IN THE LAND CLAIMS COURT OF SOUTH AFRICA

(HELD IN THE WESTERN CAPE)

CASE NO: LCC 148/08

In the matter between:

ISABEL FLORENCE (NEE DODGEN) Plaintiff

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED
5 June 2012
DATE SIGNATURE

versus

BROADCOUNT INVESTMENTS (PTY) LTD First Defendant

THE GOVERNMENT OF THE REPUBLIC

OF SOUTH AFRICA Second Defendant

THE CITY OF CAPE TOWN Third Defendant

JUDGMENT

CARELSE J:

[1] This is a claim for restitution in terms of the Restitution of Land Rights Act ('Restitution Act'). The claim relates to an improved property, Erf 44408, Cape Town, 1071 m^2 in extent, commonly known as Sunny Croft, Kromboom Road, Fraserdale Estate, Rondebosch. The claim was initially launched by Lionel Florence acting in his own right and on behalf of his brothers, Norman Samuel and Ronald Philip Florence. Norman Florence in a letter dated 2 October 1995,

gave Lionel Florence his interest in Sunny Croft to dispose of as his own. Ronald Florence granted Lionel Florence written authority to act on his behalf without surrendering his right to share in any restitution award. Lionel Florence died before the claim was finalised. His wife, Isabel Joyce Florence was substituted as the plaintiff. The Florence family are members of the so-called 'coloured 'community.

[2] When the claim was launched Lionel Florence sought restoration of ownership of Sunny Croft but the claim for restoration has since been abandoned. Instead the plaintiff seeks *inter alia* equitable redress in the form of financial compensation as well as the erection of a memorial plaque to be erected on the site where Sunny Croft once stood. As a result of the plaintiff abandoning the claim for actual restoration the first defendant concluded a settlement agreement with the plaintiff in which the first defendant agreed that a memorial plaque recording the dispossession be erected at Sunny Croft site. The first defendant withdrew its opposition. The second defendant opposes the claim. The third defendant abides the decision of this Court. The plaintiff and the second defendant are in agreement that this Court has four issues to determine. I will set out and deal with these four issues later on in my judgment.

[3] To best understand the matter it is necessary to set out a factual background as well as a historical background. A statement of agreed facts in this regard was signed and submitted by both the plaintiff and the second defendant. These facts are:

1. In December 1952 the Florence family took occupation of Sunny Croft in terms of a lease agreement with its owner, Dr Yeller. They lived there until November 1970;

2. On 9 January 1957, Lionel, Norman, and Ronald Florence purchased Sunny Croft from Dr Yeller in terms of a written instalment sale agreement;

3. The agreement has been lost but Lionel Florence was present when the agreement was signed;

4. Instalments of R90.00 per month from January 1957 were paid to Dr Yeller for a period of 13 years and 10 months. The further terms of the sale agreement are uncertain.

5. As a result of racially discriminatory legislation, which prohibited the transfer of land to disqualified persons, Sunny Croft was never transferred into the name of the Florence brothers;

6. On 16 October 1970 the Florence brothers entered into a memorandum of agreement of cancellation of sale with Dr Yeller in terms of which they cancelled the 9 January 1957 sale. A copy of the cancellation agreement is attached to the plaintiff's statement of claim.

7. A total of R14 896.00 was paid towards the purchase price of the subject land.

8. The terms of the cancellation agreement included *inter alia* that the Florence brothers pay to Dr Yeller R46.00 on or before 31 October 1970 and for Dr Yeller to

refund to them an amount of R1350.00. This did not constitute just and equitable compensation for the dispossessors of the rights in Sunny Croft.

9. The Florence family vacated Sunny Croft during November 1970 as a result of threats from Group Areas Inspectors;

10. The Florence family incurred removal costs estimated at R85.00 as a result of the dispossession;

11. The parties agreed that the market value of Sunny Croft in 1970 was R31 778.00;

12. The plaintiff accepts an estimate by a witness, Mr du Toit, that the 1957 market value of Sunny Croft was R 8 131.00;

[4] There are four issues that this Court is required to determine. They are:

1. The loss suffered by the plaintiff as a result of the dispossession of their rights to Sunny Croft in 1970, and whether such loss would equate to just and equitable compensation, calculated as at the time of dispossession;

2. The appropriate method to be used when converting the 1970 loss into present day monetary value;

3. The amount of financial compensation the Florence family should receive as a *solatium* in respect of the hardship and suffering they experienced as a result of the dispossession; and

4. Whether the second defendant should be ordered to pay the costs of erecting the memorial plaque on the Sunny Croft site.

I propose to deal with these issues, for ease of reference, by setting out my factual findings on each issue at the outset with my reasons following.

The first issue – the nature and extent of the 1970 loss

[5] It was not in dispute that the Florence family had a right in land as defined by the Restitution Act[1]. It is further not in dispute that the Florence family were dispossessed of a right as a result of past discriminatory legislation. What is in dispute is whether or not the Florence family had paid the full purchase price at the date of dispossession. It is the plaintiff's case that they were the *de facto* owners and should be compensated as such. It is the second defendant's case that the loss suffered by the plaintiff is the under-compensation for the cancellation of the agreement, alternatively for the proportional interest gained in the property. As to the amount of the 1970 loss, on a totality of the evidence I am satisfied that the purchase price for Sunny Croft in 1957 was paid in full, by 1970 for reasons set forth later in my judgment. As at 1970, I find that the extent of the Florence family's 1970 loss, is the agreed market value of Sunny Croft (R31 778.00) plus the agreed removal costs (R85.00), less the agreed compensation received at the time of the cancellation of the agreement (R1 350.00) which is equivalent to (R30 513.00). The said amount of R1 350.00 is inexplicable. Having regard

[1] Section 1 of the Restitution Act

to the aforegoing, I find that the Florence family was under-compensated in the amount of R30 513.00 in 1970.

My reasons for the aforegoing findings are:

[6] I pause to mention that in the absence of the deed of sale there was a concerted effort by both the plaintiff and the second defendant to recreate the terms of the deed of sale. On the first issue the plaintiff called three experts, Professor Mesthrie, Dr Wittenberg and Mr Margolius. The second defendant called Mr Du Toit. The aforegoing experts have put up a number of different theoretical conjectures. Because of the view I take of this issue it is not necessary to repeat the various theoretical conjectures of the various experts on this issue. It is all on record. The three letters are dispositive of the question whether the purchase price for Sunny Croft has been paid in full. The relevant portions of the three letters read as quoted hereunder.

[7] In a letter dated 7 September 2008, Lionel Florence said:

> "... He paid 13 years 10 months of R90.00 per month totalling to R14950.00 including R46.00 which we had to pay by the 31st October 1970 which is on page 2 of the cancellation of sale. I am assuming that these two amounts amalgamated totals to R15 000.00 for the price of the property...."[2]

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[2] Exhibit O: 77

[8] In a further undated letter, Lionel Florence said:

> "... Thinking that we had almost completed paying the R15 000.00, he agreed to with a payment which he demanded of R46.00 which we paid on 31 October 1970..."[3]

[9] In a letter dated 19 September 2008, the late Lionel Florence said:

> "... By the 16/10/1970 when the cancellation of sale was signed we had paid R90.00 per month for a period of 13 years 10 months, totalling R14 950.00 plus we had to pay a further R46.00 before the 31/10/1970 as full and final settlement. Meaning that a price of R15 000.00 was the agreed price for Croft..."[4]

[10] The three letters are not beyond criticism. However, one has to bear in mind that Lionel Florence would have had to rely on his memory to record events which happened some 51 years earlier. If the letters are viewed together, there can be no doubt that the author regarded the purchase price as fully paid. The letters, in my view, constitutes the best indication of full payment, and substantiates my finding to that effect. It is not necessary for me to decide what the amount of the purchase price was.

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[3] Exhibit P: 80

[4] Exhibit Q: 82

[11] In terms of section 2(1) and (2) of the Restitution Act, a person shall be entitled to restitution of a right in land if: the person was dispossessed of a right in land after June 1913; the dispossession was the result of past racially discriminatory laws and practices; the person has lodged a claim for restitution by no later than 31 December 1998; and just and equitable compensation as contemplated in section 25(3) of the Constitution was not paid. S 25(3) of the Constitution provides:

> " 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 interest 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."

[12] In *Du Toit v Minister of Transport*[5], the Constitutional Court had the following to say on the role of market value or actual financial loss as factors in the determination of compensation under section 25(3) of the Constitution:

> "Section 25(3) indeed does not give market value a central role. Viewed in the context of our social and political history, questions of expropriation and compensation are matters of acute socio-economic concern and could not have been left to be determined solely by market forces. The approach of beginning with the consideration of market value (or actual financial loss for that matter) and thereafter deciding whether the amounts are just and equitable is not novel. It was adopted by Gildenhuys J in *Ex parte Former Highland Residents: In re Ash and Others v*

[5] *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC) par [37] at 316 A-E

Department of Land Affairs[41]. The Court in that matter did not deal with the interpretation and application of s 12(1) of the [Expropriation] Act but rather with s 2 of the Restitution of Land Rights Act[42] in the context of monetary compensation for dispossession of land. Nevertheless, the Judge pointed out that the market value of the expropriated property could become the starting point in the application of s 25(3) of the Constitution since it is one of the few factors in the section which is readily quantifiable. Thereafter, an amount may be added or subtracted as the relevant circumstances in s 25(3) may require. Actual loss may play a similar role depending on the circumstances of the case."

[13] Restitution of a right in land includes equitable redress. In this case, equitable redress is claimed. I must now decide whether any of the other factors I have to consider to determine equitable redress, require an amount to be added to or subtracted from the actual financial loss suffered by the Florence family (being R30 513.00 in 1970).

[14] It is trite law that the Restitution Act contains no directive on the make-up of the equitable redress; the Court is enjoined in s 33 of the Restitution Act to have regard to certain factors when making its orders. The following of those factors may be relevant to an award of compensation in this matter:

'(b) the desirability of remedying past violations of human rights;

(c) the requirements of equity and justice;

(eA) the amount of compensation or any other consideration received in respect of the dispossession, and the circumstances prevailing at the time of the dispossession;

(eB) the history of the dispossession, the hardship caused, the current use of land and the history of the acquisition and use of the land;

(eC) in the case of an order for equitable redress in the form of financial compensation, changes over time in the value of money..."

Equitable redress must be established with regard to the factors listed in s 33 of the Restitution Act.

[15] The starting point for any court is to determine the purpose of Restitution. The Constitutional Court has pronounced in numerous of its decisions that not only must the Constitution be interpreted purposively so too must the Restitution Act. The Restitution Act is 'remedial legislation umbilically linked to the Constitution'[6] When interpreting the Restitution Act every Court must promote 'the spirit, purport, and objects of the Bill of Rights'[7]. In an earlier decision the Constitutional Court described the purpose of the Restitution Act in the following terms:

> " ... (A)lthough it is clear that a primary purpose of the Act was to undo some of the damage wreaked by decades of spatial apartheid, and that this constitutes an important purpose relevant to the interpretation of the Act, the Act has a broader scope. In particular, its purpose 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."[8]

[16] It has been stated over and over again that when interpreting a constitutional right such as the right to restitution the interpretation should be generous rather than a legalistic one,

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[6] *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC) [53]

[7] *Goedgelegen supra* [53] ; s 39(2) of the Constitution

[8] *Alexkor Ltd and Another v The Richtersveld Community and Others* 2004 (5) SA 460 (CC), 2003 (12) BCLR 1301 at par [98]

aimed at fulfilling the purpose of a guarantee and securing for individuals the full benefits of their constitutional rights[9].

[17] It is trite law that the purpose of equitable redress in the form of financial compensation is 'to put the dispossessed, insofar as money can do it, in the same position as if the land had not been taken.'[10] In *Hermanus v Department of Land Affairs*[11], Gildenhuys AJ (as he then was) said:

> " The general principle, ...is that
>
> > ' the displaced owner should be left as nearly as is possible in the same position financially as he was prior to the taking , provided that the damage , loss or expense for which compensation was claimed was directly attributable to the taking of the lands'."

[18] In *Prinsloo and Another v Ndebele Ndzudza Community and Others*[12], Cameron JA (as he then was) said:

> "The Act recognizes complexities of this kind and attempts to create practical solutions for them in its pursuit of equitable redress. The statute also recognises the significance of registered title. But it does not afford it unblemished primacy. I consider that, in this case, the farm's residents established rights in the land that registered ownership neither extinguished nor precluded from arising."

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[9] *Goedgelegen supra* at page 218 par [51]

[10] *Haakdoornbult Boerdery CC and Others* 2007 (5) SA 596 (SCA) at page 610 – 611 par [48]

[11] *Hermanus v Dept of Land Affairs: In re Erven 3535 and 3536, Good wood* 2001 (1) SA 1030 (LCC) at page 1039 par [15]

[12] *Prinsloo and Another v Ndebele Ndzudza Community and Others* 2005 (6) SA 144 (SCA) at page 154 par [38]

In the present case the Florence family lived at Sunny Croft for an uninterrupted period of 18 years, before they were dispossessed in November 1970. In any event, the Florence family has had beneficial occupation of Sunny Croft for a continuous period of not less than 10 years prior to their dispossession, which brings their rights to Sunny Croft within the definition of *right in land* contained in section 1 of the Restitution Act, which therefore entitles them to restitution under the Act.

[19] Having regard to the purpose of the Act, the need for a generous interpretation of Constitutional rights, the purpose of compensation, the complex situations claimants found themselves in, the sale and dispossession taking place against the context of the Group Areas Act, together with the section 33 factors in particular: the hardship experienced by the Florence family in particular their aged mother; justice and equity and remedying past violations together with the totality of all the evidence and expert opinions, the inescapable conclusion is that their equitable redress should be the amount of their 1970 financial loss, escalated to its present day value in order to accommodate changes over time in the value of money.

The second Issue

I turn now to deal with the question of what is the appropriate method to be used for converting the 1970 loss into a present day value.

[20] At the outset of the hearing of this matter, the aforegoing issue had not yet been determined by any Court. However at the conclusion of this matter, judgment on this issue had been given in *Farjas (Pty) Ltd v Minister of Agriculture and Land Affairs & Others*[13] where Mia AJ said:

> " ... However I am of the view that CPI adequately caters for the change in the value of money over time and is an appropriate method to determine compensation to place the plaintiffs' in as close a position as possible to the position had they not been expropriated..."

I agree with this finding.

[21] I have considered the opinions of Dr Wittenberg, Professor Natrass and Professor Viruly as well as the submissions by the plaintiff and the second defendant and I am persuaded that the CPI is the appropriate method to convert the 1970 loss into a present day value.

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[13] *Farjas(Pty) Ltd v Minister of Argriculture and Land Affairs & Others* LCC 57/2007; *Rainy Days Farms(Pty)Ltd v Minister of Agriculture and Land Affairs & Others* LCC58/2007 23 June 2011, [2011] ZALCC 22 at page 18 par [27];

[22] My reasons for my aforegoing findings are set out herein below.

[23] In the cases of *Ex parte Former Highlands Residents: In re Ash & Others v Department of Land Affairs* and *Hermanus v Department of Land Affairs: Erven 3535 and 3536 Goodwood*[14] the Court was not required to deal with the second issue because the parties in those matters agreed that the CPI should be used as an agreed method to convert the amount of the loss to present day value.

[24] It is the plaintiff's case that the dispossessed right is land, which is an investment. Therefore CPI is inappropriate because it measures consumption. The thrust of the plaintiff's case is that the plaintiff must be compensated for the loss of an investment. The plaintiff relies on the evidence of Dr Wittenberg and Professor Nattrass. It is the second defendant's case that the phrase 'changes over time in the value of money' refers to the inflation rate which is measured by the CPI. The state relies on the evidence of Professor Viruly. The plaintiff submits that Professor Viruly's understanding of the s 33 factors is flawed because he is unfamiliar with the principle of nominalism of currency. The principle of nominalism of currency, in my view, is not relevant in this case. In my view the central issue is the interpretation of the phrase 'changes over time in the value of money'.

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[14] *Ex parte : Former Highlands Residents: In re Ash & Others v Department of Land Affairs* [2000] 2 All SA 456 (LCC) see also *Hermanus v Department of Land Affairs: Erven* 3535 and 3536, Goodwood 2001 (1) SA 1030 (LCC)

[25] To sum up, the plaintiff's approach as stated by Professor Nattrass and confirmed by Dr Wittenberg is "to put the Florence family back in the position that they were as of 1970, they should be compensated for their lost 'investment'- not the loss of purchasing power of the value of the property."[15] The second defendant's approach is based in Professor Viruly's report. Professor Viruly approached the loss on the basis that the Florence family had a house in 1970. In 1970 the house 'disappeared', the family suffered a loss as a result of the dispossession. He looked at the value of money over time, not the value of the house. The plaintiff submits that the approach of Professor Viruly would result in a financial award being substantially less than the value of an award of restitution.

[26] In my view there is a fundamental difference in approach to the issue by the parties and it is this difference which has in my view led to the divergent meanings given to the phrase 'changes over time in the value of money'.

[27] Plaintiff submitted that the facts in this case are distinguishable from the facts in the *Farjas* case (*supra*). Plaintiff further submitted that the plaintiff in the *Farjas* case purchased the land as a development in which to make a tidy profit, whereas in this case the plaintiff bought a house in which to live. The legislation does not distinguish between different landowners or different purposes for which dispossessed properties were held.

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[15] Bundle A2: 392-393

[28] One of the criticisms of the Farjas judgment is that the court was not referred to relevant international law principles. The plaintiff submitted that the purpose of compensation for the loss of land taken from a person or a community is to put that person or community, in so far as money can do it, in the same position as if the land had not been taken. This principle is accepted in international law which courts are required by section 39(1)(b) of the Constitution to consider when interpreting the Bill of Rights. Chapter 14 of the Constitution provides:

> "233 **Application of international law –**
>
> When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.'

Section 39(1) (b) of the Constitution which is applicable to the interpretation of section 25(7) of the Restitution Act provides:

(1) ...
(a) ...
(b) must consider international law;..."

[29] I was referred to the leading international case of *Factory at Chorzow*[16] which deals with the principles applicable to the payment of compensation for purposes of restitution. In *Factory at Chorzow (supra)* the court held:

> "[124] It follows that the compensation due to the German Government is not necessarily limited to the value of the undertaking at the moment of dispossession (my underlining), plus interest to the day of payment. This limitation would only be admissible if the Polish Government had had the right to expropriate (my underlining), and if its wrongful act (my underlining), consisted merely in not having paid to the two Companies the just price of what was expropriated ; in the present case, such a limitation might result in placing Germany and the interests protected by the Geneva Convention, on behalf of which interests the German Government is acting, in a situation more unfavourable than that in which Germany and theses interests would have been if Poland had respected the said Convention. Such a consequence would not only be unjust but also and above all incompatible with the aim of Article 6 and following articles of the Convention- that is to say, the prohibition, in principle, of the liquidation of the property, rights and interests of German nationals and Companies controlled by German nationals in Upper Silesia – since it would be tantamount to rendering lawful liquidation and unlawful dispossession indistinguishable in so far as their financial results are concerned.
>
> [125] The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decision of arbitral tribunals – is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it – such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.(my underlining)

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[16] *Factory at Chorzow* (Germ. v Pol.), 1928 P.C.I.J.(ser. A) No. 17 (Sept. 13)

[126] ... The dispossession of an industrial undertaking – the expropriation of which is prohibited by the [48] Geneva Convention – then involves the obligation, to restore the undertaking , and if this is not possible, to pay its value at the time of the indemnification, which value is designed to take the place of restitution which has become impossible. To this obligation, in virtue of the general principles of international law, must be added that of compensating loss sustained as the result of the seizure...". (my underlining)

[30] The facts in *Factory at Chorzow (supra)* are distinguishable from the facts in this case. A fundamental distinction between the two cases is that in this case the Florence family was dispossessed in terms of the Group Areas Act, a ' legal act ' because the then apartheid Government acted in terms of a law, although racially discriminatory, does not make the act (the taking) illegal. Whereas in *Factory at Chorzow* the act of dispossession was an 'illegal act' because the Polish Government did not have the right to expropriate.

[31] I was referred to several international law articles[17] most of which discussed the principle set out in *Factory at Chorzow (supra)*. In my view both the international law articles and the case of *Factory at Chorzow* are not applicable to the facts of this case.

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[17] *Prinsloo and Another v Ndebele – Ndzundza Community and Others* 2005 (6) SA 144 (SCA) [33] – [34]

Makulike Community: In re Pafuri area of the Kruger National Park case number LCC 90/98, 15 December 1998, per Dodson J

In re Kronspoort Community 2002 (1) SA 124 (LCC)

Ex Parte Former Highlands Residents: In re Ash & Others v Department of Land Affairs [2000] 2 All SA 456 LCC

SA Eagle Insurance Company (Ltd) v Hartley 1990 (4) SA 833 (A) 839F-H

Legal Consequences of the Construction of a Wall in the Occupied Paestinian Territory, (Advisory Opinion), ICJ Reports 2004, pp.181 -194, Paras.114-137

[32] As I have stated, the issue before me is the interpretation of the phrase 'changes over time in the value of money'. Returning to Professor Nattrass and Dr Wittenberg's reasoning, which is that there is no single value of money as money can be used for both consumption and for savings. If it is used for saving then its value changes over time as interest is added. In my view, the phrase 'changes over time in the value of money' simply means, what a person can buy with the money. An investment is commonly understood as interest earned from the money. These are two different concepts. If a person invests money in all likelihood a person will receive the interest on that investment. That total sum received will not be the same as the original money. For example, if one invested R100.00 (original amount of money) and at the end receives R120.00, it is no longer the same money. It is the original amount plus the proceeds. This could also have tax implications for the plaintiff. No mention was made in this regard. Professor Nattrass and Dr Wittenberg's reasoning is flawed for the following reasons:

1. The value of the money does not change because interest is earned. Interest is only added to the orginal money. The orginal money remains the same.

2. Accumulated interest can never be part of the value of money; it is the proceeds of money. These are two completely different concepts.

Democratic Republic of Congo v Uganda, (Judgment), ICJ Reports 2005, p. 82, Para. 259

Guiso –Gallisay v Italy European Court of Human Rights (Grand Chambers) 2009

Mphela & Others Haakdoornbult Boerdery CC &Others 2008 (4) 488 (CC) [32]

Article 35 of Draft Articles on State Responsibility

United Nationals Pinheiro Principles

[33] The plaintiff concedes that CPI compensates for the loss of purchasing power. That being so, the phrase 'changes in the value of money' can only mean the loss of purchasing power, which is measured by the CPI.

[34] One of the paramount criticisms levelled against the use of the CPI in converting the 1970 loss into current day value, is that the Florence family will not be able to buy an equivalent house and therefore the use of the CPI will give rise to a discrepancy between the value of financial compensation and restoration. There is no evidence on whether or not the use of the CPI will not be sufficient to buy the Florence family a new house.

[35] The second defendant submits that what a dispossessed person or community will subsequently do with the compensation received is of no consequence in determining whether the compensation received in respect of the property was adequate or not. I agree. The Restitution Act [in sec 2(2)] provides that no person shall be entitled to restitution of a right in land if just and equitable compensation as contemplated in s 25(3) of the Constitution, calculated at the time of dispossession, was received in respect of the dispossession. Just and equitable compensation does not include recompense for lost investment opportunities. The

same reasoning must, in my view, be followed when calculating a shortfall in just and equitable compensation for purposes of awarding equitable relief. Loss of investment yields cannot become part of the shortfall by utilising it to convert the shortfall into its present day value.

The third issue- *solatium*

[36] The plaintiff seeks an additional amount of compensation by way of *solatium*. Such an award is by no means automatic. In the present case the second defendant does not oppose an award of *solatium*. It is the amount that is in dispute. The plaintiff seeks an amount of R15 000.00. The second defendant submits that an amount of R8 000.00 is appropriate.

[37] Jose Zalaquett said in an article[18] "Why Deal with the Past":

> "I believe reparations are indeed very important because they convey an acknowledgment of victims' dignity. But reparations must be made in such a manner that people do not see them as an entitlement, payment or trade-off ... Once you start pulling a thread of the knot of reparation, you may continue without an end in sight. This is particularly true if the majority of the population has been aggrieved. For this reason it may be worth considering whether reparations in South Africa should be emphasised more in their symbolic and spiritual aspects than in their material ones... It may be beyond the means of any society to repair properly what has been a grievance inflicted upon the majority of the population. There may be ways of distinguishing particular injuries but this must be done in a manner that is understandable to the entire population so that no one has reason to wonder why only some received reparation."

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[18] "Why Deal in the Past" in *Dealing with the Past: Truth and Reconciliation in South Africa*, Boraine *et al* eds, Institute for Democracy in South Africa, 1994 at 8

Gildenhuys J quoted this excerpt with approval in par [34] of his judgment in *Hermanus v Department of Land Affairs: Erven 3535 & 3536, Goodwood (supra).*

[38] Professor Mesthrie is a Professor of History at the University of the Western Cape. She has written extensively on the Group Areas Act and its consequences, including several articles on the forced removal of the Black River Community (of which the Florence family formed part of). She concluded 36 interviews with former residents of Black River, including two interviews with Lionel Florence before his death. She testified that the Florence family was constantly harassed by the Group Areas Inspectors to vacate Sunny Croft. As a result hereof the Florence family came under severe pressure and was embarrassed by the forced removals.

[39] The Florence family life was disrupted and the family was split up. Professor Mesthrie said that the Florence family suffered emotionally, financially and psychologically by the forced removal. The hardship experienced by the Florence family was not disputed by the second defendant.

[40] Having regard to the aforegoing, I am nevertheless required to balance the interests of the Florence family and the interests of the State from where the money to pay *solatium* will come from. The purpose of the award is symbolic. It does not attempt to provide full redress

for the family's emotional suffering, but acknowledges the dignity and worth of the claimants. In my view an amount of R10, 000 is appropriate.

The fourth issue – Costs of erecting a memorial plaque.

[41] At the outset of the hearing of the matter the plaintiff entered into a settlement agreement with the first defendant wherein it was agreed that the plaintiff could erect a memorial plaque on the subject land. This agreement was concluded between two private parties. The second defendant was not a party to the agreement.

[42] The plaintiff seeks an order directing the second defendant to pay the reasonable costs associated with the erection of a memorial plaque on the subject land. This is opposed by the second defendant.

[43] The issue I am required to determine is whether or not the second defendant should pay for the costs of the erection of the memorial plaque. The settlement agreement was between the landowner (first defendant) and the plaintiff. This is a private matter between them. This court does not have the jurisdiction to make such an order.

[44] I have made an award for symbolic reparation in the form of *solatium* which acknowledges the indignity and hardship suffered by the Florence family in the course of their dispossession in 1970.

Costs

[45] Plaintiff seeks an order that the second defendant pay plaintiff's costs (insofar as the costs have not been met by the Land Claims Commission) including the costs of two Counsel. The second defendant submits that there is no need for such an order because the second defendant is funding the plaintiff's litigation in terms of s 29(4) of the Restitution Act. In my view, there is no evidence that the costs incurred by the plaintiff, will not be paid by the Commission. There is therefore no need for a cost order to be made.

Conclusion

[46] During the hearing of this matter the parties had agreed a CPI factor as at the end of December 2010. After the hearing of this matter I caused a letter to be addressed to the parties where I gave them the opportunity to amend the CPI factor to reflect the values as at the end of March 2012. I further requested the parties to inform me that if I granted the Florence family an award, in whose favour should the award be made. In response, the plaintiff proposed a CPI factor to be applied as at the end of March 2012, of 48.79527751. The second defendant proposed a CPI factor of 48.79528, which is the same as that of the plaintiff except that it has

been rounded off. I will accept that the CPI factor is 48.79528. Both parties agreed that the award should be made in favour of Mrs Florence in both her capacity as executrix of Lionel Florence's estate and in a representative capacity on behalf of Ronald Florence. In my view if Mrs Florence was mandated to deal with the claim she would be entitled to accept the money. Having found that the under-compensation is R30 513.00. This amount (R30 513.00) escalated to the end of March 2012 and using the CPI factor agreed upon of 48.79528, the under-compensation amounts to R1 488 890.00.

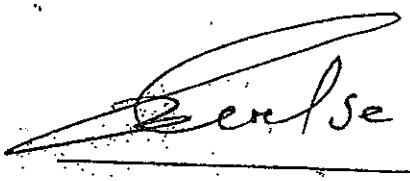
[47] For the reasons set forth above, I conclude that the plaintiff is entitled to equitable redress in an amount of R1 498 890.00, being the amount of under-compensation escalated to the end of March 2012 (R 1 488 890.00) plus the amount of the *solatium* (R10 000.00).

[48] In the result I make the following order:

1. The second defendant is ordered to pay equitable redress to the plaintiff in an amount of R1 498 890.00.

2. No order is made on the prayer that the second defendant must pay the costs of the erection of a memorial plaque.

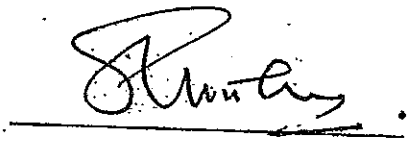
3. No order as to costs is made.



Z CARELSE

Judge of the Land Claims Court

I agree.



E.S RIVETT-CARNAC

Assessor

Appearances

For the Plaintiff

Advocate P Hathorn, assisted by F Jakoet and S Harvey

Instructed by Henk Smith, Legal Resource Centre

For the Respondent

Advocate B Joseph

Instructed by Johann Benkenstein, State Attorney