IN THE LAND CLAIMS COURT OF SOUTH AFRICA
HELD AT RANDBURG

Case number: **LCC 37/2008**

Matter argued: 5 October 2012
Judgment delivered: 30 November 2012

In re

KOOKFONTEIN TRADING COMPANY (PTY) LTD Claimant

concerning

PORTIONS "A" AND "B" OF THE FARM KOOKFONTEIN 265 JQ

JUDGMENT

GILDENHUYS J

INTRODUCTION

[1] This is a claim for the restitution of rights in land under the Restitution of Land Rights Act 22 of 1994 ("the Act") concerning:

> Portion A (now renumbered portion 5) of the farm Kookfontein No 265 Registration Division J Q, in extent 53,3412 ha; and
>
> Portion B (now subdivided into portions 7 and 30) of the farm Kookfontein Nr 265, Registration Division J Q, in extent 30,9073 ha,

situated in the area of jurisdiction of the present Rustenburg Local Municipality, Bonjanala District, North West Province ("the Farm"), together 84,2485 ha in extent. The Farm was expropriated during 1966 in terms of racially discriminatory legislation. The Regional Land Claims Commissioner

referred the claim for restitution to this Court in terms of sec 14 of the Act on 31 March 2008.

THE FACTS

[2] During the Anglo-Boer war, the Bokhary[1] families (three related South African families of Indian descent) assisted the Boer army. Paul Kruger, then President of the Zuid-Afrikaansche Republiek, gave them the farm in appreciation of their assistance.

[3] The heads of the three families were three brothers, referred to in these proceedings as the Grandfathers. They were Mr Suliman Ahmed Bokhary (Grandfather A), Mr Ismail Mohammed Bokhary (Grandfather B) and Mr Mohomood Ahomed Bokhary (Grandfather C). The three grandfathers are now deceased. The three families established various businesses in South Africa. They lived in Johannesburg and on the Farm. They established and operated a general dealer's shop on the Farm (at which they also sold fresh produce and petrol from bowsers), a butchery and a cinema. They cultivated vegetables (especially "Indian greens") on the Farm, for their own use and for sale in the shop and in Johannesburg. The licence for the butchery was in the name of a member of one of the families. The butchery had been condemned some time before the expropriation, apparently for non-compliance with certain health regulations. There is evidence that before the expropriation, income from the businesses on the Farm were distributed amongst members of the three families.

[4] During 1930 the Farm was registered in the name of Kookfontein Trading Company (Pty) Ltd ("the Company") under Certificate of Partition Transfer No 10255/1930. The Company was incorporated on 18 May 1917, with two of the Grandfathers as the original shareholders. Each of them

[1] The surname has different spellings in documents before the Court: Bakharia, Bokharia, Bukharia, Bakhary or Bokhary. I will use "Bokhary", except when quoting from documents where it is spelt differently.

subscribed for 250 shares of £1 each. The pre-1930 registration history of the Farm is not relevant for purposes of this judgment.

[5] The Farm was situated in an area occupied by black people. The general dealer's business and the cinema were the only ones in the area. Their customers were predominantly black. Since the nineteen fifties, the fact that an Indian family owned and occupied the Farm and did business on the Farm, was unacceptable to the then government.[2] Expropriation of the farm became a distinct possibility.

[6] The Bokhary family actively supported the ANC, then a prohibited organisation. The family feared that they may lose the Farm and the businesses, or receive inadequate compensation for it. According to evidence by family members, the families received legal advice from an attorney, Mr Melman, to put in place a written lease. The purpose of the lease would be to make it more difficult for the government to acquire the farm or to pay inadequate compensation. Accordingly, a written lease agreement was signed on 16 October 1957 by Mr S A Bokhary (as lessor) and Mr S M Bokhary (as lessee), in terms of which he hired -

> "the shop together with other buildings which he is at present occupying on Farm Kookfontein 337 District Rustenburg. [He would] furthermore be entitled to make use of the remainder of the farm for cultivating for his own use but shall not occupy any buildings on the farm not at present occupied by him."[3]

The lease was for a period of nine years and eleven months, from 1 September 1957 to 31 August 1967. The rental was £50.0.0d per month.[4] There was no provision for escalation. It was not explained why the Company, as owner of the farm, was not party to the lease.

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[2] Amongst the papers before the Court there is a memo from the then Native Affairs Department (date not fully legible, probably 18/2/1959), which contains the following statement: "Dit is 'n ongesonde toestand dat die Indiër daar binne die Naturellegebied grond besit en veral 'n bioskoopsaal daar besit. Die beleid is, om die grond plus die besigheid daar uit te koop en die vergoeding is die gewone Landsraadwaardasie plus 3 jaar se winste t.o.v.die besigheid - daarby sal blykbaar die bioskoopwinste ook ingereken word. Die Indiër verlang £20,000 of £6000 sonder die besighede."

[3] Par 1 of the lease agreement.

[4] Par 3 of the lease agreement.

[7] By notice of expropriation dated 1 August 1966, the Farm was expropriated from the Company by the Minister of Agricultural Credit and Land Reform in terms of the then Bantu Trust and Land Act No 18 of 1936. The expropriation became effective on 29 September 1966, 13 months before the expiry date of the lease. The farm was transferred into the name of the South African Bantu Trust on 30 December 1966. Kookfontein was paid an amount of R21 732,00 compensation for the expropriation of property. At the time of expropriation, the property was still being used for residential, agricultural and business purposes by members of the Bokhary families.

[8] Mr Ahmed Yusuf Bokhary lodged a restitution claim in respect of the property on behalf of the Bokhary family with the RLCC on the prescribed Land Claim Form. Mr Ahmed Yusuf Bokhary is a grandson of one of the Grandfathers. The claim form contains no reference to the Company.

[9] When it became necessary to prosecute the restitution claim, the Bokhary family discovered that the Company was deregistered by the Registrar of Companies during 1949 because it failed to submit certain statutory forms as required under the Companies Act. Mr Ahmed Yusuf Bokhary then applied to the Supreme Court for an order that the Company be restored to the register under the provisions of sec 73 of the Companies Act, 1973. The application was granted and the Company was restored by Court Order dated 8 November 1966.

[10] Prior to the hearing of the claim by this Court, it was agreed between the original claimant (mr Ahmed Jusuf Bokhary), the Company, the RLCC and the State (through the Department of Rural Development and Land Reform) that the Company will proceed as claimant in the matter.[5]

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[5] It was confirmed on behalf of the Regional Land Claims Commissioner at a pre-trail conference on 30 January 2009 that it intended to refer a restitution claim by the Company to this Court in its notice of referral dated 19 February 2008, and that it is satisfied that the claim form lodged by Mr Ahmed Yusuf Bokharia supports such a restitution claim.

THE CLAIM

[11] Restitution of a right in land in terms of the Act can be by way of restoration of the right in land or by way of equitable redress. Equitable redress includes the granting of an appropriate right in alternative state-owned land, or the payment of compensation[6]. The claimant opted for financial compensation.

[12] The parties agreed that in assessing the financial compensation, the Court would have to determine an amount that would have been just and equitable compensation at the time of the dispossession (August 1966), using 1966 values, deducting therefrom the amount of compensation actually received (R21 732,00), and escalating the shortfall to bring it up to its present day value by using the consumer price index ("CPI")[7]. The parties subsequently agreed (on 20 November 2012) that the CPI factor to be applied is 58,82915.

[13] The Company amended its claim many times[8]. Ultimately it was for R 244 068, arrived at as follows:

Value of 2,8879 ha land with business premises thereon:	R 35 394,00
Value of 81,3606 ha land with improvements thereon:	R 10 170,00
Value of 10,2440 ha land with mining potential	R 10 244,00
TOTAL LAND VALUE (ROUNDED OFF)	R 55 800,00
Loss of goodwill of the business on the land:	R 210 000,00
TOTAL COMPENSATION	R 265 800,00
Less amount paid at time of expropriation	R 21 732,00
TOTAL CLAIM	R 244 068,00

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[6] See the definitions of "restitution of a right in land", "restoration of a right in land" and "equitable redress" in sec 1 of the Act.

[7] This method was applied by the Land Claims Court in *Ex Parte Former Highlands Residents; In Re: Ash and others v Department of Land Affairs* [2000] 2 All SA 26 (LCC); *Farjas (Pty) Ltd v Minister of Agriculture and Land Affairs and Others, Rainy Days Farms (Pty) Ltd v Minister of Agriculture and Land Affairs and Others* [2011] ZALCC 22 and *Florence v Broadcount Investments (Pty) Ltd and Others* [2012] ZALCC 11.

[8] There were at least nine applications for amendment.

[14] The amount of R55 800,00 claimed in respect of land value is based on a valuation by Dr V G Ghyoot, and the amount of R210 000,00 claimed in respect of loss of goodwill is based on an assessment by Mr Delieu Swart. The State accepted that the claimant was under-compensated at the time of the expropriation (1966), and tendered a further amount by way of equitable relief, over and above what was paid at the time of the expropriation, in an amount of R1 026,00 (as at its 1966 monetary value, to be escalated to its present day value).[9] The parties agreed on a CPI escalation factor of 58, 82915.

THE HEARING

[15] At the hearing, the parties are *ad idem* on the following facts:

- that the Company received R21 732,00 by way of compensation at the time of the expropriation;
- that the amount of R21 732,00 did not constitute just and equitable compensation at the time of the Company's expropriation, and that the Company's claim is therefore not precluded by sec 2(2) of the Act;
- that the Company was dispossessed of the Farm as a result of past racially discriminatory laws or practices.

[16] The Company presented evidence by the following witnesses[10]:

- Family members
- Mr Ahmed Yusuf Bokhary (grandson of Grandfather A - original claimant)
- Mr Ahmed Suliman (son in law of Grandfather C)
- Mr A Mehtar (grandson of grandfather A)
- Mr Abdul Haffejee (nephew in law of grandfather C)

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[9] The State previously tendered an amount of R2 079 062 (at present day value). The tender was not accepted, and has been superseded by the present tender.

[10] I have spelt their names in accordance with a list given to me at my request by the claimant's attorney on 15 October 2012.

- Other lay witnesses

- Mr C F Pretorius (Group Surveyor Manager, Impala Platinum Mines)
- Mr Ahmed Kahn (friend and adviser of the Bokhary family

- Expert witnesses

- Mr D C F Janse van Rensburg (valuer)
- Prof H L M du Plessis (actuary)
- Mr V J Farris (chartered accountant)
- Dr V G Ghyoot (valuer)
- Mr Delieu Swart (chartered accountant).

The RLCC/ State presented evidence by the following witnesses:

- Mr D Jendrzejewski (valuer)
- Mr C Tong (chartered accountant).

[17] Mr Erasmus, who appeared before us on behalf of the claimant, informed us during argument that the claimant will not rely on the evidence given by Mr Pretorius, Mr van Rensburg and Mr Farris.

ASSESSMENT OF EQUITABLE RELIEF

[18] The concept of equitable relief by way of financial compensation is wide enough to include, over and above the value of the dispossessed property, redress for any financial loss directly caused by the dispossession.[11] Since the Act does not break compensation down into different categories, the Court must apply general principles. It must also have regard to all relevant factors prescribed by the Act and the Constitution. It is not possible to enumerate every possible factor. As was stated in *Illovo Sugar Estates Ltd v South African Railways and Harbours*[12]*:*

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[11] *Hermanus v Department of Land Affairs: In Re Erven 3535 and 3536, Goodwood* 2001 1 SA 1030 (LCC) paras [13] - [15] at 1038B-1039F.
[12] 1947 1 SA 58 (D) 64

"The truth is that it is not possible to state with logical completeness the principles underlying the assessment of compensation. It is sufficient to say that an owner manifestly ought not to receive more than his total loss, and that the value of his land may be assessed on such a basis and at such a figure as to negative all possibility of his having suffered any loss over and above that sum."

[19] This Court has in the past assessed the amount of compensation to be awarded as equitable relief, by determining what would have been just and equitable compensation as at the date of dispossession (taking into account all relevant factors), deducting therefrom the compensation received at the time[13], and escalating the shortfall to its present day value[14] in accordance with the CPI[15]. This is a practical method of assessment, although it may not be suitable in all cases. I will follow it in this case. The parties did not suggest any other method.

[20] The purpose of compensation under the Constitution and the Act is different from the purpose of damages in private law. Duard Kleyn [16] explains the difference as follows:

"The purpose of damages in private law is to undo the consequences of an unlawful act. In determining the amount to be awarded, the affected party must be placed in the hypothetical economic position he/she might have been in had the act not taken place. The object is to award full damages, including loss of future income and profits. Expropriation, on the other hand, is a lawful taking of property in the public interest. The purpose of awarded compensation is not that it should make up for all losses suffered: it is rather to replace the object with its value. The property guarantee is transformed into a value guarantee."

[21] The determination of what would have been just and equitable compensation for the expropriation of the the Farm during 1966 must be

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[13] Sec 33(eA) of the Act.
[14] Sec 33(eC) of the Act
[15] For examples, see *Ash v Department of Land Affairs* [2000] 2 All SA 26 (LCC); *Hermanus v Department of Land Affairs: In re Erven 3535 and 3536, Goodwood* 2000 1 SA 1030 (LCC); *Farjas v Minister of Agriculture and Land Affairs and Others, Rainy Day Farms v Minister of Agriculture and Land Affairs and Others* [2011] ZALCC 22; *Florence v Broadcount Investments (Pty) Ltd and Others* [2012] ZALLC 11.
[16] "The constitutional protection of property: a comparison between the German and South African approach" (1996) 11 *SAPR/PL* 402 at 442.

done in accordance with sec 25(3) of the Constitution[17] and sec 33 of the Act. It is no easy task. Not only must the valuers and the Court rely on data of the past, which is often difficult to obtain, but they must also consider factors introduced by the Act.

[22] Sec 33 of the Act enjoins the Court to have regard to a list of factors in considering its decision in any particular matter. The following factors on the list might be relevant for the assessment of compensation payable by way of equitable relief to a land restitution claimant:

> "(a) the desirability of remedying past violations of human rights;
> (b) 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 the 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;
> (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.

[23] The amount of compensation must be just and equitable as contemplated in sec 25(3) of the Constitution. Sec 25(3) requires the compensation to reflect an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including-

> (a) the current use of the property;
> (b) the history of the acquisition and use of the property;
> (c) the market value of the property;
> (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and

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[17] Although not specifically stated, this can be inferred from sec 2(2) of the Act. 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 sec 25(3) of the Constitution, calculated at the time of dispossession, was received in respect of the dispossession. In my view, the same principles should apply in assessing any shortfall of what would have been just and equitable compensation.

(e) the purpose of the expropriation.

Should the amount of compensation, however calculated, not be just and equitable as contemplated in the Constitution, it must be adjusted to an amount that is just and equitable.[18]

MARKET VALUE OF THE LAND

[24] I come to the market value of the land. Mr Janse van Rensburg and Dr Ghyoot valued the land and testified for the claimant, whilst Mr Jendrzejewski valued the land and testified for the State. Since Mr Erasmus informed me that the claimant will not rely on the evidence of Mr Janse van Rensburg[19], I will restrict myself to the evidence of Dr Ghyoot and Mr Jendrzejewski.

[25] The Farm has a very irregular shape. The Eastern part of the Farm includes of narrow finger of land, some 5km long, about 120 metres wide at its far end and about 18 metres wide at the other end, where it connects with the rest of the Farm. There is also a hill which divides the Farm into two distinct sections and restricts access between the two sections. The Western portion of the farm is located next to an area which was, in 1966, well populated by black people, giving the Western section a distinct business potential. An area of 2,8879 ha on the Western section was in fact used for business purposes. There were agricultural activities on the rest of the farm.

[26] Various methods of valuation can be used. The valuer must select the most suitable method.[20] It was held in *Minister of Water Affairs v Mostert and Others* [21] *that* -

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[18] *Cf Du Toit v Minister of Transport* 2006 1 SA 297 (CC) paras [35] and [36] at 315F-I.
[19] Mr Janse van Rensburg was not a good witness.
[20] *Pietermaritzburg Corporation v South African Breweries* 1911 AD 501 at 524: "The valuator has to bear in mind that it is not for him to give effect to any particular theory of valuation. The actual market value of the immovable property at the date of assessment is what has to be determined."
[21] 1966 (4) SA 690 (AD) 723E-G

> "Comparable transactions, particularly where the sales are concluded after objective and impersonal bargaining, afford the most satisfactory evidence of a fair market value because it demonstrates how circumstances have affected the minds of purchasers and sellers. See *Pietermaritzburg Corporation v S.A. Breweries Ltd,* 1911 AD 501 at p. 516. Where such evidence is not available or, not satisfactory, the valuer would normally have regard to evidence which indicates what the fair market value probably would be in the light of the income which may be derived from the land."

The preference to be given to the direct comparison valuation approach (comparable sales) where circumstances permit, has been confirmed in many subsequent Court decisions.[22]

The business portion of the Farm (2,8879 ha) - Dr Ghyoot's valuation

[27] Dr Ghyoot testified that, due to the lack of comparable transactions, he followed the income capitalisation method in his valuation of the business portion of the Farm (including the improvements used for business purposes). The method is based on the assumption that a purchaser will pay no more for property which will yield a particular income flow than the amount for which he or she can obtain a similar income flow with similar risks elsewhere. The method is suitable for fully developed properties[23] yielding an income which derives from attributes of the property and not from the efforts or business acumen of its owner or manager.[24] In the case of *Union Government v Maile*[25], the income approach was used to value a farm shop under lease to a tenant. I am satisfied that, in the circumstances of this case, it is a suitable method to value the business premises.

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[22] A list of the decisions is contained in Gildenhuys, *Onteieningsreg* (2nd ed) in note 40, p 213.
[23] *Southern Transvaal Buildings (Pty) Ltd v Johannesburg City Council* 1979 1 SA 949 (W) 956F
[24] *White v Union Government* 1937 CPD 225 at 228.
[25] 1943 AD 3

[28] Dr Ghyoot's valued the business premises on the basis of its net operating annual income, as follows:

Potential Gross Income (PGI)[26]	R7 890
Vacancy/Collection loss @ 5%	R 395
Effective Gross Income (EGI)	R7 495
Operating Expenses at 15%	R1 124
Net Operating Income (NOI)	R6 371

Capitalisation rate 18%
Capitalised value = R35 394

Mr Jendrzejewski used the income capitalisation method, but as a comparative check against the figure he arrived at by following a different valuation approach[27]. Using the income capitalisation method, he arrived at a valuation of R28 000. Nevertheless, he discarded the method because there was "no written confirmation of the formal land use and the proposed income and [no] estimates could be obtained / 100% verified."[28]

[29] Dr Ghyoot estimated the potential gross monthly income that could be derived from letting the premises (shop, cinema and houses) on the 2,8879 ha portion of the Farm to be R657,50, arrived at as follows:

Shop	116,5 sq m @ R2 / sq m	R233,00	
Cinema	364,5 sq m @ R1 / sq m	R364,50	
House		R 40,00	
House		R 20,00	
TOTAL		R657,50	(R7890 per year)

Investigations by Dr Ghyoot disclosed even higher rentals per square metre for similar shops. However, Dr Ghyoot used the rentals set forth above, since they are the rentals suggested by Mr Jendrejewsky in his income

[26] The calculation of the sum of R7 890 is contained in par [19] below.
[27] *Cf Sher and Others NNO v Administrator, Transvaal* 1990 4 SA 545 (A) 549B-F
[28] Record, file 16 p 12.

capitalisation exercise. Mr Jendrejewsky found that premises occupied by the Sun Supermarket in Phokeng (which is in the same area) had been let at R2 per sq m during 1960 to 1970.

[30] The estimated achievable monthly rental for the shop and the cinema is considerably higher than the actual rental of R100 per month payable by Mr S M Bokhary terms of the lease. In Dr Ghyoot's view, the rental under the lease was not an open market rental. Other premises in the area achieved much higher rentals. His opinion is supported by a letter written by attorney Melman to the Department of Lands on 24 October 1962, during negotiations for a possible sale of the Farm. The letter includes the following statement :[29]

> "At present the rental return or income from the properties is R159-00 per month which amount is a reduced amount and could easily be increased if our clients were to do certain alterations and renovations which have been requested by tenants, but which our clients have not effected due to negotiations with your Department. Our client point out that the butchery has been condemned and is vacant but could be easily restored and a rental recovered.
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> .....
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> Our clients point out that there are existing leases in respect of certain of the premises[30] which will have to be recognised, and that if your Department were to purchase, your Department would recover from these tenants an income which could be set-off against the purchase price.
>
> .....
>
> Our clients also point out that in the normal course of events on the expiry of the leases the premises would revert back to them, and if they wanted to trade on their own account they would have what virtually amounts to a concession and a very valuable right.
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> Trading in their own account our clients could and would earn far in excess of R160-00 per month which is the present rental return." [31]

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[29] File 9 p 42-43

[30] The leases referred to are probably the business lease with Mr S M Bokhary and leases in respect of the houses on the Farm. This is evident from a letter by Mr Melman to the Department of Lands dated 6 July 1962, the relevant portion reading: "....there is only one lease in existence ....., the remaining tenants being on monthly tenancy."

[31] The R160-00 probably represents R100-00 for the business and R60-00 for the houses.

[31] Although, according to Dr Ghyoot's information, small rural shops usually do not have vacancies, he nevertheless included a provision of 5% of expected gross income for "vacancy/collection".Mr Jendrejewsky used a factor of 10%. In my view, 5% is sufficient.

[32] Dr Ghyoot found that, generally speaking, very little maintenance work was done on rural shops such as the one on the Farm. At the time of the dispossession, rural properties were not subject to municipal rates and taxes. The only expenses were for water and electricity, often provided by the landowner, although electricity was sometimes provided by Eskom. Dr Ghyoot allowed 15% of expected gross income for expenses. This accords with Rode's Retail Report for the fourth quarter of 2009, which indicates an average cost ratio of 15% for street-front shops in Limpopo. Dr Ghyoot reckoned that the operating expenses for a rural shop are unlikely to be higher. I agree. Mr Jendrejewsky used a factor of 25%, which cannot be justified.

[33] The capitalisation rate used in an income capitalisation valuation approach will have a big influence on its outcome. Dr Ghyoot had discussions with various valuers and property economists as to what would be an appropriate rate during 1966. Their opinions varied from 15% to 22%. At the time, current interest rates were some 2% lower that at present. Mr Jendrejewsky used a capitalisation rate of 18% which Dr Ghyoot, in the light of the above, considered to be reasonable. He therefore used the same rate.

The remainder of the Farm (81,3606 ha) - Dr Ghyoot's valuation

[34] According to Dr Ghyoot, the highest and best use for the remainder of the Farm in 1966 was for agriculture. That was not contested. The farm is located in a "mineralised area".[32] I will consider a possible potential for mineral exploitation later in this judgment.

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[32] Dr Ghyoot's valuation, file 9 p 30.

[35] Dr Ghyoot based his valuation of the remainder of the farm on two comparable sales, being:

- Portions 44 and 45 of Boekenhoutfontein Nr 260 JQ, 69,8074 ha in extent, sold on 4 November 1964 for R8 500, *i.e.* R122 per hectare.
- Portions 59 and 60 of Boekenhoutfontein Nr 260 JQ, 63,9107 ha in extent, sold on 6 June 1964 for R8 400, *i.e.* R131 per hectare.

Both properties were unimproved as at date of sale. Dr Ghyoot could not find any other sales of comparable land which he could be sure was vacant at the date of sale.

[36] When making his comparison, Dr Ghyoot took into account that the Farm enjoyed a better location than the comparable properties in terms of business and development potential. The western portion was adjacent to a populated area and next to a busy highway. The awkward shape of the eastern portion and the restricted access between different parts of the Farm made it less desirable than the comparable properties. The narrow finger of land forming part of the Farm is not optimal for either agricultural use or for development purposes. Having regard to the comparable sales and to the positive and negative attributes of the Farm, Dr Ghyoot valued the remainder of the farm at R125,00 per hectare, which comes to R10 170 for the 81,3606 hectares. This is slightly less than Mr Jendrzejewski's valuation of R130 per hectare for the land, without any contributory value added for improvements.

Mr Jendrzejewski's valuation

[37] Mr Jendrejewsky valued the entire Farm as follows:

Land component - 84,2485ha @ R130/ha	R10 952,00
Improvements - R44,323 @ 73% depreciation	R11 806,00
TOTAL VALUE: R22 758,00 rounded off to	R22 800,00

The land value was based on comparable sales. The improvements were valued by determining their replacement costs and reducing it by different factors for economic obsolescence, physical obsolescence, functional obsolescence and purchaser resistance. Mr Jendrzejewsky assessed the replacement costs at R44 323 and arrived at a depreciated value for the improvements (after the above deductions) of R11 806,00.[33]

[38] Fixed improvements are part of the land and must be valued as such. It is wrong to value them separately.[34] Improvements will (in most cases) contribute to the vale of the land, and it is their contributory value that has to be determined. It was stated in *Durban Corporation and Another v Lincoln:* [35]

> "A building standing upon a piece of land is like a picture on a piece of canvass; and just as it is impossible to sell the picture apart from the canvass on which it is painted, so it is equally impossible to sell a building apart from the land. It is possible to scrape the paint from the canvass, and it is possible to pull the building down and sell the material, but then the work has been destroyed and what is sold is not the building but the building material. In law a building accedes to the land; it is not a separate property and cannot be owned as a thing separated or disconnected from the land on which it stands. It is, therefore, idle to attempt to find the market value of a building separated from the land on which it stands, and any valuer attempting to do so is pursuing a will of the wisp."

Replacement costs less depreciation might in some cases be the only practical manner by which to assess the contributory value of improvements to land.[36] In the present case, the contributory value of the improvements is not so much informed by their brick and mortar as by the use to which they can be put and the income which can be derived from

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[33] According to Mr Jendrzejewsky's detailed calculations, the depreciation factor is 73,36%. In his conclusion, however, he stated that the depreciation factor is 73%. When calculating the depreciated value of the improvements, however, he used 73,36% and not 73%. Had he used 73%, the depreciated value of the improvements would have come to R11,967. Nothing much turns on this.

[34] *Held v Administrateur-Generaal vir die Gebied van Suidwes-Afrika* 1988 2 SA 218 (SWA) at 226I; *Dormehl v Gemeenskapsontwikkelingsraad* 1979 1 SA 900 (T) at 908F; *Durban Corporation and Another v Lincoln* 1940 AD 36 at 45.

[35] Supra, at 42.

[36] *Dormehl v Gemeenskapsontwikkelingsraad* 1979 1 SA 900 (T) at 908F; see also *Ash and Others v Minister of Land Affairs* [2000] 2 All SA 26 (LCC) par [51] at 45d-e.

them. In my opinion the income capitalisation method of valuation is, despite its shortcomings, the most appropriate method in this case to determine the value of the business premises (which, by the very nature of the method, will include the contributory value of the improvements).

Potential for exploitation of mineral rights

[39] If a claimant alleges that a property has a potential for a particular use, which includes the possible exploitation of mineral rights, he must prove it.[37] It was held in *Port Edward Town Board v Kay* [38] that:

> "Such proof has three components: (a) that the potential exists; (b) that a willing buyer and seller would have taken it into account in fixing the price; and (c) the *quantum*. Component (a) must be shown as a reasonable possibility. Component (b) must be proved on a balance of probabilities. Once (a) and (b) has been conceded or established there is no *onus* in the narrow sense in respect of component (c)." [39]

[40] At the time of the expropriation, the mineral rights were not separated from the ownership of the Farm. Dr Ghyoot assessed the contributory value of the mineral rights at R10 244,00. He concluded that at the time of the expropriation the "market participants" would have perceived mineral reserves under 10,2440 ha at the far end of the narrow finger on the Eastern portion of he farm.

[41] Mr Erasmus, who appeared for the claimant, placed great emphasis in his argument before us on the location of the Farm within what he referred to as a "mineralised area" According to a letter by Attorney Melman to the Regional Representative, Department of Lands dated 24 October 1962,[40] a prospecting contract in respect of the Farm was entered into by the claimant with the Potgietersrust Platinum Mines during 1926. There were

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[37] *Port Edward Town Board v Kay* 1996 3 SA 664 (A) at 674J; *Loubser en Andere v Suid-Afrikaanse Spoorweë en Hawens* 1976 4 SA 589 (T) at 615D-E; *Bonnet v Department of Agricultural Credit and Land Tenure* 1974 3 SA 737 (T) at 744E-H.
[38] *Supra* at 675B-E
[39] References to authorities contained in the *dictum* omitted.
[40] File 9, pp 42-43.

also other prospecting and exploration activities being undertaken in the region. I accept that the Farm might well have been located in a so-called "mineralised area". That by itself, however, does not justify an inference that a potential purchaser will pay more for the land than its agricultural value because of a potential use which it might have for the exploitation of minerals.

[42] At least ten years after the expropriation, the above-mentioned 10,2440 hectares of land at the far end of the narrow finger was included in a mineral lease as part of a very large lease area (the "Impala Lease Area"). The particular 10,2440 hectares of land was never mined. Mining in the Impala Lease Area took place elsewhere.

[43] Dr Ghyoot suggested that the inclusion of the 10,2440 ha of the Farm into the "Impala Lease Area" provides "an objective means of quantifying the extent of whatever minerals were perceived by market participants to exist on the subject property in 1966." [41] I cannot agree. Firstly, it was not established that the alleged perception of the market participants was already in existence during 1966. Secondly, the "Impala Lease Area" comprises a very large tract of land, which includes many farms. The existence of the mineral lease cannot support the inference made by Dr Ghyoot that the market participants were of the view that the specific 10,2440 ha contained proven mineral reserves, just because it was part of the Impala Lease Area.

[44] Dr Ghyoot obtained information from a certain Mr Jan Rautenbach[42] that the market rate for mineral rights around 1966 was R1 000 per hectare for proven mineral reserves. He therefore added an amount of R10 244 to his valuation in respect of a potential for mineral exploitation on the aforesaid 10,2440 hectares. In my view this addition cannot be justified, for the reasons which follow.

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[41] Par 8.4 of his valuation report, file 9 p 32.
[42] Mr Rautenbach was involved in the administration of mining leases for Impala Platinum Limited.

[45] Dr Ghyoot used information (*viz* the inclusion of the 10,2440 hectares of the Farm into the "Impala Lease Area") which did not exist in 1966, to support his conclusion that during 1966 the market participants perceived that exploitable minerals might exist on the 10,2440 hectares. He cannot do so. Eloff J held as follows in *Devland Investment Co (Pty) Ltd v Administrator, Transvaal:*[43]

> "I am not aware of any authority which lays down that in order to assess compensation for actual loss arising from expropriation regard may be had to unforeseen future events. I think that it would lead to anomalies if it were permissible to do so. Inequities to the disadvantage of the expropriator or the expropriatee could result, depending on whether that future event indicated a higher or a lower award. An event of that sort is in my mind in any event of the nature of a *nova causa* which should on general principles be excluded from consideration. I am of the view that it is irrelevant. In my judgment we should answer the legal question by saying that a future event of the sort described by the arbitrator, which would not have been foreseen at the time of the notices, may not be proven or taken into account."

The same principles would be applicable when the existence of a potential use of land and the influence which a potential of such use might have on the market value of the land, have to be determined.

[46] In *Sekretaris van Binnelandse Inkomste v Connan*[44] the Court had to consider the valuation of mineral rights for transfer duty purposes. Botha AJ held that the value of the mineral rights at issue-

> "..... kan te eniger tyd bepaal word ooreenkomstig die gegewens wat op daardie tydstip[45] bekend is oor die potensialiteite daarvan, en wat, uit die aard van die saak, van tyd tot tyd moet wissel namate meer definitiewe gegewens oor die potensialiteite van die regte bekend word." [46] [My underlining]

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[43] 1979 1 SA 321 (T) at 329E-G
[44] 1974 3 SA 111 (A)
[45] The date of acquisition for purposes of the determination of transfer duty.
[46] At 117D-E of the judgment.

A similar line of reasoning was followed by Botha R (as he then was) in the case of *Loubser en Andere v S.A. Spoorwee en Hawens*[47], where he decided that post-expropriation tests relating to the potential use of expropriated land for mineral exploitation may not be taken into account in the assessment of compensation, if it is unlikely that the tests would have been done before the conclusion of the notional sale by either the notional seller or the notional buyer or both.

[47] The notional parties to a notional sale of the Farm during 1966 would not have known that the 10,2240 hectares on the Eastern extremity of the farm had a potential to be included as a very small part of a large lease area covered by a mineral lease some ten years later. There is no evidence to justify a finding that during 1966 there existed anything more than a hope that the Farm (or part thereof) might be underlain with exploitable mineral reserves.

[48] In the case of *Viscount Camrose and Another v Basingstoke Corporation*[48], the Court of Appeal in England decided that compensation for the expropriation of land which might have development potential, but where the demand for the anticipated development was "so far distant as to warrant only a 'hope' of development", can be determined with regard to that hope. Hope value of a property is the value which it has in accordance with its present use, but with an additional amount added for the "hope" that at some time in the future a potential for a different use might be realised.[49]

[49] In my view, the value which the mineral rights (which have not been severed from the ownership of the land) might add value of the aforesaid 10,2240 hectares, is nothing more than a "hope value". That "hope value" is certainly not equal to the going rate of R1 000 per hectare at which

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[47] 1976 SA 590 (T) 623F-H. See also *Davey v Minister of Agriculture* 1979 1 SA 466 (N) at 469F-G

[48] [1966] 3 All ER 161 (CA) at 164A

[49] See Southwood *The Compulsory Acquisition of Rights* 84; *Van Zyl v Stadsraad van Ermelo* 1979 3 SA 549 (A) 573C-H

mineral rights traded in 1966. [50] The notional buyer and seller at that time will not know whether the 10,2240 hectares are in fact underlain by proven and commercially exploitable minerals, how marketable the mineral rights might be, and at what price. A notional buyer might be prepared to pay something extra for the land because it is situated in a "mineralised area", in the hope that he may turn it to profit some day. There is no evidence what that "something extra" might be. I will have to determine it as best as I can in the light of all the evidence before the Court. If the amount is less than what the claimant might be entitled to, it will be the unhappy result of the manner in which the hope of exploitable minerals was assessed and presented to the Court.[51]

[50] Taking into account all relevant evidence, and cognisant of the imponderables set forth above, I conclude that a notional buyer would have paid an amount of R2 500 over and above the agricultural value of the Farm because it is situated in a "mineralised area", in the hope that he might in future make some money out of the mineral rights.

Conclusion on land value

[51] I conclude that the market value of the Farm in 1966 was as follows:

Business premises (2,8879 ha)	R35 394,00
Remainder of the farm (81,3606 ha)	R 10 170,00
Hope value of the mineral rights	R 2 500,00
TOTAL	R 48 064,00

[52] That brings me to the question whether R48 064,00 would have been just and equitable compensation for the Farm in 1966, if it had to be

[50] A notional buyer will, in my view, not be prepared to add R1000 per ha to the purchase price of the 10,2240 ha when, at best, he will be able to sell the mineral rights for the same amount if it is proved that the area is underlain by exploitable minerals.
[51] See *Van Zyl v Stadsraad van Ermelo,* supra at 573F-H, where the Court found itself in a similar situation.

assessed in accordance with sec 25(3) of the Constitution.[52] Market value is one of the five factors to be considered under sec 25(3), and can serve as the starting point for the determination of compensation, to be adjusted upwards or downwards as justice and equity may require.[53] Although not specifically mentioned in sec 25(3) as a factor to be considered, financial loss must also be taken into account in the assessment of compensation.[54] In the present case, the compensation claim is for the market value of the Farm (escalated to its present day value) and financial loss, being loss of goodwill. As far as the market value of the Farm is concerned, there was no contention by either party that, apart from an upward adjustment to accommodate changes over time in the value of money[55], any other adjustments (either upwards or downwards) are required.

THE CLAIM FOR LOSS OF GOODWILL

[53] I turn to the claim of R210 000 for the loss of goodwill of the business on the Farm. Mr Bhedesi, who appeared with Mr Zulu on behalf of the State, submitted that the business on the farm was not owned or conducted by the Company, and that the Company did not lose any goodwill as result of the expropriation.

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[52] Section 25(3) of the Constitution reads as follows: "The amount of compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including -
(a) the current use of the property;
(b) the history of the acquisition and use of the property;
(c) the market value of the property;
(d) the extent of direct state inverstment and subsidy in the acquisition and beneficial capital improvement of the property; and
(e) the purpose of the expropriation.

[53] *Ex Parte Former Highlands Residents: In Re: Ash and others v Department of Land Affairs* [2000] 2 All SA 26 (LCC) par [34] at 40c-e; *Du Toit v Minister of Transport* 2006 1 SA 297 (CC) par [34] at 316B-E

[54] Sec 25(3) requires all relevant circumstances to be considered. The five listed factors are not a *numerus clausus*. See *Du Toit v Minister of Transport* 2006 1 SA 297 (CC) par [34] at 314G-H; *Mhlanganisweni Community v The Minister of Rural Development and Land Reform and Others* [2012] JOL 28899 (LCC) par [74]; Southwood *The Compulsory Acquisition of Rights* at 26-27. The right to compensation for financial loss caused by a dispossession for racially discriminatory purposes was recognised in *Baphiring Community v Uys and Others* 2007 5 SA 585 (LCC) par [13] at 590H-591A.

[55] Sec 33(eC) of the Act

[54] It was held in *Jacobs v Minister of Agriculture* [56] *that:*

> *"Goodwill is an intangible asset pertaining to an established and profitable business, for which the purchaser of the business may be expected to pay, because it is an asset which generates, or helps to generate, turnover and, consequently profits."*

A claim for loss of goodwill must be proved by the claimant, although the *onus* might not be as stringent as in ordinary civil litigation.[57] Colman J stated in the *Jacobs* case (in relation to the determination of compensation for loss of goodwill):

> "The question of *onus* has arisen in this case because the plaintiff did not place before me all the evidence which, in my view, he could and should have done in respect of his claim for loss of goodwill. I am not suggesting that he could have provided conclusive proof, or anything like it, with regard to the amount of his loss. The most that could have been expected of him was that he place before the Court such relevant *data* as were available to him in order to assist it in making a proper estimate of the appropriate compensation."

I will be guided by these principles in deciding whether the claimant is entitled to compensation for loss of goodwill.

[55] At the time of the dispossession, there existed a lease in respect of the shop on the farm, given by Ahmed Suliman Bokhary (as lessor) to Suliman Mahmood Bokhary (as lessee). The lease was signed on 16 October 1957. The following clauses are relevant to the issues before us:

> "WHEREAS
>
> (B) THE LESSEE is at present a tenant to the lessor of a shop on Farm Kookfontein 337 District Rustenburg.
> (B) THE parties have agreed upon the terms and conditions upon which the lessor has agreed to grant to the Lessee a further lease in respect of the said premises.

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[56] 1972 4 SA 608 (W) at 621A-B
[57] *Greyvenstein en 'n Ander v Minister van Landbou* 1970 4 SA 233 (T) at 237C-D; *Jacobs v Minister of Agriculture* 1972 4 SA 608 (W) at 628C-631B.

NOW THEREFORE THESE PRESENTS WITNESS:

1. THAT subject to the terms and conditions hereinafter set forth, the lessor hereby lets to the Lessee, who hereby hires the shop together with other buildings which he is at present occupying on Farm Kookfontein 337 District Rustenburg. The Lessee shall furthermore be entitled to make use of the remainder of the farm for cultivation for his own use but shall not occupy any other buildings on the farm not at present occupied by him.[58]

2. THIS lease shall commence on the first day of SEPTEMBER, 1957 and shall continue for a definite period of 9 (nine) years and 11 (eleven) months terminating on the 31st day of AUGUST, 1967.

3. THAT for and in consideration of his occupation of the leased premises, the Lessee shall pay to the Lessor as rental, the sum of £50.0.0d. (Fifty pounds) per month payable monthly in advance on the first day of each and every month without any deductions and free of exchange at the Lessor's premises in Johannesburg or at such other address in the Union of South Africa as the Lessor may from time to time designate to the Lessee in writing.

4. The Lessee shall be entitled to carry on a General Dealers business as at present being carried on by him but the Lessor does not warrant that a licence be granted to the Lessee for that purpose."

Mr Ahmed Suliman Bokhary (the lessor) was one of the grandfathers and a shareholder of the Company. Mr Suliman Mahmood Bokhary was not a shareholder.

[56] Mr Erasmus, who appeared on behalf of the claimant, contended that the lease agreement is not a genuine agreement but a sham, concluded on the advice of an attorney, Mr Melman, in order to make it more difficult for the then government to expropriate the farm. This contention is supported to some extent by *viva voce* evidence given by the claimant's witnesses, but the documentation before the Court tell a different story.

[58] There were three houses on the farm "owned" and occupied by others. No compensation is claimed in respect of these houses. Presumably, the "owners" were separately compensated.

[57] If neither the Company nor the three Bokhary families owned the goodwill of the businesses on the Farm, it follows that compensation for loss of goodwill cannot be included in the compensation award. As I have said, the claimant bears an *onus* to establish that it is entitled to compensation for loss of goodwill.

Was it established that the Company or the Bokhary families lost goodwill?

[58] Mr Ahmed Bokhary testified that the business on the farm belonged to the Company and was run by the Bokhary families. Notwithstanding the existence of the written lease agreement, the witness did not agree that the Claimant let the business to anyone, and stated that there must have been a reason why that scheme was devised. According to the evidence of Mr Ahmed Suliman, the profits from the business on the farm were shared between the families of the descendants of the three grandfathers, despite the existence of the written lease agreement. Mr A Mehtar, a grandson of one of the grandfathers, testified that he was living with his mother at Fochville when the dispossession occurred. They made a living "from the profits of Kookfontein", which ceased when the Farm was expropriated. He said his mother told him that the three grandfathers ran businesses on the Farm and that the profits were shared equally between the three grandfathers. According to evidence given by Mr Ahmed Kahn[59], who undertook investigations on behalf of the claimants, the late Mr S M Bokhary (a son of the first grandfather) told him before he passed away that the profits from the business on the Farm were shared by the three grandfathers, regardless who ran the business. He subsequently confirmed with the families of the other two grandfathers that this remained the position up to the time of the expropriation.

[59] The fact that the monies derived from the businesses were, according to the witnesses who testified on the aspect, shared between the three grandfathers and their families, supports an inference that the monies were not income of the Company. This inference is strengthened by the the contents of an affidavit made by Mr Yusuf Suliman Bokhary on 11 October 1966 and filed in support of the Court application for the Company to be

[59] Mr Kahn is not a member of any of the Bokhary families.

restored after it was deregistered during 1949. The affidavit contains the following statements:[60]

> "6. THAT my late father conducted a trading store on the said property [the Farm] and the said trading store continues to be conducted to this day on the said property.
> 10. Other than the property aforementioned [*i.e.* the Farm] the company has no other assets and liabilities."

There is no indication that Mr Y S Bokhary's father conducted the business on behalf of the Company or, for that matter, on behalf of the Bokharia families.

Can the Company be compensated for goodwill which the families might have lost?

[60] If the monies distributed amongst the family members were profits from the business and not rental, the families might have suffered a loss of goodwill as result of the expropriation. The restitution claim was originally lodged by Mr Ahmed Yusuf Bokhary on behalf of the Bokhary family. It was subsequently agreed between the parties that the claim would be prosecuted in the name of the Company.

[61] It was held by this Court in *In re Moodley NO*[61] *that:*

> "The right to restitution of property dispossessed as a result of past racially discriminatory laws or practices is a constitutional right contained in the Bill of Rights. The standing of a claimant for the assertion of such a right must be considered in a manner which will promote the spirit, purport and objects of the Bill of Rights.
> .....
> The provisions of the Restitution Act make it clear that the objects of the required procedure for bringing a restitution claim are threefold. First, to exclude restitution claims not lodged by 31 December 1998. Secondly, to enable the Commission on Restitution of Land Rights to inform interested parties of the claim. Thirdly, to

[60] Record, file 9 pp 167 to 169.
[61] 2002 3 SA 846 (LCC) at paras [8] and [9], on 849E and 850B-D

enable the Commission to investigate the claim and to prepare a report for the Court, ..."

These objects have been achieved. The claim was accepted and investigated by the Commission and referred to this Court for adjudication.

[62] In my view, if it is established that the Bokhary families suffered a loss of goodwill, redress might by claimable by the Company on behalf of the families, provided they have authorised the Company to do so. The oral evidence before the Court indicates, at best for the claimant, that an amorphous group of persons might have lost income as result of the expropriation of the farm. I need not, however, decide whether the Company can claim compensation for loss of goodwill on behalf of the families because I am of the view, as I shall indicate hereunder, that the claimant did not establish that either the Company or the families suffered any loss of goodwill.

Was the lease in favour of Mr S M Bokhary a sham?

[63] If Mr S M Bokhary was a genuine tenant of the business premises and conducted the business for his own account, it follows that neither the Company not the Bokhary families would have a claim for loss of goodwill in respect of the business, because the goodwill (being an intangible asset) did not belong to them but to Mr S M Bokhary.

[64] I am not convinced that the lease in favour of Mr S M Bokharia is a sham. It purports to replace an oral lease by a written lease, which might well have been done on legal advice given by attorney Melman. Clauses such as that the lessor does not warrant that the lessee will be given a licence for the business, and also the rental which is well below market rental, suggest that it is a genuine lease. It is also significant that the lease was not for the entire Farm. If the purpose of the document was not to record a genuine contractual relationship but to obstruct the government's expropriation intentions, I would have expected the entire Farm to be subject to the lease.

[65] The lessee, Mr Suliman Mahmood Bokhary, lodged a seperate restitution claim. In a research report prepared by Felicity van Heerden/Richard Sebolai for the RLCC[62], the authors stated the following:

> "[Mr S M Bohkary] leased a portion of the farmland from the Kookfontein Trading Company and paid rentals to A S Bokharia. After the land was expropriated by the South African Bantu Trust, Mr Bokhary was allowed to occupy and pay rental."

The above excerpt from the research report supports my view that the lease was genuine. Some time after receipt of Mr S M Bokhary's claim, the RLCC "collapsed" his claim file into the claim file of Mr A Y Bokhary.[63]

[66] A memo from the then Department of Bantu Administration and Development dated 2 August 1960, dealing with the intended acquisition of the Farm[64], contains the following paragraph:

> "6. Dit mag ook gemeld word dat die eienaars geregtig is op vergoeding van drie jaar se winste, maar aangesien hy geensins die eiendomme wou aanbied of wins- en verliesstate wou verstrek nie - dit is te folio 62 aangevra - is die vergoeding hier buite rekening gelaat, maar indien hy daarop aanspraak maak, kan dit toegestaan word."

[67] During 1965, Ministerial approval was obtained for the acquisition of the Farm.[65] One of the terms of the approval was:

> "(g) Die huurkontrak sal aanvaar word. Die huurgeld moet vanaf datum van registrasie maandeliks vooruit aan die Bantoesakekommissaris, Rustenburg, betaal word."

[68] During the acquisition process the then Department of Lands again asked the company for audited financial statements to support its claim for

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[62] Record, file 2 p 179. The research report is an annexure of the report by the RLCC to this Court in terms of sec 14(2) of the Act.
[63] Record, file 2 p 178. At a pre-trail conference held on 30 January 2009 the RLCC was directed to consider whether Mr SM Bokhary is/could be an interested party in the present proceedings and, if so, to serve the necessary papers on him. It does not appear that any papers were served on him.
[64] File 9 p 53-54
[65] File 9, p 104.

loss of goodwill.[66] It failed to provide such statements, possibly because the statements did not exist or because, if they existed, they did not show any business income. Furthermore, the founding affidavit filed in the Court application for the restoration of the company give the distinct impression that the company was not involved in any business, and that the general dealer's store was run by a family member.

[69] The only evidence of any income derived by the Company is contained in a letter dated 24 October 1962 by the Company's attorney, Mr Melman, to the regional representative of the Department of Lands. The letter refers to rental income of R160 per month, not to business income. There is also no evidence that any component of the business was licensed in the name of the Company or conducted by the Company. The butchery was licensed in the name of Mr "Mahamud Ahamed Bakharia".[67]

[70] At the time of the expropriation, the then Government undertook to honour the leases (including the lease of the business premises)[68] in respect of structures on the farm. After the expropriation, the rental for the business premises were paid to the Government. Mr S M Bokhary (the lessee under the written lease) remained in occupation of the premises and continued the business until very recently, when he passed away. Members of his family still occupy the premises and run their business from it.

[71] The claimant did not to present any evidence as to the basis on which Mr S M Bokhary remained in occupation of the general dealer's shop after the expropriation. That raises a number of questions. Did he at any stage share the profits with the rest of his family, or did he only pay them the rental as stipulated in the 1957 lease agreement? If the profits were shared, is that still being done and, if not, when and for what reason did it terminate? Mr Mohammed Mather testified that the income his mother used to receive from the business ceased after the expropriation. That

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[66] Letter by the Secretary for Bantu Administration and Development dated 22 October 1960, record file 5 p 619.
[67] A copy of the licence is contained in the record, file 7 p 16.
[68] There were also leases in respect of houses on the farm, which are not relevant in this case.

income might well be a share of the rental income derived from leases of premises on the Farm, which ceased because the rental had to be paid to the State after the expropriation. The oral evidence from some of the witnesses that profits from the business (as opposed to rental income) were shared between the families is vague and largely based on hearsay.

[72] There is no explanation why the successors or family members of Mr S M Bokhary were not called as witnesses to explain the basis on which he occupied the business premises on the Farm before the expropriation, and continued doing so after the expropriation. The inference to be drawn from the absence of such evidence, particularly in view of the circumstances described above, is that the Company and/or the families leased the business premises to Mr S M Bokhary, who conducted the business thereon for his own account and continued doing so after the expropriation. The monies shared amongst the families were in all probability derived from rental income.

[73] At the time of the expropriation, the claimant refused to give the Department any financial statements in support of a permitted award of additional compensation equal to three years' annual profits. This refusal prevented the award of any additional compensation which the claimant could have obtained. It is trite law that a claimant must take reasonable steps to mitigate any financial loss caused by the expropriation. If it fails to do so, the loss will not be compensated.[69] In the present case, if the Company or the Bokhary families suffered a loss of goodwill (which in my view they did not), nothing was done by them to mitigate the loss. The refusal to make the required financial statements available was not explained.

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[69] *Minister of Transport v du Toit* 2005 1 SA 16 (SCA) at 25B-C; *Minister of Lands v Moresby-White* 1978 2 SA 898 (R,AD) at 909F-G and 910B-D; *Minister of Water Affairs v Mostert and Others* 1966 4 S 690 (A) at 735H-736B.

[74] I conclude that the claimant did not establish that either itself or the amorphous group of Bokhary family members suffered any loss of goodwill caused by the expropriation of the Farm. It failed to show, on a balance of probabilities, that the lease of 16 October 1957 was a sham. If the lease is genuine, and I accept that it was, the goodwill of the business belongs to the lessee and not to the lessor. The lessee did not loose any goodwill because he continued with the business after the expropriation. Even if the claimant did suffer a loss of goodwill, it failed to mitigate the loss by giving the expropriator the required financial statements. For all of the above reasons, the claim for loss of goodwill cannot succeed.

CONCLUSION

[75] To summarise, the claimant is entitled to compensation by way of equitable relief in an amount of R48 064, arrived at as follows:

Business premises (2,8879 ha)	R35 394
Remainder of the Farm (81,3606 ha)	R10 170
Additional "hope" value in respect of mineral rights	R 2 500
TOTAL	R48 064

[76] The claimant was paid compensation in an amount of R21 732 at the time of the expropriation. That is R26 332 short of what would have been just and equitable at the time, had the compensation been determined in accordance with the principles set forth in sec 25(3) of the Constitution. The State tendered an amount of R1 026,00 (as at 1966 values),[70] which is not sufficient to make up the shortfall. The claimant is therefore entitled to equitable relief in an amount of R 26 332,00 (as at 1966 values), escalated by an agreed factor of 58.82915 to bring it up to its the present day value. Applying the factor of 58.82915, the amount comes to R1 549 089, which I will round off to R1 550 000.

[70] A previous tender of R2 079 062.60 (at present day values) by the State was not accepted by the claimant.

COSTS

[77] Legal action to claim restitution of a right in land (including a claim for equitable redress) is a claim against the State. It is constitutional litigation, because the claimant is asserting a constitutional right to land restitution.[71] It was held by the Constitutional Court in the case of *Biowatch Trust v Registrar, Genetic Resources and Others*[72] that in Constitutional litigation between the State and private parties seeking to assert a constitutional right, the State should ordinarily pay the costs if it loses. This Court has applied the principles set forth in the *Biowatch* judgment in land restitution matters, where the claimants were successful against the State.[73] In the present case, the compensation award is substantially more than the amount of the State's current tender. In my view, the claimant is entitled to a cost order against the State.

[78] The record in this case consists of 18 thick arch lever files. The taxing master is requested to satisfy himself/herself that the inclusion of all the documents in the files were necessary, and that there are no duplication of documents. The record also contains many applications brought by the claimant for the amendment of its response. The cost order against the State does not include the costs of these applications and the wasted costs caused thereby.

[79] By agreement between the parties, the costs payable by the State will include the qualifying fees of Dr V Ghyoot and Prof H L M du Plessis, as well as the fees for their reports, preparation and testimony.

[80] The following order is hereby made:

(1) The claimant is entitled to equitable relief by way of financial compensation in an amount of R1 550 000.

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[71] Section 25(7) of the Constitution

[72] 2009 6 SA 232 (CC), paras [23] and [24] at 246D-247B. The case is not a land restitution matter.

[73] *In re Kusile Land Claims Committee: Land Restitution Claim, Midlands North Research Group and Others* 2010 5 SA 57 (LCC) par [35] at 70E-71A

(2) The state must pay the claimant an amount of R1 550 000.

(3) The State must pay the claimant's costs as taxed between party and party, including the qualifying fees of Dr. V.G. Ghyoot and Prof H L M du Plessis (inclusive of their reports, preparation and testimony), but excluding the costs of the various applications by the claimant to amend its response, and the wasted costs caused thereby.

A Gildenhuys
Judge of the Land Claims Court

I agree

A Zybrands
Assessor

Appearances:
For the claimant:
Mr M C Erasmus SC
instructed by
Röntgen & Röntgen Incorporated
Pretoria

For the State / Regional Land Claims Commissioner Gauteng and North West Province
Mr R Bhedesi SC
with him
Mr M Zulu
instructed by
the Office of the State Attorney,
Pretoria.