IN THE LAND CLAIMS COURT OF SOUTH AFRICA

Heard at **CAPE TOWN** on 1 April 2004 **CASE NUMBER**: LCC 151/98
before **Gildenhuys AJ** and **Wiechers (assessor)**

Decided on: 29 April 2004

In the case between:

THE RICHTERSVELD COMMUNITY First Plaintiff

and

ALEXKOR LIMITED First Defendant

THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA Second Defendant

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JUDGMENT

GILDENHUYS J:

[1] In this matter the plaintiff, a community known as the Richtersveld community, claims restitution of certain land forming part of the territory commonly known as the Richtersveld. The present owner of the land, Alexkor Ltd, and also the Government, oppose the claim. They are, respectively, the first and second defendants.

[2] The plaintiff was dispossessed of a narrow strip of diamondferous land, to which I shall refer as "the subject land". The subject land is situated alongside the western coast of the Northern Cape Province. The plaintiff contends that the dispossession occurred through -:

> "a series of legislative and executive steps whereby, after the discovery of diamonds in the mid 1920s, State alluvial diggings were established on the subject land, the public, including the Richtersveld people, were excluded from the subject land, mineral rights in the subject land were granted to Alexkor [a state-owned diamond mining corporation] and full ownership of the subject land was ultimately transferred to Alexkor".[1]

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1 Supreme Court of Appeal Judgment (n4 below), par [91].

[3] The restitution claim was brought under Section 2(1) of the Restitution of Land Rights Act.[2] Under that section, a community is entitled to restitution of a right in land if it was dispossessed of such right after 19 June 1913 as a result of past racially discriminatory laws or practices.

[4] After the close of pleadings, it was ordered under rule 57(1) of the Land Claims Court Rules[3] and by agreement between the parties, that some of the issues would be adjudicated at a preliminary hearing of the case. These issues (to which I shall refer as the first round issues) comprise everything which the plaintiff has to establish to entitle it to restitution of the land under section 2(1) of the Restitution of Land Rights Act, with the exception only of the form which any restitution should take and the amount of compensation (if compensation is to be awarded).[4] It was ordered that if the plaintiff is successful on the first round, the remaining issues would be adjudicated at a later date.

[5] The first round issues were first heard by me and an assessor. We dismissed the the restitution claim. The plaintiff then appealed to the Supreme Court of Appeal, which upheld the appeal.[5]

[6] The Supreme Court of Appeal held that the Richtersveld community had a customary law interest in the subject land, which included a right to the minerals and other mineral resources of the land. It found that State policy since the 1920s had consistently been to ignore the community's rights to the subject land and to regard it as crown land. Underlying that policy -

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2 Act 22 of 1994, as amended.

3 Made under section 32(1) of the Restitution of Land Rights Act and published in Government Notice 300 in *Government Gazette* 17804 of 21 February 1997.

4 The parties subsequently agreed that if any issue under section 2(2) of the Restitution of Land Rights Act arose in the pleadings, it will be determined during the second round. See paras [37] and [38] below.

5 The judgments have been reported as follows:
the Land Claims Court judgment: *Richtersveld Community and Others v Alexkor Ltd and Another*, 2001 (3) SA 1293 (LCC) [the LCC Judgment];
the Supreme Court of Appeal judgment: *Richtersveld Community and Others v Alexkor Ltd and Another*, 2003 (6) SA 104 (SCA) [the SCA Judgment].

> "..... was the obvious, albeit unexpressed, premise that the Richtersveld became Crown land upon annexation because its people were insufficiently civilised. It can be safely accepted that an essential part of this premise was the race of the Richtersveld people. No alternative springs to mind or was suggested. The racial discrimination, therefore, is clear."[6]

In the result, the Supreme Court of Appeal declared that the Richtersveld Community is entitled in terms of sec 2(1) of the Restitution of Land Rights Act to:

> "restitution of the right to exclusive beneficial occupation and use, akin to that held under common-law ownership, of the subject land (including its minerals and precious stones)".[7]

[7] Both defendants appealed to the Constitutional Court against this declaratory order. Save for a minor amendment to the order, the Constitutional Court dismissed the appeal.[8] The Constitutional Court held that -

> "the real character of the title that the Richtersveld Community possessed in the subject land was a right of communal ownership under indigenous law".[9]

Indigenous law is now an integral part of South African law depending, for its ultimate force and validity, on the Constitution.[10] The content of the indigenous law rights held by the community has to be determined with reference to the history and the usages of the community. The Constitutional Court found that there was a history of prospecting for minerals by the community, which is "*consistent only with ownership of the minerals being vested in the community*".[11] It then concluded:

> "We are satisfied that under the indigenous law of the Richtersveld Community communal ownership of the land included communal ownership of the minerals and precious stones. Indeed both Alexkor and the government were unable to suggest in whom ownership in the minerals

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6 Para [109] of the SCA Judgment.

7 Par [111] of the SCA Judgment.

8 The Constitutional Court judgment has been reported as *Alexkor Ltd and Another v The Richtersveld Community and Others*, 2003 (12) BCLR 1301 (CC) [the CC Judgment].

9 Para [62] of the CC Judgment.

10 Para [51] of the CC Judgment.

11 Para [70] of the CC Judgment.

> vested if it did not vest in the Community. Accordingly, we conclude that the history and usages of the Richtersveld Community establish that ownership of the minerals and precious stones vested in the Community under indigenous law."[12]

[8] The Constitutional Court found that the rights of the plaintiff in the subject land were not recognised under the Precious Stones Act[13] because the rights had not been registered. All land in respect of which there was no registered owner was treated under the Act as unalienated Crown Land.[14] Only registered ownership was recognised, respected and protected. For the most part, white people held their land through registered ownership, whilst black people seldom acquired any title of this sort. The inevitable impact of the Precious Stones Act's failure to recognise indigenous law ownership was racially discriminatory against local black land owners. Therefore, according to the Constitutional Court judgment, the laws and practices by which the Richtersveld people were dispossessed of the subject land, discriminated against them on racial grounds.[15]

[9] The Constitutional Court confirmed the finding of the Supreme Court of Appeal that the Community is entitled to restitution of the subject land, but amended the order so as to declare that the Richtersveld Community is entitled -

> "to restitution of the ownership of the subject land (including its minerals and precious stones) and to the exclusive beneficial use and occupation thereof".[16]

[10] At a pre-trial conference held on 23 January 2004, the parties agreed that a number of further issues can conveniently be decided seperately from the remaining issues. These issues, together with the context from which they arise, have been set out by the parties in a document dated 2 February 2004, as follows:

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12 Para [64] of the CC Judgment.

13 Act 44 of 1927. All further references to the Precious Stones Act will be to this Act.

14 Para [89] of the CC Judgment.

15 Para [96] of the CC Judgment.

16 Para [103] of the CC Judgment.

"1. The plaintiff claims the following relief, *inter alia:*

1.1 An order that the defendants restore to the Richtersveld community ownership of the rights to minerals in, and exclusive beneficial use and occupation of, the subject land (Supplementary Particulars of Claim para 20.1);

1.2 An order that the Richtersveld community be compensated for the diminution in the value of their rights in the subject land as a result of the defendant's extraction of minerals from it (Supplementary Particulars of Claim para 20.2);

1.3 An order that the defendants repair the environmental damage to the subject land which is capable of repair, and an order declaring that the Richtersveld community be compensated for the environmental damage not capable of repair (Supplementary Particulars of Claim paras 20.3 - 20.7).

2. The defendants deny:

2.1 that the Restitution of Land Rights Act 22 of 1994, as amended, ("the Act") provides for a combination of both restoration of a right in land and equitable redress (first defendant's plea paras 2.1 and 2.2; second defendant's plea paras 3(a) and (b));

2.2 that the Act empowers this Court to grant an order that the environmental damage to the subject land be repaired or that the plaintiff is entitled to any compensation for such damage under the Act (first defendant's plea paras 13.2 and 13.3; second defendant's plea para 12).

3. At a pre-trial conference held on 23 January 2004, the parties agreed that they would formulate the issues to be argued as initial issues on 1 and 2 April 2004. The parties have since agreed that they are these:

3.1 Does the Act empower this Court to make an order for a combination of restitution of the subject land, with equitable redress, more specifically:

(a) granting the plaintiff restitution of the whole of the subject land together with compensation for the diminution in the value of the land as a result of the defendant's extraction of minerals from it;

(b) granting the plaintiff restitution of a portion or portions of the subject land together with compensation for that part of the subject land in respect of which restitution is not ordered?

3.2 Does the Act empower this Court to make an order directing the defendants to repair environmental damage to the subject land or to compensate the plaintiff for such damage?"

[11] The hearing of the above issues was set down for 1 April 2004. Shortly before that date, both defendants gave notice of their intention to amend their pleas by including a new paragraph to the effect that, had the plaintiff's indigenous rights in the subject land been recognised by the Precious Stones Act which was in force at the time, it would have been encumbered and restricted in various

ways by the Act; consequently an award under the Restitution of Land Rights Act in relation to the plaintiff's rights to minerals and precious stones in the subject land, falls to be calculated with regard to such encumbrances and restrictions.[17] The plaintiff opposed the applications for amendment.

[12] The plaintiff claims

- restoration of the rights in the subject land to which it is entitled, and
- compensation insofar as the defendants cannot make complete restoration of such rights because minerals have been extracted from and environmental damage has been caused to the subject land.

These claims underlie the issues which are the subject of this judgment. In adjudicating upon them, I will consider, firstly, whether as a matter of law it is competent for this Court to grant the plaintiff both restoration and equitable redress in the form of compensation. Thereafter, I will consider whether this Court has jurisdiction to order the defendants to repair the environmental damage caused to the subject land, or to pay compensation for such damage. Lastly, I will consider the applications to amend.

[13] A claimant who satisfies the requirements of section 2 of the Restitution of Land Rights Act, is entitled to restitution. Section 2 does not entitle the claimant to any particular form of restitution. A substantive right to a particular form of restitution only comes into existence when this Court makes a restitution order.[18] The Restitution of Land Rights Act defines "restitution of a right in land" as meaning -

> "(a) the restoration of a right in land; or
> (b) equitable redress."[19]

These terms, in turn, are defined as follows -

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17 The full text of the proposed amendment is quoted in par [39] below.

18 *Blaauwberg Municipality v Bekker* [1998] 1 All SA 88 (LCC) 104d - e; *In re Kranspoort Community* 2000 (2) SA 124 (LCC) para [82]; *The Khosis Community at Lohatla & Others v The Minister of Defence & Others*, unreported judgment of the SCA in case 665/2002 delivered on 8 March 2004 para [5].

19 Sec 1 of Act 22 of 1994.

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

"*equitable redress* means any equitable redress, other than the restoration of a right in land, arising form the dispossession of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices, including -

(a) the granting of an appropriate right in alternative state-owned land;

(b) the payment of compensation."[20]

[14] The court's power to make a restitution order is in the first place derived from section 35 of the Restitution of Land Rights Act. It gives the court a discression to order *"a wide variety of potential forms of relief"* in any particular case.[21] Section 35(1)[22] provides that this court may *inter alia:*

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20 Sec 1 of Act 22 of 1994.

21 The Makuleke Community concerning Pafuri Area of the Kruger National Park and Environs, Soutpansberg District, Northern Province [1998] JOL 4264 (LCC) para 8; *In re Kranspoort Community* 2000 (2) SA 124 (LCC) para 82.

22 Section 35(1) reads as follows:

"The Court may order -

(a) the restoration of land, a portion of land or any right in land in respect of which the claim or any other claim is made to the claimant or award any land, a portion of or a right in land to the claimant in full or in partial settlement of the claim and, where necessary, the prior acquisition or expropriation of land, portion of land or right in land: Provided that the claimant shall not be awarded land, a portion of land or a right in land dispossessed from another claimant; or the latter's ascendant, unless -

(i) such other claimant is or has been granted restitution of a right in land or has waived his or her right to restoration of the right in land concerned; or

(ii) the Court is satisfied that satisfactory arrangements have been or will be made to grant such other claimant restitution of a right in land;

(b) the State to grant the claimant an appropriate right in alternative state-owned land and, where necessary, order the State to designate it;

(c) the State to pay the claimant compensation;

(d) the State to include the claimant as a beneficiary of a State support programme for housing or the allocation and development of rural land;

(e) the grant to the claimant of any alternative relief."

- order *"the restoration of land, a portion of land or any right in land ..... to the claimant"*[23];
- order *"the State to pay the claimant compensation"*.[24]

There is no suggestion in the language of section 35(1) that the court may only select one of the possible orders and may not combine two or more of them in the exercise of its wide discretionary remedial powers.

[15] Far from limiting restitution of a right in land to one form only, there are compelling indicators in section 35(1) that the Court, in awarding restitution, may order a combination of several forms. These indicators include the following:

- Section 35(1)(a) provides that the Court may order restoration or award substitute land in full or in partial settlement of the claim. The clear implication is that if such an order is made in partial settlement of the claim, it may be combined with an additional order in settlement of the balance of the claim.

- In terms of section 35(1)(d) the court may order the state to include the claimant as a beneficiary of a state support programme for housing or the allocation and development of rural land. Such an order would seldom suffice as the only relief afforded to the claimant, but would often be an appropriate form of supplementary relief. It could hardly have been intended that the court may not combine such an order with other relief granted under section 35(1).

- Section 35(1)(e), allows the court to order that the claimant be granted any alternative relief. It clearly allows the court to supplement any relief granted under sections

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23 Section 35(1)(a).

24 Section 35(1)(c).

35(1)(a) to (d). It could never have been intended to be competent only in the absence of other relief.

[16] The definitions of "*restitution of a right in land*", "*restoration of a right in land*" and "*equitable redress*" in section 1 of the Restitution Act, do not in any way contradict or detract from the meaning and implications of section 35(1). They merely make it clear that "*restoration of a right in land*" and "*equitable redress*" are two discrete forms of "*restitution of a right in land*", and that they do not overlap. They do not say or imply that the court may not, in an appropriate case, order a combination of both.

[17] Section 25(7) of the Constitution[25], which forms the constitutional foundation for the right to restitution, does preclude this interpretation of section 35(1) of the Restitution of Land Rights Act. Section 25(7) provides that a claimant dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices "*is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress*".[26] It does not say or imply that Parliament may not authorise or that a court may not afford restitution through a combination of both. Section 25(7) of the Constitution merely sets the minimum threshold for the constitutionally guaranteed right to "*restitution*" or "*equitable redress*", and then leaves it to Parliament to determine the extent of the relief.

[18] After the Constitution[27] was adopted, the Restitution of Land Rights Act was amended to bring it in line. More specifically, the preamble was amended to provide a reference to the restitution of property or to equitable redress. Furthermore, the term "*restitution of a right in land*" was defined as meaning the restoration of a right in land or equitable redress.

[19] Both Mr Schippers for the first defendant and Mr Gauntlett for the second defendant

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25 Act 108 of 1996.

26 The word "restitution" in section 25(7) evidently means "restoration".

27 Act 108 of 1996.

contended that "*or*" in the context of the definition cannot and does not mean "*and*". There is support to be found in several decided cases for the view that the meaning of "*or*" would in most (but not all) cases be disjunctive, not conjunctive. For example, Bristowe J held in *Colonial Treasures v Great Eastern Collieries Ltd* [28]:

> "To read 'or' as 'and' is a violent expedient which ought not to be adopted except in the last resort, for the simple reason that 'or' does not mean 'and', and when the legislature uses 'or' it must *prima facie* at all events be taken to mean 'or' and not 'and'."

In *Ngcobo and Others v Salimba CC; Ngcobo v Van Rensburg*[29], Olivier JA found that -

> "It is unfortunately true that the words 'and' and 'or' are sometimes inaccurately used by the Legislature and there are many cases in which one of them has been held to be the equivalent of the other (see the remarks of Innes CJ in *Barlin v Licensing Court for the Cape* 1924 AD 472 at 478). Although much depends on the context and the subject-matter (*Barlin* at 478), it seems to me that there must be compelling reasons why the words used by the Legislature should be replaced; *in casu* why 'and' should be read to mean 'or', or *vice versa*. The words should be given their ordinary meaning ' ..... unless the context shows or furnishes *very strong grounds* for presuming that the Legislature really intended' that the word not used is the correct one (see Wessels J in *Gorman v Knight Central Gm Co Ltd* 1911 TPD 597 at 610; my emphasis). Such grounds will include that if we give 'and' or 'or' their natural meaning, the interpretation of the section under discussion will be *unreasonable*, *inconsistent* or *unjust* (see *Gorman* at 611) or that the result will be *absurd* (*Greyling and Erasmus (Pty) Ltd v Johannesburg Local Road Transportation Board and Others* 1982 (4) SA 427 (A) at 444C-D) or, I would add, *unconstitutional* or *contrary to the spirit, purport and objects of the Bill of Rights* (s 39(2) of the 1996 Constitution)."

[19] In the case of *Botha v Suid-Afrikaanse Spoorweë en Hawens*[30], Mostert J analysed a provision in the Railways Expropriation Act[31] which allows an expropriatee to claim compensation under three different headings, each of them separated from the others by the word "or". He found that the context of the Act

> "..... dui op alternatiewe vergoedingsoorsake wat aan die onteiende beskikbaar is en dat die uitoefening van sy regte om skade te eis kragtens een van daardie vergoedingsoorsake hom nie

28 1904 TS 716, at 719.

29 1999 (2) SA 1057 (SCA) at 1067J - 1068D.

30 1975 (4) SA 669 (T).

31 Section 6 of Act 37 of 1955 (now repealed).

die reg ontneem om kragtens 'n ander van sy vergoedingsoorsake te eis nie."[32]

On the same basis, it can be concluded that the award of restitution to a claimant under the Restitution of Land Rights Act need not be confined to only one of its forms.

[20] Mr Gauntlett submitted that the words "*other than*" in the definition of equitable redress being "*any equitable address, other than the restoration of a right in land, arising from the dispossession of a right in land .....*", is indicative that a claim for "equitable redress" cannot be combined with a claim for "restoration". I cannot agree. The words "*other than*" intends to convey nothing more than that restoration and equitable redress constitute separate forms of restitution. It does not say or imply that redress awarded to a claimant cannot be a combination of both forms.

[21] If the context of the Restitution of Land Rights Act requires a conjunctive meaning to be given to the word "*or*" where it is used in the definition of "*restitution of a right in land*", it must be so interpreted. As I have indicated, section 35(1) of the Act points to a conjunctive meaning. I will, however, also consider two other interpretive aids. The first is to enquire into the purpose of the enactment, which can provide a reliable indication of what the legislature intended by the enactment. The second is to examine whether giving "*or*" a conjuctive meaning would lead to any absurdity, inconsistency, hardship or anomaly. I will commence with the first.

[22] Our law is, in the words of Schutz JA in *Standard Bank Investment Corporation Ltd v Competition Commission and Others*[33], *"an enthusiastic supporter of purposive construction*", in the sense described by Smalberger JA in *Public Carriers Association and Others v Toll Road Concessionaries (Pty) Ltd and Others*[34]:

> "Mindful of the fact that the primary aim of statutory interpretation is to arrive at the intention of the Legislature, the purpose of a statutory provision can provide a reliable pointer to such intention where there is ambiguity".

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32 At 673B - C.

33 2000 (2) SA 797 (SCA) 811I - J.

34 1990 (1) SA 925 (A) 943G - H.

The Restitution of Land Rights Act must, on the basis of previous decisions by this Court, be interpreted purposively. See in this regard *In re Kranspoort Community*[35], *Dulabh and Another v Department of Land Affairs*[36] and *In re Former Highlands Residents: Sonny v Department of Land Affairs*[37]

[23] The purpose of the Restitution of Land Rights Act has been exemplified in several judgments, both of this Court and of the Constitutional Court. The Constitutional Court asserted in its judgment in this case that the purpose of the Act is -

> "to provide redress to those individuals and communities who were dispossessed of their land rights by the government because of the government's racially discriminatory policies in respect of those very land rights".[38]

[24] This court decided in *Dulabh v Deparment of Land Affairs*[39] that the Restitution of Land Rights Act -

> "clearly aspires to redress the wrongs of the past, by giving restitution to those dispossessed under discriminatory provisions of apartheid legislation, and the meaning of restitution must be determined in this context."

It was held in *Hermanus v Department of Land Affairs*[40] that the principles which govern the determination of compensation payable in satisfaction of a claim for restitution, include the following:

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35 2000 (2) SA 124 (LCC) at 142B-E.

36 1997 (4) SA 1108 (LCC) at 1126B - 1128B; [1997] 3 All SA 635 (LCC) at 650d - 652a.

37 2000 (2) SA 351 (LCC) 355G - 357G, [2000] 1 All SA 157 (LCC).

38 Para [98] of the CC Judgment.

39 1997 (4) SA 1108 (LCC), para [55].

40 2001 (1) SA 1030 (LCC) at 1042E - 1043A.

> "(a) On ordinary principles of justice, a person who, under compulsion of law, has his property taken away from him, should be compensated in full.
> (b) Full compensation not only includes land value, but also other damage, loss or expense directly attributable to the taking of the land."

This court reiterated in *Baphiring Community v Uys and others*[41] that

- the purpose of giving fair compensation to the claimant for restitution, "*is to put that person or community, insofar as money can do it, in the same position as if the land had not been taken*", and

- compensation "*also implies reparation for the wider damage inflicted as the result of dispossession and oppression*".

[25] The purpose of restitution under the Restitution of Land Rights Act also finds expression in the factors which the court is required to take into account under section 33 when exercising its remedial powers under section 35. They include:

> "(b) the desirability of remedying past violations of human rights;
> (c) the requirements of equity and justice;
> (eB) the history of the dispossession, the hardship caused, the current use of the land and the history of the acquisition and use of the land;
> (f) any other factor which the Court may consider relevant and consistent with the spirit and objects of the Constitution and in particular the provisions of section 9 of the Constitution".

[26] On the defendants' narrow interpretation of the court's remedial powers, namely that the court must choose between restoration on the one hand and equitable redress on the other, without ever combining the two, it will in some instances be impossible to give full weight to all relevant factors which have to be considered. Each form of restitution may, on its own, fail to achieve the overall purpose of restitution. The absence of explicit authority to combine various forms of restitution does not rule out

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41 Unreported judgment of the LCC in case 64/1998 delivered on 5 December 2003, paras [12] and [14], available form www.wits.law.ac.za.

the court's power to order a combination, where equity and justice so require. It was held by this court in *Former Highlands Residents: in re Sonny and Others v Department of Land Affairs*[42] that -

> "where it is evident that the legislature did not intend to prescribe for a particular factual situation, but to leave it to the court to work out a solution as the circumstances of every particular case may require, justice and equity will guide the court in making an appropriate order".

[27] This Court put forward an example of a possible combined order in the *Dulabh* case.[43] It made the point:

> "that the brutal forced removal impetus under apartheid resulted in people not only being dispossessed of their land, but often in their houses simultaneously being demolished. Whilst these people may now be able to return to their land under the Land Restitution Act, they cannot return to their demolished houses. In instances such as these, an appropriate order might well be an award of compensation for the loss of a house in addition to physical restitution/restoration of a right in land. To exclude compensation in cases like these would be to ignore the injustice of the demolitions".

[28] Mr Trengove, who appeared for the plaintiff, gave similar examples. These include situations where

- it is feasible to restore part of the land but not all of it because the remainder has been developed or alienated into hands from which recovery is not practicable;

- restoration of most of the bundle of rights comprising ownership of the land is feasible but not all of it because the land has been encumbered by servitudes or other limited real rights in favour of third parties and it is not practicable to have the encumbrances removed; or

- restoration of all of the rights comprising ownership of the land is feasible but the land has been damaged and its minerals extracted since dispossession as a result of which

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42 [2000] 1 All SA 157 (LCC), para [22].

43 *Dulabh and Another v Department of Land Affairs* 1997 (4) SA 1108 (LCC) para [59] at 1129C - E.

mere restoration does not put the claimant "*in the same position as if the land had not been taken*".[44]

[29] As the defendants would have it, the plaintiff can either get restoration of what is left of the subject land after the removal of the diamonds, without compensation for the diamonds, or compensation which would include the value of both the land and the mineral rights, but never a combination of restoration and compensation. This interpretation of the Restitution of Land Rights Act would mean that the court has to choose between the desirability of restoration on the one hand and the need for full compensation on the other. That, in my view, would defeat the purpose of the Act.

[30] I turn to the next interpretive aid. Our courts have often applied the principle, as described in *Bhyat v Commissioner for Immigration* [45], that when construing a provision of an Act, the plain meaning of its language must be adopted, unless it leads to some absurdity, inconsistency, hardship or anomaly which the court is satisfied the legislature could not have intended.[46] On the defendants' interpretation of the Restitution of Land Rights Act, if the court orders the payment of compensation in satisfaction of a claim for restitution, the compensation will be such as to compensate the claimant in full for its loss. It will put the claimant, "*insofar as money can do it, in the same position as if the land had not been taken*".[47] On the other hand, if the court in the exercise of its remedial discretion, orders restoration of land which had been impaired after the dispossession, it will be precluded on the defendants' interpretation from supplementing the restoration with an order for the payment of compensation. This will result, shown in the examples given above, in a stark discrepancy between the adequacy of the remedies of restoration on the one hand and compensation on the other.

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44 See the *Baphiring Community* case, *supra*.

45 1932 AD 125 at 129.

46 See also *POSWA v MEC for Economic Affairs, Environment and Tourism, Eastern Cape* 2001 (3) SA 582 (SCA) para [10] and *Bekker v Naude* 2003 (5) SA 173 (SCA) para [12].

47 *The Baphiring Community v Uys and others*, unreported judgment of the LCC in case 64/1998 delivered on 5 December 2003, para [12], available from www.wits.ac.za.

This court recognised the possible anomaly in the *Highlands*[48] and *Hermanus*[49] cases, but refrained from deciding how it should be resolved because it was not necessary to do so. The anomaly only arises on the defendants' interpretation of the right to restitution. It is a further indicator against their interpretation.

[31] I conclude that it is competent for the court to order both restoration and compensation in satisfaction of a claim for restitution whenever a combination of both are required to achieve the objectives of the Restitution of Land Rights Act.

[32] I turn to the issue of whether this Court is competent to make an order for the repair of or compensation for environmental damage. The plaintiff alleges that the defendants caused substantial environmental damage to the subject land. It asks for orders that the defendants repair the damage insofar as it is capable of repair and pay compensation for it insofar as it is not. The defendants plead *inter alia* that a claim for the repair of or compensation for environmental damage, is not competent under the Restitution of Land Rights Act. Mr Trengove emphasized that it is the competence of such an order that is now at issue, and not whether it is an appropriate remedy in the circumstances of this case. It will first consider the remedy of compensation, and then the remedy of repair.

[33] It was made clear in the *Dulabh,*[50] *Hermanus*[51] and *Baphiring*[52] cases that an award of compensation should compensate the claimant in full, so as to put the claimant "*insofar as money can do it, in the same position as if the land hand not been taken*". The compensation must provide not only for the value of the land taken, but also for other damages, loss or expenses directly attributed to the dispossession of the land. It follows that, in a case such as this one, if the Court orders restoration

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48 *Ex parte Former Highland Resident; In re: Ash v Department of Land Affairs* [2000] 2 All SA 26 (LCC) para [77].

49 *Hermanus v Department of Land Affairs* 2001 (1) SA 1030 (LCC)1044C-E, para [28].

50 *Dulabh v Department of Land Affairs* 1997 (4) SA 1108 (LCC) para [45].

51 *Hermanus v Department of Land Affairs* 2001 (1) SA 1030 (LCC) para [25].

52 *The Baphiring Community v Uys and others*, unreported judgment of the LCC in case 64/1998 delivered on 5 December 2003, paras [12] and [14], available from www.wits.ac.za.

of all or part of the subject land, and if it finds that the defendants have caused damage to such land, it may decide to award, in addition, compensation to allow for the damage. It is trite that, in a case where only compensation is awarded, the compensation has to sufficient make up for what was taken away, and not merely for the current value of the land in its damaged condition. It ought to be no different where the court orders restoration of the damaged land instead. In such a case it would be competent for the court to order that, in addition to the restoration of the land, compensation be paid for the reduction in the value of the land caused by the environmental degradation.

[34] Mr Trengove submitted that the court is not confined to the remedy of compensation for the impairment of the land, and that under section 35 of the Restitution of Land Rights Act it may also order the state to repair the degradation of the land, insofar as it is capable of repair.
Mr Trengove suggested that the power under section 35(1)(a) to order the state to restore the land to the claimant, includes the power to order the state to restore the land in the condition in which it was at the time of dispossession. The concept of restoration means the return to the claimant of what was taken from it. It implies the return of the land in its condition as at the time of dispossession, where it is feasible to do so. The court is expressly empowered to order the state to acquire the land if it is in the hands of a third party, by expropriation if necessary, in order to return it to the claimant.[53] There appears to be no reason why it could not also be ordered to return the land to its erstwhile condition by repairing the damage to it, in cases where it is feasible to do so.

[35] Section 35(2)(a) of the Restitution of Land Rights Act empowers the court to "*determine conditions which must be fulfilled before a right in land can be restored or granted to a claimant*". It may for instance require the claimant to pay a specific sum of money to the state before restoration.[54] I can find no reason why the court may not also make it a condition of restoration that the state must first repair any damage to the land.

[36] Section 35(1)(e) empowers the court to grant the claimant "*any alternative relief*". The

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53 Section 35(1)(a) read with section 35(5).

54 Section 35(2)(b).

legislature left "*alternative relief*" undefined, so as to confer the widest possible discretion on the court to devise an appropriate remedy for achieving the purposes of the Restitution of Land Rights Act in the circumstances of any particular case. This Court has a wide discretion in its selection of an appropriate remedy from an extensive variety of potential forms of relief.[55] I conclude that, in the exercise of that wide discretionary power, the court may in an appropriate case order the state to repair the damage to the land, insofar as it is feasible to do so and to pay compensation for it insofar as it is not. I have not been asked to decide whether such an order would be appropriate in the circumstances of this case, and I refrain from making any finding or expressing any opinion on that question.

[37] I come to the application to amend. The application must be considered in the light of the following. The parties agreed at the pre-trial conference on 31 August 2000 and this Court ordered,

> "that the issues to be adjudicated at the hearing commencing on 4 September 2000 comprise everything which the claimant needs to establish to entitle it to restitution (including, but not limited to, the nature of the rights which the alleged community previously held, and the identification of the land over which such rights were held) with the exception only of the form which any restitution to which the claimant might be entitled, will take (restoration, awarding alternative state-owned land or compensation) and the amount of compensation (if compensation is to be awarded)."[56]

The parties subsequently agreed and the Court again ordered,

> "that, insofar as the pleadings do disclose any [issue under s 2(2) of the Restitution Act], it stands over for hearing and determination in the second phase of the case".[57]

[38] It follows that everything which would entitle the plaintiff to restitution had to be determined in the first round, except the following excluded issues which stood down for determination in the second round:

- The form which any restitution to which the plaintiff might be entitled, will take and the amount of compensation, if any.

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55 *Makuleke Community Claim pertaining to Pafuri Area of Kruger National Park* [1998] JOL 4264 (LCC) para 8.

56 Minute 31 August 2000 E24 para 7.

57 Minute 28 September 2000 E24 para 5.

- Any issue under s 2(2) of the Restitution Act, if such an issue in fact arose on the pleadings as they stood at the time.

[39] The first round issues included the question whether the plaintiff was dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices and, if so, what the nature of that right was. This issue has been finally determined by the Constitutional Court. Both defendants now apply for leave to amend their supplementary pleas by including a further contention based on the Precious Stones Act. The amendment proposed by the first defendant reads as follows:

> "(a) The Precious Stones Act, 1927 (No 44 of 1927) ("the PSA") came into effect on 16 November 1927.
>
> (b) The Constitutional Court has held (in paragraphs [89] and [90] of its judgment in this matter) that the PSA and the Proclamations made pursuant to it stripped the plaintiff of its indigenous rights of ownership to land, minerals and precious stones in the subject land, on a basis which was racially discriminatory.
>
> (c) In terms of section 1 of the PSA, the right of mining for and disposing of precious stones in the subject land was vested in the Crown.
>
> (d) In terms of section 2(1) of the PSA:
>
> (i) its provisions applied to land in the Province of the Cape of Good Hope held by private persons under title which did not contain a reservation of precious stones in favour of the Crown.
>
> (ii) its provisions did not apply to any such land upon which precious stones had been discovered and mining or digging operations carried on prior to 1 April 1927, in a manner satisfactory to the Minister of Mines, whose certificate in that regard was final.
>
> (e) Mining and digging operations were as a fact not conducted on the subject land prior to 1 April 1927,and in any event no certificate as contemplated in section 2(1) was issued by the Minister of Mines in respect of any such operations.
>
> (f) The first defendant avers that equitable redress under the PSA should properly have regard to what would probably have been the position had the plaintiff's indigenous rights of land ownership and rights to minerals and precious stones been regarded

equally with registered title, for the purposes of section 2(1) read with section 116 of the PSA.

(g) If section 8 of the PSA had applied to the plaintiff, the plaintiff would have been entitled (as from 16 November 1927) to prospect for such stones on the subject land, or grant the right to others to do so.

(h) In terms of section 13 of that Act, a prospector who discovered any precious stones at any place was entitled to be issued with a certificate by the Mining Commissioner entitling him to select on private land in the Cape of Good Hope, a maximum of 200 claims.

(i) In terms of section 19 of that Act, whenever precious stones were discovered on private land in the Cape of Good Hope, the owner was entitled to receive from the Mining Commissioner a certificate entitling him to select a maximum of 400 claims.

(j) Thus, if the plaintiff's indigenous rights of ownership recognised under the PSA, as owner of the minerals and precious stones in the subject land, and if the plaintiff were to show that precious stones had been discovered and mining or digging operations were carried on in the subject land after 1 April 1927, and that the Minister had issued a certificate in respect thereof then in terms of the PSA, the plaintiff would have received a maximum of 600 claims in respect of the subject land (and then only in the event of it being found that such a discovery was made on the subject of land, which is not admitted) together with such licence monies as may have been collected in respect of such digging (pursuant to section 22 of the PSA).

(k) In terms of section 6(1) of the PSA the plaintiff as holder of rights to precious stones in the subject land could have prospected for diamonds itself or could have permitted not more than five persons to prospect: had the plaintiff neither itself prospected nor allowed someone else to prospect nor consented to proclamation of an alluvial digging, the subject land could not have been so proclaimed.

(l) Such permission could have been granted in the form of a prospecting contract, namely a contract confirming the right to prospect with an option to purchase the diamond rights, but due to the statutory reservation of the right to mine for diamonds to the Crown by virtue of section 1 of the PSA, the plaintiff could not have granted to a prospector an option to acquire any mineral lease.

(m) Any alluvial digging outside the maximum of 600 claims per registered title aforesaid:

(i) could have become available for disposal and for distribution of claims to the

public in terms of section 49 of that Act;

(ii) could have been proclaimed a State alluvial digging in terms of section 75 of that Act even though the plaintiff was the owner of precious stones on the subject land.

(n) Had the plaintiff's indigenous rights been recognised by the PSA, a distribution to the public in terms of section 49 and a proclamation as a State alluvial digging in terms of section 75 of the PSA in all likelihood would have occured.

(o) In the premises, if the plaintiff's indigenous rights aforesaid had been recognised by the PSA:

(i) the rights of the plaintiff in respect of precious stones in the subject land would have been encumbered and restricted by the reservation to the Crown of the right to mine and dispose of such stones on 16 November 1927;

(ii) the plaintiff, as a matter of law would thereby have lost to the second defendant (representing the public interest) the entirety of any right to mine and dispose of precious stones in the subject land, save for an entitlement to select at most 600 claims (the remainder of the subject land being available for the pegging of claims by the public), together with such licence monies as may have been collected in respect of such digging.

(p) Further in the premises, any order of restitution under the Restitution Act, in relation to the plaintiff's rights to minerals and precious stones on the subject land, falls to be calculated with regard to the aforegoing and in particular, paragraph (o)(ii)."

The second defendant applied for a similar amendment, which I need not quote.

[40] The plaintiff submits that the amendments cannot be allowed for each of the following reasons:

- The amendments seek to introduce a new first round issue. It is no longer permissible to do so.

- The amendments seek to introduce a contention which contradicts a final determination made by the Constitutional Court. It is not permissible to do that.

- The amendments will render the defendants' pleas excipiable in that they seek to introduce allegations that are bad in law and/or vague and embarrassing.

I will deal with each of these grounds of objection in turn.

[41] I commence with the submission that the amendment seeks to reopen a first round issue. According to Mr Trengove, that is apparent from the penultimate paragraph of the proposed amendment. It draws the following conclusions:

> "In the premises:
>
> (1) the rights of the plaintiff in respect of precious stones in the subject land would have been encumbered and restricted by the reservation to the Crown, of the right to mine and dispose of such stones on 16 November 1927;
>
> (2) the plaintiff as a matter of law would thereby have lost to the second defendant (representing the public interest) the entirety of any right to mine and dispose of precious stones in the subject land, save for an entitlement to select at most 600 claims (the remainder of the subject land being available for the pegging of claims by the public), together with such licence monies as may have been collected in respect of such digging"

It is clearly not permissible for this Court to revisit a first round issue at this stage of the proceedings. See *David Hersch Organisation v Absa Insurance Brokers*[58]. A court which has given a final decision on a preliminary issue is *functus officio*, and cannot reopen the issue[59].

[42] One of the grounds upon which the proposed amendments can be successfully opposed is that it would resuscitate an issue which has already been disposed of in a previous hearing. The defendants argue that their proposed amendment does not contradict or re-open the Constitutional Courts' finding that the plaintiff is entitled to restitution of the right of ownership of the subject land including its minerals and precious stones. According to the defendants, the Precious Stones Act[60] brought about significant legal consequences in relation to the right of mining for and disposing of all

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58 1998 (4) SA 783 (T) at 787.

59 See *SA Eagle Versekeringsmaatskappy v Harford* 1992 (2) SA 786 (A) at 792 and *Schmidt Plant Hire v Pedrelli* 1990 (1) SA 398 (D) at 405 to 409.

60 Act 44 of 1927.

precious stones. It's intended scope, subject only to the proviso to section 2(1) thereof[61] and to what the Constitutional Court held was its discriminatory premise, would according to the defendants have affected all land owners. It would have impacted upon the plaintiff's legal rights, had they been recognised at the time. Indeed, according to its long title, the purpose of the Precious Stones Act was -

> "to consolidate and amend the laws in force in the several provinces of the Union relating to prospecting and mining for precious stones, to amend in certain respects the laws relating to the diamond trade".

[43] The defendants' submission may be tested by a notional example. In deciding upon a claim for restitution, this Court might hold (in a "round one" ruling) that a claimant had been dispossessed of its ownership of a farm by a racially discriminatory law or practice. When the Court determines compensation during round two, the defendant might point to legal constraints which would in any event have affected the exercise of the lost ownership. Questions of the impact on the lost ownership of measures such as pollution control, town planning or even a possible expropriation, have to be relevant for the determination of compensation. According to the defendants, this example shows that it is not implicit in the "round one" determination made by the Constitutional Court in this case that the plaintiff in round two

- can shrug off other legislative or executive acts applicable to <u>all</u> relevant mineral right holders; or

- can by so doing assert a claim to "equitable redress" which puts them in a <u>better</u> position than others.

The defendants argue that their proposed amendments are squarely related to the amount of compensation which might be awarded, and not to the existence of the dispossessed right.

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61 Section 2(1) reads as follows:

> "Notwithstanding anything in any other law contained, the provisions of this Act shall apply to land in the Province of the Cape of Good Hope held by private persons under title which does not contain a reservation of precious stones in favour of the Crown: Provided that, save for the provisions of section one hundred and fifteen, the provisions of this Act shall not apply to any such land upon which precious stones have been discovered and mining or digging operations have been carried on prior to the first day of April 1927, in a manner satisfactory to the Minister, whose certificate shall be final."

[44] The plaintiff's second objection, which is related to the first, is that the Constitutional Court has already held that the right of which it was dispossessed was a right of full ownership, including minerals and precious stones. The proposed amendments, so it was contended, suggest that the rights were limited rights which fell significantly short of full ownership, in that they were encumbered and restricted by the reservation to the Crown of the right to mine and dispose of precious stones.

[45] Counsel for the defendants pointed out that, in the first place, the Constitutional Court spoke of ownership, not "*full*" ownership (as suggesting no possible limitations) [62]. Effect must be given to the *exact* words of the Constitutional Court's order, unless there is ambiguity, in which case reference may be made to the judgement itself. [63] In the second place, as already stated, the amendments proceed from the premise that the plaintiff had ownership of the mineral rights, and seek to establish what would have happened if that ownership had been recognised.

[46] Lastly, the plaintiff submitted that the defendants' amendments should in any event be disallowed because they will render their pleas bad in law and/or vague and embarrassing and consequently excipiable. The main thrust of the complaint is that the provision of the Precious Stones Act could not and does not detract from the plaintiff's rights. The restrictions are imposed by the Act on an "*owner*" or "*surface owner*". The Precious Stones Act [64] defines "owner" in relation to private land and "surface owner" as the registered owners. The plaintiff was never the registered owner. The Constitutional Court held that the plaintiff had been an indigenous law owner of the subject land (including its minerals and precious stones). That was not a registered right and was never capable of registration.

[47] Both defendants allege that their applications for amendments are based on a report by

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62 Full ownership was described by de Groot, *Inleiding tot die Hollandsche Rechts-Geleerdheid*, 2.3.9 as follows:

> "Volle is den eigendom waer door iemand met de zake alles mag doen nae sijn geliefte ende t'sijnen bate dat bij de wetten onverboden is."

63 *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A) at 305 D-H; *Frankel Max Pollak Vinderine Inc v Menell Jack Hyman Rosenberg & Co Inc and Others* 1996 (3) SA 355 (a) at 352 E-J; *Mostert NO v Old Mutual Life Assurance Co (SA) Ltd* 2002 (1) 82 (SCA) at 86 D.

64 Section 116.

an expert on mineral rights, Professor MO Dale. The report is annexed to the first defendant's heads of argument. It explains the origin of some of the defendants' proposed amendments. Mr Trengove submitted that much of the report is contingent upon a false premise. Professor Dale states in the opening paragraph of his report that it is based on the postulate -

> "That the community is in law to be regarded as if it were the registered holder (either as land owner or as separate mineral right holder under certificate or cession of mineral rights) of the rights to diamonds in the subject land at the time of the dispossession"

Mr Trengove argued that this postulate is incompatible with the finding of the Constitutional Court. The Constitutional Court held that the plaintiff had ownership of the subject land under indigenous law, including its minerals and precious stones.[65] That indigenous law right was never registered and was never capable of registration. It cannot be equated with a registered right.

[48] In essence, the alleged excipiability of the paragraphs which the defendants propose to insert into their pleas revolve around the issue of whether the Precious Stones Act apply to and restrict the rights which the Constitutional Court found the plaintiff had in respect of the subject land. It does not seem to add much to the first two objections.

[49] The main enquiry for this Court at the forthcoming trial, unless it confines its restitution award to restoration of the subject land, will be the basis for determining the compensation. The enquiry is a very broad enquiry, and the Court is unassisted by any precedent. The proposed amendment is directed at the assessment of any compensation which the Court might decide to award to the plaintiff. A key component of such an assessment could well be the value of the ownership of the right to minerals and precious stones on or under the subject land. The term "ownership", in the context of the Constitutional Court Order, denotes the legal relationship between the owner (*in casu*, the plaintiff) and the minerals and precious stones.[66] I am not persuaded that the Constitutional Court intended the relationship to be untrammeled by legislative constraints. Mr Trengove conceded during argument that, in valuing the plaintiff's rights, regulatory restrictions have to be taken into account. He suggested that

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65 Para [102] of the CC judgment.

66 See Silberberg and Schoeman's *The Law of Property*, 4th ed by Badenhorst, Pienaar and Mostert, p1.

the provisions of the Precious Stones Act on which the defendants rely, go beyond regulatory restrictions.

[50] The Court has a discretion whether or not to allow an amendment.[67] This discretion must be exercised with due regard to certain basic principles. If a defence proposed by an amendment is opposed on the basis that it is not viable in law, or that it would render a pleading excipiable, the Court should, in the absence of special circumstances, adjudicate upon the grounds for the objection and if they are valid, refuse the amendment.[68] There are, however, a number of reported decisions where the Court, in the peculiar circumstances of the case, allowed an amendment which might arguably be bad in law, without deciding whether it is bad or not.[69] In *Cordier v Cordier*[70] for example, the plaintiff sought an amendment to a claim which, in both its original and its amended form, might be prescribed. Barker J, in deciding whether to allow the amendment, said[71]-

> "it is only *possible*, not *definite*, that prescription is the full answer to plaintiff's case. It may be, on the other hand, that plaintiff is able to allege and prove an acknowledgment of liability by the defendant (cf s 14(1) of the 1969 Act) or a waiver of the defence, or some other counterblast to defendant's assertion that plaintiff's new claim is prescribed. The grant of the amendment will leave it open to plaintiff to do so, whereas its refusal will leave plaintiff no option but to appeal."

[51] This Court will have to break new ground in working out the principles upon which any compensation which it might decide to award, has to be appraised. Many factual and legal issues will come into play. The Court may have to turn back the clock and determine compensation on the basis of what might have been, had the plaintiff's rights been recognised at the time. In doing so the Court will, in the words used by King AJ in *Southern Transvaal Buildings (Pty) Ltd v Johannesburg City Council*[72], have to transport itself "*into a world of fiction*". It must postulate a non-existing

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67 *Commercial Union Assurance Co Ltd v Waymart NO* 1995 (2) SA 73 (A) 77F/G; *Caxton Ltd and Others v Reeva Forman (Pty) Ltd and Another* 1990 (3) SA SA 547 (A) 565G.

68 *RM van de Ghinste & Co (Pty) Ltd v Van de Ghinste* 1980 (1) SA 250 (C) 258H - 259A.

69 *Cross v Ferreira* 1950 (3) SA 443 (C), *Crawford-Brunt v Kavnat and Another* 1967 (4) SA 308 (C), *Christies Fish Supplies (Pty) Ltd v Ornelas Fishing Co (Pty) Ltd* 1978 (3) SA 431 (C).

70 1984 (4) SA 524 (C).

71 At 535I.

72 1979 (1) SA 949 (W).

environment where indigenous law ownership is recognised, and determine the impact which laws such as the Precious Stones Act, which did not contemplate such an environment, would have had on the mineral rights of the plaintiff. It will have to assess just and equitable compensation in a make-believe world, which King AJ aptly described as an "*Alice in Wonderland world*", where the task of the Court becomes "*curioser and curioser*".

[52] The relevance of the Precious Stones Act to the plaintiff's indigenous law rights is dependent upon the notional environment which the Court will have to postulate for purposes of determining compensation. It will be premature for the Court to pronounce on what impact the Act will have on the plaintiff's rights before the Court has decided what postulates will govern its appraisement of compensation.

[53] Mr Gauntlett suggested that the plaintiff appears to want the best of both worlds. It invokes the Constitutional Court's conclusions regarding the discriminatory effect of the Precious Stones Act, on the basis that the Act excluded it from recognised ownership, and then it invokes that very exclusion to escape the constraints which the Act imposes on land owners when it comes to an enquiry regarding equitable compensation.[73] The requirements of justice and equity to which the Court must have regard under section 33(c) of the Restitution of Land Rights Act, might well require the Court to postulate a "what might have been" scenario in which the plaintiff's rights are subject to some constraints (not necessarily those contained in the Precious Stones Act), and to value them accordingly. Any decision at this stage on whether particular constraints will have to be thought in or thought out, may pre-empt the freedom which the Court should have to work out an equitable basis for assessing compensation.

[54] In my opinion, the exceptional circumstances of this case justify a departure from the ordinary rule that objections to a proposed amendment of a pleading on grounds that the amendment would render the pleading excipiable or not viable in law, should be heard *pari passu* with the application for the amendment.[74] By allowing the amendment, I will enable the defendants to raise the

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73 The plaintiff submitted that the Precious Stones Act could not restrict its rights to minerals and precious stones because it was a customary law owner, and not a registered owner.

74 See *Nxumalo v First Link Insurance Brokers (Pty) Ltd* 2003 (2) SA 620 (T) 623A-E.

limitations imposed by the Precious Stones Act, should it become necessary to determine what the plaintiff may or may not have been entitled to do with its rights to minerals and precious stones, had it not been dispossessed thereof. It is possible (I put it no stronger than that) that the plaintiff may be able to show that some legal restrictions imposed by the Precious Stones Act (insofar as they may be relevant), limit the effect of the Constitutional Court Order and must therefore be disregarded. The plaintiff remains free to deliver a replication to that effect, or to argue it at the forthcoming trial.

[55] I come to the issue of costs. The plaintiff was substantially successful on the two legal issues reserved for decision during this round of the proceedings. It is entitled to its costs. It was not argued that the practice which this Court sometimes follow of not making costs orders, should be followed in this case. The defendants should also pay the costs of the applications to amend. Because the plaintiff's opposition to the application was not unreasonable, the costs will include the costs of opposition.

[56] It is hereby ordered as follows:

(a) It is declared that the orders claimed by the plaintiff for both restoration and compensation in satisfaction of its right to restitution in terms of section 2(1) of the Restitution Act, are competent in terms of section 35 of the Restitution Act.

(b) It is declared that the orders claimed by the plaintiff for repair of and/or compensation for the environmental damage to the subject land, are competent in terms of section 35 of the Restitution Act.

(c) The first defendant's application to amend its supplementary plea in accordance with the revised notice of amendment of 5 April 2004, is hereby granted.

(d) The second defendant's application to amend its supplementary plea in accordance with the revised notice of amendment of 31 March 2004, is hereby granted.

(e) The defendants are ordered jointly and severally to pay the plaintiff's costs relating to,

- the determination of the preliminary issues and
- the applications to amend.

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JUDGE A GILDENHUYS

I agree

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PROF M WIECHERS
***ASSESSOR**

* (Assessor appointed in terms of section 28(5) of the Restitution of Land Rights Act, Act 22 of 1994).

For the plaintiff:
Adv W H Trengove SC, Mr G Budlender, Adv P Hathorn, Adv J F Roos , Mr H Smith instructed by *Legal Resources Centre, Cape Town.*

For the first defendant:
Adv J J Gauntlett SC, Adv S Ntai instructed by *E Moosa, Waglay & Peterson, Cape Town.*

For the second defendant:
Adv Schippers SC instructed by *State Attorney, Cape Town*.