *Land Acquisition* above n 46 at 107-8:

> "A difficulty which arises in the application of this principle is that valuation is in the ordinary case based on market value and, if the proposed public purpose and the possibility or likelihood of resumption therefore has become known prior to the date of resumption, the market value at the time of resumption will probably reflect by way of increase or decrease the possibility or likelihood of resumption for that public purpose. Therefore that value cannot be accepted. Yet it is inevitably in most cases the starting point of the process of valuation. With the actual market value at the time of resumption as the starting point it is then necessary to determine whether that value has been depressed or elevated by the market's foreknowledge of the possible or likely public purpose and consequent resumption. It is therefore inevitable in such circumstances that the public purpose has to be taken into account in the process of valuation but it can be taken into account only for that purpose."

70 LCC 34/99, 17 December 1999, internet website address http://www.law.wits.ac.za/lcc/1999/3499sum.html. Meer J held in respect of the *Pointe Gourde* principle (at par [26]):

> "Notwithstanding that the Expropriation Act does not apply to the present enquiry, given the extent to which this principle has come to be accepted both locally and internationally as an equitable one in the determination of market value, I have come to the view that section 25(3) must be interpreted so as to require its application, where appropriate, in the determination of market value."

71 The standard size for what was known as a "burgher erf".

were zoned for single residential purposes. Some had houses and outbuildings on them. The township had a distinctly rural character.

[41] At the time of the dispossessions, the township was unserviced, with roads only partially demarcated. No engineering services had been installed. Water was only available from boreholes and wells. There was no electricity supply or sewerage system. The installation of essential services would have been problematic, because the configuration of the erven and the topography of the land were not conducive toward the economic installation of such services. The township was not served by public transport. Access to the township was gained through two access roads leading off a provincial road towards the north of the township. There was a school nearby, along the western boundary of the township. There was no medical clinic. The only public amenity shown on the original layout plan was a public square, erf 78.

[42] Prior to 1 July 1964, the township was under the jurisdiction of the Transvaal Board for the Development of Peri-Urban areas. I will refer to that Board as the Peri-Urban Board. On 1 July 1964, the township came under the jurisdiction of the City Council of Pretoria, together with a number of other townships in the vicinity. During the 1950s, and also during the beginning and middle of the 1960's, when the dispossessions occurred, the inhabitants of the Highlands were almost exclusively persons of colour. Many of them owned the properties on which they lived. Other properties in the Highlands, comprising mostly (if not exclusively) vacant erven, belonged to white persons.

[43] During 1958 the Highlands township was declared to be an area for future occupation and ownership by members of the so-called white group.[72] Pursuant to subsequent notices in the Government Gazette,[73] the Pretoria City Council acquired the powers of the Group Areas Development Board in relation to the Highland township, including the power to purchase and expropriate land in the township. Although it was evident from the surrounding circumstances that

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72 By Proclamation No 150 on 6 June 1958. In terms of Proclamation 151 of 1998, the provisions of the Group Areas Development Act, 69 of 1955, were made applicable to *inter alia* the Highlands.

73 Notice 1744 published in the Government Gazette on 21 November 1958 amended by Notice 754 published in the Government Gazette of 19 May 1961.

Highlands township was intended for re-development, the parties in this case were unable to trace any formal re-development scheme.

[44] During the period from 1960 to 1967, the Pretoria City Council acquired, through forced sales and expropriations, the properties which belonged to the claimants in this case. Those forced sales and expropriations constitute the dispossessions upon which the claims are based. After the Council became owner of all the properties in the Highlands township, the general plan was cancelled. The existing improvements were demolished. An entirely new general plan was prepared and approved by the Surveyor General on 17 January1980. The new township was known as Extension 2 of Newlands. Very little is left of the Highlands township, as it existed when the dispossessions took place.

Reconstructing the past

[45] In order to assess the claims, it was necessary to reconstruct the layout plan of the township as it existed when the dispossessions occurred. The reconstruction was done by Mr H N Schoeman, a professional engineer. He had available to him the general plan of the township, as approved in 1905. He also had two aerial photographs taken during 1958 and 1964. He had the 1964 aerial photograph enlarged ten times. He then drew the boundaries of the stands onto this enlargement, and digitized the boundary lines. The buildings were drawn in, and also digitized. The buildings were classified as houses, other constructions or outbuildings. Buildings found only on the 1958 aerial photograph were also digitized and transferred to the enlargement of the 1964 aerial photograph. All this made it possible for him to calculate the surface areas of the houses, other constructions and outbuildings on an individual basis.

[46] Finally, a plan indicating all the stands with the buildings thereon was drawn to serve as a general index. The preparation of this plan and the calculation of the surface areas of the improvements is a major technological achievement, making it possible to undertake the quantification of the restitution claims on a far more rational basis than would have been the case if reliance had to be placed only on secondary evidence relating to the nature and sizes of the

improvements. During the hearing, Mr Moshoana indicated that the remaining claimants accept the correctness of this plan. Mr Schoeman therefore did not give evidence.

Agreements between the parties and between the expert witnesses

[47] The claimants instructed Mr J A Lungu, a valuer, to give expert evidence in this case. The Department of Land Affairs instructed Mr J A Griffiths (a valuer) and Mr S A R Ferero (a town and regional planner). The experts, Messrs Lungu, Griffiths and Ferero had a meeting on 27 January 2000. At this meeting it was agreed:

- that the comparable sales approach is the most generally agreed and applicable valuation method;
- that sales will only be comparable if they are worthy of comparison, and any price can be meaningfully adjusted, provided there is homogeneity; and
- the highest and best use of the subject properties for valuation purposes was to continue with the existing use of each individual erf;

[48] In the meeting of experts on 27 January 2000, Mr Lungu suggested that "the sociological impact of forced removal" should also be considered, as set out in his reports. He said he has taken this aspect into account to reach his valuation, although no specific percentage is mentioned in his report. His evidence was to the same effect. In addition, he suggested that a 10% *solatium* be added to the compensation, as provided for in the Expropriation Act.[74] I will deal with these aspects later in this judgment.[75]

[49] At a pre-trial conference on 26 January 2000, the amount of compensation received for each dispossession and the size of each dispossessed property were agreed. During the trial, the remaining disputes were further narrowed down by a succession of agreements.

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74 Section 12(2). See above n 59.

75 Par [75] to [77] below.

[50] After some evidence was given, the valuers agreed on the improvements which existed on each of the properties at the time of dispossession.[76] This comprised:

- An agreement on the nature of the improvements, being either a house or an outbuilding;
- An agreement on the surface areas of the improvements. These areas were taken from the plans prepared by Mr Schoeman.[77] Where houses were identified as having pitched roofs, a deduction of 10% was made against the stated area, to allow for space under the eaves. No deduction was made in respect of houses with flat roofs or in respect of outbuildings (irrespective of whether they had pitched or flat roofs);
- An agreement that erf 39 (claim 5) and erf 36 (claim 31) which, according to Mr Lungu, had improvements on them, were in fact vacant; and
- An agreement that the replacement cost of all improvements must be depreciated by 50%.

Subsequently, the valuers agreed that the valuation made by Mr Griffiths of all the improvements on the subject properties, was correct. The valuation was based on replacement cost less depreciation.

[51] Both Mr Lungu and Mr Griffiths determined the value of the dispossessed properties as being the aggregate of the vacant land value and the depreciated replacement cost of the improvements. This is not always what happens in practice.[78] In this case it is the only practical method. I am satisfied that the agreement on the contributory value of the improvements, as

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76 Agreement reached between Mr Lungu and Mr Griffiths on 1 February 2000.

77 See par [45] above.

78 See *Dormehl v Gemeenskapsontwikkelingsraad* 1979 (1) SA 900 (T) at 908F where van Dijkhorst AJ (as he then was) said:

> "Ek neem in ag dat in die praktyk die kontrakspartye moontlik nie aparte waardes beding van grond en geboue nie. By die tipe geding is dit egter onvermydelik dat analities te werk gegaan word by sowel vergelykbare transaksies as by die waardebepaling van die onteiende eiendom self, anders loop die proses gevaar om in blote raaiwerk te ontaard."

reached between the valuers, is fair and equitable, and that the Court may act upon it in determining the market value of the dispossessed properties.[79] To arrive at that value, all that is left to the Court is to determine the vacant land value. With that in mind, I will now proceed to consider the evidence before the Court.

Mr Lungu

[52] Mr J A Lungu has impressive academic qualifications. He holds a BSc (Land Economics) degree form the University of Zambia and an MSc (Land Economics) degree from the University of Aberdeen (Scotland). He was registered in terms of the Valuers Act [80] during 1997 as an associate valuer in South Africa. He had valued properties in Botswana, Lesotho and Swaziland, but very few in Gauteng. He operates from Pietersburg, in the Northern Province. His lack of knowledge and experience of the Gauteng property environment became evident during cross-examination, when he had to concede that he did not know where to obtain basic information which was necessary for his valuations.[81] As I will indicate later in this judgment, he based his valuations on comparable sales. He relied, to a very great extent, on incorrect information regarding those sales. He "rejected", without motivation, the comparable transactions relied upon by the Department of Land Affairs. When the errors in the particulars of many of the comparable sales on which he relied were pointed out to him, he made no attempt to adapt or rectify his valuation. In short, he was a slipshod, unimpressive witness.

[53] Mr Lungu chose three townships from which to gather evidence of comparable transactions. The first is Newlands, a township situated immediately to the West of the Highlands. Property values in that township were not influenced by Group Areas legislation. According to Mr Ferero, the township was unserviced when the dispossessions in the Highlands occurred. Mr Ferero was employed by the Peri-Urban Board at that time. Nevertheless, Mr Lungu reported

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79 To make their valuations for purposes of this case, the valuers had to move back in time for more than 35 years. That is a formidable undertaking. It must be accepted that their valuations, particularly relating to improvements, will be more conjectural than might otherwise have been the case.

80 Act 26 of 1982.

81 This includes data such as aerial photographs, contour maps and general plans of townships.

that "all basic municipal services were provided by the Council". This is clearly wrong. The second township selected by Mr Lungu is Ashley Gardens. That township was, when the Highlands dispossessions took place, fully serviced. Many of the erven were improved. Group Areas legislation did not influence property values. The third township selected by Mr Lungu is Lady Selbourne. This township was a fully serviced and largely built-up township when the Highlands dispossessions took place. It is situated many kilometres away from the Highlands, closer to the Pretoria central business district. Its inhabitants were almost exclusively black.

[54] Mr Lungu prepared a table showing eleven "sales" in Newlands, which he said he used for comparative purposes. The table indicated, in respect of each "sale", the erf size and the price. He converted the global price to a price per square metre, to facilitate the comparisons. Three of the so-called sales[82] were not sales at all. They were transfers from the executor in an estate to the heirs. The "price" given was the amount at which the erf was valued for estate duty purposes. One transaction[83] was an exchange transfer, not a sale, and the "price" given was the price on which transfer duty was paid. Two transactions[84] were sales in execution, and as such are not comparable.[85] One transaction[86] was a sale of improved land, which cannot be of assistance in determining the value of vacant land. The remaining three transactions were arms length sales. One of them[87] took place during 1969, when there was a property boom. It is not comparable for determining values which existed from 1960 to 1966. The remaining two transactions are transactions on which the Department also relied.[88]

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82 Erf 10 (1952 transaction) and erf 18 (twice).

83 Erf 3.

84 Erven 11 and 24.

85 See *Katzoff v Glaser* 1948 (4) SA 630 (T) at 637.

86 The remainder of erf 5.

87 Erf 2.

88 Erf 10 (1962 transaction) and erf 26.

[55] Mr Lungu had to convert the erf sizes of the Newlands properties from imperial measurements to metric measurements. In seven of the eleven transactions, the conversions were incorrectly done. This resulted in the price per square meter also being incorrect.

[56] Mr Lungu prepared a similar table of "sales" for Ashley Gardens. Many of the conversions of erf sizes from imperial to metric measurements were wrong. One of the so-called "sales" was no sale at all, but a donation.[89] Many transactions shown as individual sales of a particular erf are in reality composite transactions where several erven were sold together for a single price, making it impossible to determine a separate price for each erf.[90] In some instances, the year of sale was incorrectly stated.[91]

[57] Not only is the table of comparable "sales" on which Mr Lungu relied for comparable transactions in Ashley Gardens totally unreliable, but Ashley Gardens, which was then a fully serviced modern township on which considerable building activity had already taken place, is not comparable to the Highlands (which was badly laid out and had only unserviced stands).

[58] Mr Lungu concluded, on his erroneous figures, that the

> "average property values in Ashley Gardens were 1½ times more than what was being paid as compensation (basic values) in The Highlands during the years of expropriation".

The "1 ½ times more" is not substantiated. In my view the Ashley Gardens sales, being sales of fully serviced erven, are not "worthy of comparison" (to use the words of the agreement between the valuers).[92] They cannot be meaningfully adjusted to be of assistance in establishing the land values which pertained in the Highlands.

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89 Erf 6.

90 The sale of erven 45, 46, 48 and 54, the sale of erven 82 and 87 and the sale of erven 104 and 105.

91 Erven 69, 82, 87, 70, 72, 86 and 100.

92 See par [50] above.

[59] Thirdly, Mr Lungu relied on sales in Lady Selbourne. He prepared a table of "sales". Mr Grobler, for the Department of Land Affairs, pointed out numerous errors in this table, similar to those which occurred in the tables for the Highlands and for Ashley Gardens. I will not deal with them in detail. Lady Selbourne, in my view, is not comparble at all. It was a fully developed and serviced township, largely built-up, situated quite far away and to the north west of the Highlands.

[60] Lastly, Mr Lungu relied on a table of sales which he prepared of transactions that took place in the Highlands between 1950 and 1965. This table, too, is full of errors. I will limit myself to some examples. The sale of erf 73 took place in 1944, not in 1950, as stated by Mr Lungu. Both dates are so far back from the dates of dispossession that the sale has no comparative value. Some properties, including erf 7, erf 19, erf 48 and portion 4 of erf 86, were improved when they were sold. They are of no use for determining the value of vacant land. The sales listed in respect of portion 2 of erf 69 and portion 16 of erf 79 are sales in execution, of no comparative value. The "sale" listed in respect of erf 3 is actually an estate transfer by an executor to an heir. The so-called "price" is the estate valuation. As with the other three townships, the table of sales is so inaccurate that no credence can be given to it.

[61] The incorrect data on which Mr Lungu relied, led him to untenable conclusions, such as the following

> "Our argument that property values in The Highlands were assessed lower is further supported by the fact that despite The Highlands erven being developed at the time of expropriation, the assessed values were still far lower than those in Ashlea Gardens which were not improved. The reasons for such a situation are difficult to explain from a valuation point of view."[93]

[62] Mr Lungu concluded his valuation as follows:

> "If fair compensation was to be paid to the claimants in The Highlands, an average rate of R1.28 per square meter on vacant land should have been adopted in the evaluation exercise because it was the average rate which was obtaining in the neighbourhood (Ashley Gardens) and Newlands."

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93 Par 4 of this third report. Also see above par [58].

Elsewhere in his valuation he stated (in contrast to the above):

> "Because the Highlands was in the peri-urban area without any services provided by the municipality, the going price should have been lower than the neighborhood which enjoyed municipal services. Due to these differential factors, we allowed for a 33% reduction on the comparable sales. The reduction is derived from a comparative price index in the Highlands with neighborhood before the time of expropriation which shows that property values in the Highlands were a third lower than the neighborhood in the open market."

I cannot accept any of that. The tables of transactions from which Mr Lungu extracted that amount is so full of errors that it is totally unreliable. Ashley Gardens is not comparable to the Highlands. The 33% adjustment is pure guesswork. It is not supported by any comparative price index. When the errors were pointed out to Mr Lungu, he conceded most, if not all of them. He blamed them on a deeds office researcher whose services he was using. That is no excuse.[94] A valuer must adequately investigate and analyse all comparable transactions. He must acquaint himself with local conditions. He must have sufficient background and experience of the type of property and the area involved. He must do the necessary investigative work. He should not rely on conclusions reached by others. He must accept responsibility for the accuracy of all factual data contained in his valuation. If the factual data on which he builds his valuation is wrong, his conclusions will also be wrong. For reasons set out above, I reject Mr Lungu's valuation.[95]

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94 It is states in the *Valuers' Manual* (Butterworths , Durban 1992) at 2-1 that:

> "The function of a valuer is not only to estimate value - there is more to it. His responsibility to perform a specialised operation with care and skill also demands that the processing of his valuation should be carried out according to ethical standards which underwrites his credibility, efficiency and honesty of purpose."

95 Mr Grobler, for the Department of Land Affairs, put it to Mr Lungu that he did not have the necessary knowledge and experience to accept the valuation brief. Margolius, the president at the time of the South African Institute of Valuers, gave the following advice to valuers in an article "Valuation for Land Restitution Purposes" contained in *The South African Valuer* (No 57, March 1999) at p 6:

> "I would suggest that should you feel that the brief falls beyond your expertise, that you decline to accept it. Remember you will always be respected for declining a brief due to the complex nature thereof rather than accepting one that could be to your detriment and that of our profession."

Mr Lungu might have done well if he had heeded that advice.

Mr Ferero

[63] Mr S A R Ferero, a town planner, was called as a witness by the Department of Land Affairs. He holds a BA degree and a diploma in Town and Regional Planning, both from the University of Pretoria. He is a registered Town and Regional Planner and a corporate member of the SA Institute of Town and Regional Planners. During the period 1961 to 1967, which is the time when most of the dispossessions in this case occurred, he was employed as a town planner by the Peri-Urban Board. Subsequently, he went into private practice in Pretoria. Over the last twenty years, he has acted extensively for local authorities in town planing hearings, and for many government departments, local authorities and private clients involved in litigation. He was also responsible, as a consultant, for the planning and proclamation of some 300 townships.

[64] Mr Ferero gave evidence on the establishment and history of the Highlands and the general attributes of the township at the time of the dispossessions. I relied on that evidence when I described the township earlier in this judgment. He also described the neighbouring township of Newlands, which is relevant to this case because reliance was placed on comparable sales of erven in that township. During the period between 1960 and 1965, the erven in Newlands township were unserviced. Newlands was in the same position as the Highlands. Ashley Gardens, situated close to the Highlands, was proclaimed in 1961. Mr Ferero testified that is was a fully serviced, modern township. From a townplanning and township development point of view, Ashley Gardens was in a totally different category from the townships of Newlands and the Highlands.

[65] Mr Ferero testified that he was in close contact with town planning and township development in general within the Pretoria area from 1961 onward. He said the Sharpville uprising in 1960 had an immensely negative effect upon confidence in the property sector of the economy, which continued until about 1965. From then on, confidence started returning, leading to a property boom towards the end of that decade.

Mr Griffiths

[66] Mr N G Griffiths was born and educated in England. He qualified as an Associate of the Royal Institute of Chartered Surveyors before he emigrated to South Africa in 1968. He is

registered as a valuer in South Africa in terms of the Valuers' Act.[96] He is a fellow of the South African Institute of Valuers and a past chairman of its Transvaal branch. He is a highly experienced valuer in private practice, and has appeared on numerous occasions as an expert witness in litigious matters.

[67] Mr Griffiths was asked to determine the market value of the subject properties in the Highlands as at the dates when the dispossessions occurred. He selected the comparable sales approach to determine the value of lots, as if vacant. To that he added the value of any improvements, determined on the basis of depreciated replacement costs, to establish the market value of improved lots

[68] Mr Griffiths considered Newlands township to be comparable to the Highlands. Newlands township was established in 1905. The general plan indicated 51 erven, varying in size from 2 500 square meters to 2 hectares. According to aerial photographs, there were limited development and no established infrastructure when the Highlands dispossessions occurred. That is also borne out by Mr Ferero's evidence. Newlands township is situated immediately adjacent to the Highlands, to the west thereof. Sales of erven in Newlands were not influenced or impeded by Group Areas legislation. Therefore sales of erven in Newlands would give a good indication of erf prices which might have been obtainable in the Highlands, if the Group Areas legislation had not exerted any negative influence.

[69] Mr Griffiths identified six arms length sales in Newlands which he considered might be comparable. I have added a calculation of the price per square metre. Particulars of the transaction are as follows:

Erf No	Area - m^2	Price -R	Buyer	Seller	Date	Price per m^2
36596	1 586	235	G Andersen	P Minnie	24/2/60	15c
10	2 551	300	G Andersen	H Hammerton	20/2/62	12c
28	5 103	700	C v. Boeghen	Shaw	23923	14c

96 Act 26 of 1982.

Erf No	Area - m^2	Price -R	Buyer	Seller	Date	Price per m^2
26	6 972	900	Newlands T/ship	Davidson	30/11/65	13c
29	2 331	500	Newlands T/ship	Jones	18/10/66	21c
2	3 877	900	G Andersen	Civilian Blind	16/6/69	23c

The last of these sales (the sale of erf 2) is not really comparable, because it took place in 1969, which is long after the Highlands dispossessions occurred.

[70] A further major property transaction in Newlands took place on 5 January 1965. Twenty-six erven,[97] together with the remainder of the township (streets and public open spaces), were sold for a composite purchase price of R25 500. That equals 8,556 cent per square meter (10,6 cent per square meter, if the remainder of the township is excluded). The sale was by N McRobert to Newlands Township (Pty) Ltd. Mr Griffiths correctly conceded, in cross-examination, that the price per individual erf cannot be determined from this transaction.

[71] Mr Griffiths next considered sales which took place in the Highlands itself, as possible comparable transactions. During the late 1950s, sales were generally depressed. Many of them were sales in execution for the recovery of amounts due to the Peri-Urban Board. There was no "free flowing" market. During the years 1962 to 1965 several sales took place from white persons to the City Council of Pretoria, and also expropriations by the City Council of Pretoria of erven held by white persons. These transactions are set out in the table below:

Date	Erf No	Area -m^2	Seller	Price	cent/m^2
2/62	77	14568	Mac Robert	2000	13.72
2/62	85	11186	Mac Robert	1600	14.3
8/62	71	4587	Fine	600	13.08
5/64	98	10207	Centurion	3000	29.39
4/64	10	5140	Golberg/Boyes	700	13.71

97 Erven 14, 17, 19-21, 25, 27, 30, 32-38, 41-51.

Date	Erf No	Area -m²	Seller	Price	cent/m²
4/64	RE 26	2552	Goldberg/Boyes	400	15.67
4/64	15	5104	Mc Dougell	1000	19.59
4/64	44	5104	Courtney	720	14.1
4/64	62	2662	Courtney	400	15.02
5/64	92	5104	Douglas	1500	29.39
6/65	83	5105	Roche	800	15.67

Two of these transactions are out of line, those relating to erven 98 and 92. They fetched prices much higher that the other erven. Mr Griffiths said that this might have been due to their very favourable situation at the eastern boundary of the township.

[72] Some of these transactions are sales, others are expropriations. Sales of land to an authority with expropriation powers, and also the amounts of compensation paid for land pursuant to expropriation, can serve as some indication of market value, but must be treated with caution,[98] because they are not arms length transactions. This was cogently expressed by Fagan JA in the case of *Union Government v Jackson and Others*,[99] when he said:

> "I have conceded that the prices paid by the Government for the other farms have some relevancy to the valuation of the properties in issue; but it is a far cry from that proposition to one which makes those prices the complete test for such valuation, at any rate without much fuller *data* for a comparison than the record gives us. While I have no criticism to offer on the reasons mentioned by ROPER J, in support of his assumption that the prices paid for the other farms probably represented a reasonable value, the fact remains that they were paid in transactions of a very special type, not the ordinary voluntary sales between parties who have a free choice whether or not they will consider the bargain at all. To equate them therefore with the prices obtainable at such sales which are the proper test of fair market value- is an assumption which in the absence of evidence that they do correspond, is not necessarily correct."[100]

Mr Griffiths pointed out, however, that the sellers and the expropriated owners of the erven were experienced and knowledgeable property investors. They would not accept less than full value for their properties

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98 See *van Zyl v Stadsraad van Ermelo* 1979 (3) SA 549 (A) at 568C, per Hoexter AJA (as he then was):

> "In die reël moet die vergelykbaarheid van pryse wat as gevolg van *onteiening* van vergelykbare eiendomme betaal is met 'n mate van omsigtigheid benader word omdat by sodanige gevalle twyfel mag ontstaan of die 'koper' 'n 'vrywillige' koper was."

99 1956 (2) SA 398 (A)

100 *Jackson* above n 98 at 425A-B

[73] For reaching his conclusions on the state of the property market at the time, Mr Griffiths relied on evidence given by Mr Ferero (who knew many of the operators), and also on a discussion which he had with a certain Mr G Anderson. Mr Anderson was a director and shareholder of the company Newlands Township (Pty) Ltd. He was active in the property market at the time, both in his personal capacity and through his company.

[74] Based on the available evidence, Mr Griffiths determined the probable selling prices which erven in the Highlands would have realised at the time of the dispossessions, as set out hereunder. He differentiated between different erf sizes, and gave a price range for each erf size. I have converted that to a price per square metre.

Size	price range	price per m²
± 1 000 m²	R200-R230	20-23c
± 1 275 m² (half burgher)	R230-R330	18-26c
± 2 550 m² (burgher erf)	R350-R500	14-20c
± 5 100 m² (double burgher)	R650-R900	13-18c
± 10 000 m² (4 x burgher)	R1 200	12c

In valuing each erf, he determined a price within the price range for the size of that particular erf, according to the characteristics of that erf. I will deal with his individual determinations when I set out my conclusions later in this judgment.

Adjusting the amount of market value to arrive at just and equitable compensations

[75] Knowing the market value of the properties, the next step is to consider whether the amount of that value needs to be adjusted upwards or downwards in order to arrive at what would be just and equitable compensation on the date of dispossession, as referred to in section 2(2)(a) of the Restitution Act. Mr Grobler, for the Department of Land Affairs, did not suggest that the market value be adjusted at all (either upwards or downwards). Mr Moshoana suggested an upward adjustment to take into account the brutal nature of and the social disruption caused by the dispossession.[101] He referred us to section 33(eB) of the Restitution Act, which require the Court to have regard to the history of the dispossessions and the hardship caused thereby. He

101 Section 33(eB) of the Restitution Act allows us to have regard to the "history of the dispossession" and to "the hardship caused".

submitted that the properties were particularly valuable to their owners. He referred to the case of *Harvey v Crawley Development Corporation*.[102] In that case, Romer LJ stated :

> "It seems to me that the authorities to which our attention was drawn do establish that any loss sustained by a dispossessed owner (at all events one who occupies his house) which flows from a compulsory acquisition may properly be regarded as the subject for compensation for disturbance provided, first, it is not too remote and secondly that it is the natural and reasonable consequence of the dispossession of the owner."

No evidence was led to support any item of loss except market value. The vague generalities in Mr Lungu's valuation are hearsay which, although admissible,[103] cannot be a substitute for evidence by a dispossessed person or anybody else having personal knowledge of the circumstances of the dispossessions.[104] It was not explained why such evidence was not adduced. Although a valuer (like any other expert witness) may give opinion evidence, he must have a basis for his opinion. Without such a basis, the opinion is of hardly any value. Mr Moshoana also asked for a 10% *solatium* to be added to the market value. For this request, he relied on section 12(2) of the Expropriation Act.[105] In this case, we are not determining compensation under the Expropriation Act. Mr Moshoana submitted that the properties were taken without the freely given consent of the owners, which would be sufficient reason to justify the addition of a *solatium*. None of this was supported by any substantive evidence.

[76] With regard to all Mr Moshoana's submissions, I must point out that any subjective value which the properties may have had for their owners when the dispossessions took place, cannot

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102 [1957] 1 All ER 504; [1957] 1 QB 485; [1957] 8 Property and Compensation Reports 141 at 148.

103 Section 30(2)(a) of the Restitution Act.

104 The reports by Mr Lungu contain general statements such as the following :

> "In the process of moving, some people lost businesses and other means and channels of livelihood. Thus financially and materially their lives were disorganised. They also suffered grievous social consequences like living in conditions which were comparatively squalor to their former premises
>
> Monetary compensation was paid to some dispossessed land owners, while others did not receive any compensation. Upon being removed from their land, many were made to live in sub-standard council rented accommodation in a location known as Eesterus." (par 3 of his second report)

His amended valuation certificates allow for a 10% solatium without supporting evidence. Nowhere in his reports or in the evidence which he gave in Court, is there anything substantive on which a finding that just and equitable compensation exceed market value, can be based.

105 Act 63 of 1975.

affect their market value.[106] Market value at the time of dispossession must be objectively determined.[107] Only after that has been done, can an upward or downward adjustment possibly be considered under section 25(3) of the Constitution or section 33(eB) of the Restitution Act. In this case, the evidence which would be necessary to support any such adjustment was not given. I therefore do not propose to make any adjustment.

[77] Where a person is entitled to restitution, the court can either restore the dispossessed right in land, grant an appropriate right in alternative State-owned land, or award monetary compensation. If any of the first two is implemented, there will be no room for further compensation to redress the hardship caused by the dispossession. That raises the question whether, if compensation is awarded, which is really a substitute for the land, it would be appropriate to increase the compensation in order to also repair the hardship. Because the evidence necessary to support an increase was not submitted in this case, I need not decide that question.

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106 This principle was expressed by the United States Supreme Court in the matter of *Kimball Laundry Co v United States* 338 US 1, 5-6 (1949) as follows:

> "The value of property springs from subjective needs and attitudes; its value to the owner may therefore differ widely from its value to the taker. Most things, however, have a general demand which gives them a value transferable from the owner to another. As opposed to such personal and variant standards as value to the particular owner whose property has been taken, this transferable value has an external validity which makes it a fair measure of public obligation to compensate the loss incurred by an owner as a result of the taking of his property for public use.
>
> The value compensable under the Fifth Amendment, therefore, is only that value which is capable of transfer from owner to owner and thus of exchange of some equivalent. Its measure is the amount of that equivalent."

I have taken the text from *Compensation for Expropriation* above n 38 Vol 1 page 165-166. It is also specifically provided in section 12(5)(a) of the Expropriation Act (63 of 1975) that no allowance shall be made for the fact that the property has been taken without the consent of the owner. Although the Expropriation Act does not apply in this case, its provisions can give guidance on what is just and equitable.

107 In the United States of America, for purposes of Indian tribal restitution claims, the valuation of the land taken is arrived at as follows:

> "Valuation of the land interest at the time of its taking or injury requires consideration of a multitude of factors, including the location of the land, the sale price of similar lands, and actual use or disposition of the land after the taking."

Cohen's *Handbook of Federal Indian Law* (The Michie Company, Virginia,1982) at 569.

The onus

[78] Section 2(2) of the Restitution Act contains a disqualification for persons claiming restitution of rights in land.[108] A similar disqualification was first contained in section 121(4) of the Interim Constitution.[109] After the final Constitution was accepted, it found its way into section 2(1A) of the Restitution Act.[110] Section 2(1A) was later renumbered to be section 2(2).

[79] The disqualification received judicial attention in the case of *Blaauwberg Municipality v Bekker and Others*,[111] where it was said:

> "I have already concluded that the object of section 121(4) of the interim Constitution is to exclude dispossessed persons who received just and equitable compensation from the right to claim restitution. . . . Although it may be possible under the Restitution of Land Rights Act for the Court, in its descretion, not to grant a restitution order to a dispossessed person who received just and equitable compensation, such a person remained entitled to engage in the claim process. It is the right to engage in the claim process which section 2(1A) removed, thereby giving effect to the object of section 121(4) of the interim Constitution and placing it beyond doubt that dispossessed persons who received just and equitable restitution."[112]

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108 "The subsection reads as follows:

> "2(2) No person shall be entitled to restitution of a right in land if -
>
> (a) just and equitable compensation as contemplated in section 25(3) of the Constitution; or
>
> (b) any other consideration which is just and equitable,
>
> calculated at the time of any dispossession of such right, was received in respect of such dispossession."

109 Act 200 of 1993. The subsection read as follows:

> "121(4)(a) The provisions of this section shall not apply to any rights in land expropriated under the Expropriation Act, 1975 (Act No. 63 of 1975), or any other law incorporating by reference that Act, or the provisions of that Act with regard to compensation, if just and equitable compensation as contemplated in section 123(4) was paid in respect of such expropriation."

110 The wording was identical to the present section 2(2).

111 [1998] 1 All SA 88 (LCC).

112 *Blaauwberg* above n 110 at 104f to 105b.

Mr Grobler relied on the above *dictum* to support a submission that a dispossessed person's entitlement to restitution before an award is made,[113] comprises no more than the right to engage in the claim process. He then argued that unless a claimant alleges and proves that he has not received just and equitable compensation for the right of which he was dispossessed, he would not have crossed the threshold which would allow him to engage in the claim process. In order to cross that threshold, he would have to show that the compensation which he did receive is less than the just and equitable compensation which he should have received.[114] He need not, however, prove the amount which he should have received.[115]

[80] There is much force in the above submissions. In this case, however, I need not decide the question of *onus*. As was stated by Botha J (as he then was) in *Loubser en Andere v SA Spoorwëe en Hawens*:[116]

> "Die konsep van bewyslas, uit 'n praktiese oogpunt beskou, is maar net 'n middel om die knoop deur te hak wanneer die getuienis oor die betrokke geskilpunt gelyk gebalanseerd is, en die Hof nie in staat is om te bevind dat die een weergawe op 'n oorwig van waarskynlikhede te verkies is bo die ander nie."[117]

Having rejected Mr Lungu's valuations, I have nothing else on which to decide this case but the facts agreed between the parties and the evidence given by Mr Ferero and by Mr Griffiths. Where those facts and that evidence show that a claimant has been under-compensated, I must conclude that the particular claimant has crossed the threshold of section 2(2) and that the claimant is entitled to restitution (in this case, to an award of compensation). In contract, where those facts

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113 The award can either be the restoration of the right in land which was dispossessed, or equitable redress. Equitable redress can comprise the granting of an appropriate right in alternative State-owned land, or the payment of compensation. See the definitions of "restitution of a right in land" and "equitable redress" in section 1 of the Restitution Act.

114 Schwikkard et al states in *Principles of Evidence* (Juta Cape Town, 1997) at 403:

> "Where proof of a negative assertion is an essential element of a party's claim or defence the onus of proving the negative rests on the party who asserts the negative."

See also *Kriegler v Minitzer and another* 1949 SA 821 (A) at 828.

115 It has traditionally been accepted in cases where a court must determine the compensation payable upon expropriation, that the claimant bears no onus to prove the amount. The court must determine the amount on the evidence before it. See *Bonnet v Department of Agriculture Credit and Land Tenure* 1974 (3) SA 737 (T) at 746A - 747A and *Burgess Investments (Pty) Ltd v Minister of Agriculture* 1971 PH M18 at 52, where it was decided that "no onus rests on either party".

116 1976 (4) SA 589 (T).

117 *Loubser* above n 115 at 613B.

and that evidence show that a claimant at the time of dispossession received more that what would constitute just and equitable compensation, section 2(2) will prevent any restitution award.

Conclusion

[81] Each of the individual claimants claim that at the date of the respective dispossessions, they or their predecessors were paid an amount less than market value. This was the case that the State, represented by the Department of Land Affairs, had to meet. In this case no credible evidence or argument on any relevant factor other then market value was led, thus no other matter could be taken into account when assessing just and equitable compensation. Therefore I find that payment of market value determined as at the date of dispossession would, at that time, have constituted just and equitable compensation for the claimants. The market value will be determined by adding the depreciated replacement cost of the improvements (as agreed) to the value of the vacant land (which the Court must determine). For purposes of determining the vacant land value, I accept the valuation of Mr Griffiths. I also accept the reasoning whereby he placed a value on each erf, within his range of values for the applicable size group.[118]

[82] I have prepared two schedules, which will be annexed to this judgment. The first schedule show in respect of each erf:

- the number of the erf
- the vacant land value of the erf;
- factors taken into account to arrive at the vacant land value of the erf, within the confines of the range of values determined for the applicable size group;
- the depreciated replacement value of the improvements on the erf (as agreed); and
- the market value of the improved erf, which would constitute the just and equitable compensation for the erf, calculated as at date of dispossession.

[83] If a claimant received less compensation at the time of dispossession than what would have been just and equitable, that claimant would have crossed the threshold of section 2(2) of the Restitution Act, and will be entitled to claim restitution. It was agreed that the restitution must take the form of monetary compensation. In my view, that compensation must be the difference between the amount of compensation actually received and the amount which would have been

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118 See par 74 above.

just and equitable, at the time; the difference must be escalated to accommodate changes in the value of money for the period from the time of dispossession up to the end of February 2000,[119] which is the month-end closest to the date of this judgment. The parties are in agreement that the increase should be based on the consumer price index, and agreed on the following factors:[120]

Year of dispossession	Factor to be applied to under-compensation
1960	31.95
1961	31.95
1962	31.21
1963	31.21
1964	30.5
1965	29.17
1966	27.96
1967	27.39

[84] Lastly, I have prepared a second schedule which shows, in respect of each claim:

- the compensation actually received at the time of dispossession;
- the compensation which would have been just and equitable at the time of dispossession (calculated as set out in the first schedule);
- any shortfall or excess[121] in the compensation actually received relating to what would have been just and equitable; and
- the amount of any such shortfall, increased to 29 February 2000 values, using the factors set out in par [83] above.

The increased amounts of the shortfalls are the amounts which will be awarded as compensation.

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119 Section 33(eC) of the Restitution Act.

120 The factors were calculated by Mr J H N Strydom, an accountant employed as an expert witness by the Department of Land Affairs.

121 The Restitution Act does not require the pay-back of any excess.

[85] This Court has inquisitorial powers.[122] The inquisitorial powers of the Court have been discussed by Meer J in *Mlifi v Klingenberg*[123]. She referred to what Justice D A Ipp of the Supreme Court of Western Australia[124] had to say in relation to the function of a court with inquisitorial powers. This includes amongst others :

> "- Questioning witnesses more extensively to get to the bottom of a matter (but not unfairly or in a way which prejudices either party);
> - Calling witnesses of its own accord to arrive at the truth of the matter..."

I do not believe that because this Court has these powers, it is required to build a case for any party. The Government of South Africa, through the legal aid system, is providing the financial resources for the claimants to prosecute their case, albeit on a restricted budget. The Department of Land Affairs has its own access to government funds which enabled it to thoroughly investigate and present their case.

[86] No party has asked for a costs order. I will therefore not make any cost order. It is not the policy of this Court to award costs in cases such as these, except in exceptional circumstances. Mr Moshoana has been acting for the claimants on legal aid. He has carried the burden of preparing and conducting this very intricate and voluminous litigation without any *interim* payment of fees or disbursements. The Court commends him for that commitment.

[87] The Court orders as follows:

(a) Claim 1, claimant Andrew Ash, compensation is awarded in an amount of R32 583.24;

(b) Claim 2, claimant Martha Orthelia Buys, the claim is hereby dismissed;

(c) Claim 3, claimant Elizabeth Maria Chauky, compensation is awarded in an amount of R5 673.00;

(d) Claim 4, claimant Pretoria Dioceson Trustees, the claim is hereby dismissed;

(e) Claim 5, claimant Norah Hartell, the claim is hereby dismissed;

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122 Section 32(3)(b) of the Restitution Act provides that notwithstanding anything to the contrary in this Act or in the rules:

> "..the Court may conduct any part of any proceedings on an informal or inquisitorial basis."

123 [1998] 3 All SA 636 (LCC); 1999 (2) SA 674 (LCC) at par [104] to [110].

124 Ipp "Judicial Intervention in the Trial Process" 69 *Australian Law Journal* (1995) 365 at 368.

(f) Claim 6, claimant Harriet Mabel Hendriks, the claim is hereby dismissed;

(g) Claim 7, claimant Joseph Stephanus Keppler and Frederika Keppler, the claimants did not present sufficient evidence to establish their right to claim; they may apply for leave to submit further evidence;

(h) Claim 8, claimant David Martin Marupen, compensation is awarded in an amount of R15 823.47

(i) Claim 9, the claimant Sylvia Naidoo, the claim is hereby dismissed;

(j) Claim 10, claimant Cleone Heather Poole, compensation is awarded in an amount of R5 680.22;

(k) Claim 11, claimant Anna Bennie, compensation is awarded in an amount of R63 590.60;

(l) Claim 12, claimant William Dormack, the claim is hereby dismissed;

(m) Claim 13, claimant Flora Januarie, the claim is hereby dismissed;

(n) Claim 14, claimant Mervin Daniel Hartell, the claims in respect of both properties are hereby dismissed;

(o) Claim 16, claimant George Seckle, compensation is awarded in an amount of R20 681.53;

(p) Claim 17, claimant Golliath and Others, the claimants do not have a right to claim restitution on the basis set out in their pleadings; they may apply for an amendment of their statement of claim;

(q) Claim 18, claimant Petrus Alfred Ankowitz, the claims in respect of both properties are dismissed;

(r) Claim 19, claimant Ivan Kamoo, compensation is awarded in an mount of R13 738.50;

(s) Claim 20, claimant Ivan Kamoo, the claim is hereby dismissed;

(t) Claim 21, claimant Veldman and Others, the claim is hereby dismissed;

(u) Claim 22, claimant Mariam Wilson, the claim is hereby dismissed;

(v) Claim 23, claimant George Seckle, the claim is hereby dismissed;

(w) Claim 24, claimant George Seckle, compensation is awarded in an amount of R13 950.87;

(x) Claim 25, claimant George Seckle, compensation is awarded in an amount of R17 727.28;

(y) Claim 26, claimant George Seckle, compensation is awarded in an amount of R561.78;

(z) Claim 27, claimant George Seckle, the claim is hereby dismissed;

(aa) Claim 28, claimant George Seckle, the claim is hereby dismissed;

(bb) Claim 31, claimant Ghadija Suliman, compensation is awarded in an amount of R3 195;

(cc) Claim 32, claimant Joseph Lucas, compensation is awarded in respect of both properties in an amount of R11 502.00;

(dd) Claim 33, claimant Phelucia E Smith, compensation is awarded in an amount of R17 227.92;

(ee) Claim 34, claimant Deborah Augeal, the claim is hereby dismissed;

(ff) Claim 36, claimant Elizabeth Lambert, the claim is hereby dismissed;

(gg) Claim 37, claimant Emily Betty Isaacs, compensation is awarded in an amount of R9 831.15 in respect of the remaining extent of lot 58, and in an amount of R9 585 in respect of portion 3 of lot 58.;

(hh) Claim 38, claimant Gilbert Nicolson, compensation is awarded in an amount of R38 979.00;

(ii) Claim 40, claimant Simon Cecil Posonby, the claim is hereby dismissed in respect of both properties;

JUDGE A GILDENHUYS

I agree

S GOLDBLATT

*ASSESSOR

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

For the plaintiffs:

Attorney M Moshoana instructed by *Mohlaba & Moshoana Inc, Pretoria*

For the defendant:

Adv G Grobler SC and *Adv S Hassim* instructed by *State Attorney, Pretoria*