IN THE LAND CLAIMS COURT OF SOUTH AFRICA

HELD AT EAST LONDON

CASE NO: LCC146/2007

In the case of:

LUNGISWA VILLIANCE MAY	First Applicant
MZWABANTU HAMILTON MKIVA	Second Applicant
XOLISWA FRANCIS MKHOSI	Third Applicant
NTOZIKAYISE COLLEGE LUTHULI	Fourth Applicant
MANDLA ARON GANGALA	Fifth Applicant
VAKELE L MAWEZA	Sixth Applicant
NTOMBOZUKO BHECANA	Seventh Applicant
SITYEBI WILSON MKO	Eighth Applicant

And

THE MINISTER OF AGRICULTURE & LAND AFFAIRS[1]	First Respondent
THE CHIEF LAND CLAIMS COMMISSSIONER	Second Respondent
AMATHOLE DISTRICT MUNICIPALITY	Third Respondent

East London 12, 13 October 2011

Judgment delivered 13 April 2012

JUDGMENT

Kahanovitz AJ:

[1] Now Minister of Rural Development and Land Reform.

1. Applicants in this matter seek to review and set aside various settlement agreements which were signed in order to settle land claims brought in terms of the Restitution of Land Rights Act ("the Act").[2] The signed documents record the agreement reached in terms of section 42D of the Act[3] and subsequent agreements.

2. These claims for the restitution of land rights were lodged with the Commission for the Restitution of Land Rights,[4] an institution constituted in terms of the Act. The claims were submitted by many individuals resident in different localities in and around Keiskammahoek. It is common cause that over a thousand claims were lodged and that the first respondent was satisfied that the claimants were "entitled to restitution of a right in land in terms of section 2" thus

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[2] Act 22 of 1994

[3] The relevant sub-sections of section 42D are:

42D Powers of Minister in case of certain agreements

(1) If the Minister is satisfied that a claimant is entitled to restitution of a right in land in terms of section 2, and that the claim for such restitution was lodged not later than 31 December 1998, he or she may enter into an agreement with the parties who are interested in the claim providing for one or more of the following:

- (a) The award to the claimant of land, a portion of land or any other right in land : Provided that the claimant shall not be awarded land, a portion of land or a right in land dispossessed from another claimant or the latter's ascendant, unless-
  - (i) such other claimant is or has been granted restitution of a right in land or has waived his or her right to restoration of the right in land in question; or
  - (ii) the Minister is satisfied that satisfactory arrangements have been or will be made to grant such other claimant restitution of a right in land;
- (b) the payment of compensation to such claimant;
- (c) both an award and payment of compensation to such claimant;
- (d) ...
- (e) the manner in which the rights awarded are to be held or the compensation is to be paid or held; or
- (f) such other terms and conditions as the Minister considers appropriate.

(2) If the claimant contemplated in subsection (1) is a community, the agreement must provide for all the members of the dispossessed community to have access to the land or the compensation in question, on a basis which is fair and non-discriminatory towards any person, including a tenant, and which ensures the accountability of the person who holds the land or compensation on behalf of such community to the members of the community.

(3) The Minister may delegate any power conferred upon him or her by subsection (1) or section 42C to the Director-General of Land Affairs or any other officer of the State or to a regional land claims commissioner."

[4] Section 10 of the Act.

laying the basis for the later section 42D agreement in terms of which 1704 families[5] were to be beneficiaries.

3. These claims for land in fulfilment particularly of the property rights as provided for in the Constitution[6] often lead to disputes. Unresolved disputes can be and are referred to the Land Claims Court in terms of section 14 of the Act.

4. Fortunately not all these claims remain unresolved, or land up in court. There are several ways of bringing them to resolution without litigation. In the matter before us there were initially claims lodged in eight localities.[7] The first and second respondents are of the view that all the individual claimants represented by duly elected persons then agreed to the claim being dealt with as one with an agreement that all individuals involved be treated similarly, and thus a section 42D agreement could be concluded to settle all these claims.

5. In this matter it is common cause that an agreement in terms of section 42D of the Act was signed on 16 June 2002 at a function attended by claimants, officials and dignitaries. The applicants submit that the signatories who signed on behalf of the individuals from the eight areas were not authorised by them and those they represent to do so. The respondents deny this. The crux of the agreement was that the individuals would all forego their claims for physical restoration, would instead accept equitable redress,[8] and more significantly that each claim was settled at an amount of R55564.00 each. Each claimant would receive half in cash and the remaining R27782.00 would be paid into a development fund specific for each of their localities for use in development projects.[9]

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[5] See page 133 of the record.
[6] Section 25 of the Constitution of the Republic of South Africa Act 108 of 1996.
[7] Upper Ngqumeya, Lower Ngqumeya, Upper Mnyameni, Mthwaku, Gwili-Gwili, Lower Gxulu, Ndlovini, Ngobozona. Note that at times the Applicants refer to eight areas and at others to seven. In view of this list at page 6 of the record I am recording the number as 8 throughout.
[8] Section 10(1) of the Act.
[9] See section 42D agreement clause 4.4 at page 389 of the record.

6. Consequent on this section 42D agreement, individual agreements were entered into between claimants and the Regional Land Claims Commissioner in terms of which each signatory confirmed and accepted the terms of the section 42D agreement. I will return to the individual agreements in more detail below.

7. Later an amended section 42D agreement was signed primarily to appoint the new implementing agent, the third respondent. Consequent upon this the Transfer of Payment and Administration of Funds Agreement was concluded on 30 September 2005 setting out certain financial arrangements and obligations.

8. The Applicants submit that the original section 42D agreement, the individual agreements, the amending section 42D agreement, and the transfer and payment of the administration funds agreement should all be set aside *inter alia* on the grounds that they did not agree to them and that the signatories did not have a lawful mandate to sign on behalf of each and every one of them and /or those that they claimed to represent, and that in respect of the individual agreements, that they were signed under duress.

9. The first and second respondents opposed the application on several grounds including –

   9.1 that the claims had prescribed;
   9.2 that the applicants had delayed too long in launching this application;
   9.3 that the applicants do not have legal standing to bring this application and that they are not properly authorised to do so on behalf of the communities in each locality; and
   9.4 that the agreements had been lawfully entered into and continued to be binding on the parties; and
   9.5 that the applicants rely on certain new grounds not raised in their pleadings

Their counsel submitted that if any of the first three grounds listed above are successful it should dispose of the matter entirely.

10. I need to note the presence of a third respondent in this matter, the Amathola District Municipality, the local authority with jurisdiction in the area, which in terms of the amended section 42D agreement was appointed as the implementing agent for the projects. These projects were to be funded by the proceeds from the claimants contributions. Third respondent's manager has filed an affidavit explaining that they have concluded contracts to the value of R7,505,136.66 which have been suspended pending the outcome of this dispute.[10] He further states that should the section 42D and other agreements be set aside that the potential losses including claims they may face are very high. As the implementing agent, and as a local authority that needs to work with both applicants and respondents, they would abide by the judgment. They accordingly submitted no heads of argument and their attorney of record attended court with a watching brief. I shall hereafter for the sake of brevity refer to 1st and 2nd respondents as the "respondents" and where necessary to third respondent expressly[11].

11. It is preferable to first deal with the respondents' preliminary defence that the eight named applicants were not properly authorised to bring this application on behalf of those in each of the eight areas. Counsel for the applicants submitted that each and every one of the persons named in the annexures had signed a power of attorney in favour of his or her named representative – and that these powers of attorney were available at all material times and tendered for inspection. It is however correct, as submitted by counsel for the respondents, that the authority of the applicants was not admitted in the answering papers and that the applicants failed to deal with this in reply – or to bring proof to this court that authority to act on behalf of each and every individual had been

[10] Record page 450.
[11] In respect of applications by aggrieved representatives in land claims also see Concerned Land Claimants Organisation of Port Elizabeth v Port Elizabeth Land and Community Restoration Association and Others (CCT29/06) [2006] ZACC 14; 2007 (2) SA 531 (CC); 2007 (2) BCLR 111 (CC) (21 September 2006).

given. As the applicants seek to set aside individual agreements and claim payments, proof of such authority in my opinion ought to be proved. Further it is clear that not all 1704 families who are beneficiaries of the section 42D agreement and signatories of the individual agreements seek to set aside these agreements. I am unable from the papers to ascertain the number seeking to set them aside or for that matter the number content with the arrangements, but it is clear that the rights of the latter could be affected adversely if this application were to be successful. They ought to have been joined. Counsel during argument agreed that whatever authority the applicants may or may not have to act on behalf of the other claimants, they could still each bring this application personally in their own right. While this agreement between counsel confirms that the 8 applicants have standing to bring this application it leaves question marks about the position of the other beneficiaries. If this application succeeds the decision would have serious consequences for these 1704 beneficiaries referred to in the section 42D. While arguably some may have given the applicants authority (which authority is not admitted) and could be deemed to have notice of this application, at least those who didn't give authority (if not all of them) ought to have been joined[12]. They are third parties with an interest in the individual contracts under attack in this application, with an interest in the section 42D agreement, and with a right to property[13] at stake in this matter. This court can accordingly *mero motu* raise this non-joinder so as to safeguard their interests. This could lead to the applicants being ordered to join all these parties, but in view of the provisions of rule 12(5) of the rules of this court I won't order accordingly and because the applicants are unable to succeed on the merits for the reasons set out hereunder.

12. I now consider the respondents' defence that this application which their counsel described essentially as a claim by each of the applicants

[12] See Herbstein and Van Winsen "The Civil Practice of the High Courts of South Africa" (5th edition) 2009 Juta at pages 207ff.
[13] See Section 25(6) of the Constitution of the Republic of South Africa Act,108 of 1996.

for the remaining R27782.00 of each of their agreed upon settlement amounts – has prescribed.

13. The applicants brought an application to review and set aside the section 42D agreement. The prescription defence is one that could be competent against a "debt" which in the absence of a definition in the Prescription Act[14] can be widely construed.[15] If one views this claim as one for money or a debt owed by the state[16] prescription may be a competent defence.

14. The respondents raised this defence after setting out some of the dates of signature of the agreements in their answering affidavits and then the deponent in one single paragraph states: "they now seek payment of this amount after the expiry of three (3) years from the date on which each of them signed the original section 42D Framework Agreement i.e. 16 June 2002. Therefore, whatever claim they had against the respondents prescribed long ago and is now not enforceable in terms of the provision of section 11 of the Prescription Act of 1969. Legal argument will be advanced on behalf of the respondents on the day of the hearing in this matter."[17]

15. In their reply the applicants state that the "criticism relating to prescription is ill-founded."[18] The third respondent local authority in its affidavit does not comment on or respond to the prescription defence.[19]

16. Respondents in their heads of argument wrongly state that applicant seeks setting aside only three agreements[20] - and does not include the first section 42D agreement. Further while clearly a preliminary argument that would dispose of the claim, prescription is only canvassed briefly in the penultimate paragraphs of their heads of

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[14] Act 68 of 1969.
[15] *Desai NO v Desai and others* 1996(1) SA 141 (A).
[16] *Oertel v Direkteur van Plaaslike Bestuur* 1983(1) SA 354 (A).
[17] Record page 204.
[18] Record page 413 paragraph 3.3.
[19] Record page 444ff.
[20] First and second respondents heads of argument introduction (hereinafter respondents' heads).

argument when it is stated: "The right of applicants to sue the respondents for payment of the outstanding amounts is a debt within meaning of the Prescription Act 1969. The Applicants received their payments between 2002 and 2003 instituted the present proceeding on 19 December 2007 i.e. after expiry of a period three (3) years."[21] Respondents accordingly restricted themselves to a defence based on a three year prescription period.[22]

17. It is only once I had requested supplementary heads of argument that respondents' prescription defence was clarified. They submit[23] that: "the defence raised by the respondent is in the form of extinctive prescription *ie* the right of the applicants to claim the balance from the amount of R 55 564.00 has since been extinguished because a period of three (3) years has lapsed from the day on which applicants cause of action arose." The respondents thus rely on section 11(d) of the Prescription Act.[24] They submit this debt was due "when it was immediately claimable by the creditor, and as its correlative, it was immediately payable by the debtor."[25] Respondents submit this arose once the applicants had each received the first half of the agreed R55 564.00. The respondents acknowledge[26] that they bear the onus of proving prescription – they allege that once the section 42D agreement and individual agreements had been signed, the debt was due and accordingly the 3 year period must run from 2002 when the individual agreements were signed. As the application was only issued in 2007 these debts they submitted have all prescribed. They also submit that the applicants didn't raise this debt issue in their early correspondence which grieved lack of development – and so they eventually resorted to the claim in money as the other avenues for dealing with their grievance were not bearing fruit.

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[21] Respondents' heads paragraph 5.
[22] Applicants counsel did explain for a number of reasons insufficient attention had been paid to their heads of arguments. It was for this reason amongst others that I asked for supplementary heads to be filed after the hearing particularly in respect of prescription.
[23] Respondents' supplementary heads paragraph 2.1.
[24] Act 68 of 1969.
[25] Supplementary heads paragraph 4.5 and the cases cited there.
[26] Supra paragraph 6.5.

18. Applicants refute that prescription applies – primarily because in their view the applicable prescription is six years and thus the 2007 summons interrupts prescription. They submit that the applicable prescription period is governed by section 11(c) of the Prescription Act i.e. six years. They further submit that if the applicable period is three years, that they only became aware of the debt once in receipt of the 2005 amended section 42D agreement which the respondents had consistently refused to give them along with other agreements - and the application was issued within three years receipt of the 2005 section 42D agreement. Applicants have submitted that this amended agreement, dealing solely with the issue of the implementing agent was irrelevant to the prescription period.

19. In relation to prescription – the balance in money claimed here arises from an agreement entered into in terms of section 42D of the Act. As prescription applies to debts of a statutory origin[27] the claim here is capable of prescription. The respondents acknowledge that they must establish that the claims have prescribed and this *inter alia* means that they must allege that period of prescription. In paragraph 14 above I set out exactly what respondent alleged in its affidavit. This does not meet the requirements set out in *Gericke v Sack*[28] where Diemont JA stated "The onus was clearly on the respondent to establish this defence. He could not succeed if he could not prove both the date of inception and the date of completion of the period of prescription." There is no clear statement in the answering affidavits stating that any of the many debts at issue here were due on a specified date - in its absence the defence is not properly alleged or pleaded. It is not surprising that this is not apparent from the papers as many agreements are in dispute and only a detailed exposition of all would make them susceptible to a prescription defence. Furthermore the respondents have failed to appreciate that since the date of signature of all the impeached agreements they themselves have paid money to many claimants on dates not stated on any affidavits. Each of these

[27] See Oertell above.
[28] 1978(1) SA 821 (A) at 827 H.

payments acknowledge liability and thus interrupt prescription.[29] The respondents fail to deal with these issues in their heads of argument save to submit that sometime in 2002 the individual agreements had been signed and that these agreements meant the debt was due. In these circumstances the respondents cannot succeed in having the application dismissed on the grounds of prescription.

Insofar as it may be relevant I am not convinced by the applicants' assertion that it is protected by section 11(d) of the Prescription Act i.e. six year prescription period. That 6 year period only applies to negotiable instruments and notarial contracts neither of which are the subject of this application.

20. I turn now to the applicants' grounds for having the agreements rescinded. To understand them I set out in abbreviated form the agreements that the applicants seek to have set aside *viz*

20.1 The section 42D agreement signed on 16 June 2002 is the primary agreement. It recognizes as valid the multitude of land claims lodged by the occupants of the Keiskammahoek localities and records that all having given authority to the signatories concerned, agree to a value of R55564 in respect of their individual claims and how it is to be divided and paid.

20.2 Secondly all those individual agreements concluded by claimants during 2002 of which a single sample[30] was attached to the court application.

20.3 Thirdly the amended section 42D agreement signed by those authorised to sign the initial agreement and the respondents – this one was signed on 25 July 2005; and

20.4 Finally the Transfer of Payment and Administration of Funds Agreement concluded on 30 September 2005.

21. Exactly what the applicants seek is difficult to discern: in the Notice of Motion[31] they seek to rescind "the amended section 42D Framework

[29] Section 14 of Act 68 of 1969.
[30] Record page 150.
[31] See record page 1ff at paragraphs 1 to 4.

agreement ... entered into on 16th June 2002; to rescind certain specific clauses of the "amended section 42D Framework agreement; to declare "as invalid" the individual agreements referred to in paragraph 20.2 above; and finally to declare "as invalid" the agreement referred to in paragraph 20.4 above. This isn't particularly clear. It becomes more confusing when in the founding affidavit[32] the deponent seeks an order "declaring that no framework settlement agreement exists;" declaring that if it exists it is invalid; and declaring the individual agreements to be invalid. As is apparent from the above, while the founding affidavit seeks declaratory orders in respect of the agreements of 2002, the notice of motion on the other hand concentrates, notwithstanding reference to 16 June 2002, on the what is called the "amended section 42D agreement" i.e. the 2005 document referred to in paragraph 20.3 above.

22. I, reading generously, turn now to summarize the respective causes of action relied upon by the applicants *viz*

22.1 In respect of their attack on the agreements referred to in paragraphs 20.1 and 20.3 above, in the notice of motion they allege them to be invalid on the grounds that these were decisions unilaterally taken by the respondents without consultation and further, as alleged in the founding affidavit, signed by persons on behalf of the claimants who did not have authority to do so;

22.2 In respect of their attack on the individual agreements referred to in paragraph 20.2 above, on the grounds that these were signed "under duress and undue pressure." [33]

22.3 In respect of their attack on the agreement referred to in paragraph 20.4 above, the order sought and grounds alleged i.e. lack of representivity of the committees, is mentioned only in the notice of motion and not raised again in the founding affidavit.

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[32] See record page 13ff at paragraph 4.1 ff.
[33] See Record page 2 : Notice of Motion paragraph 3 (b).

23. The applicants admitted during argument that the primary reason for bringing this application is to ensure that the balance of the agreed R55564.00 granted to each of them is paid to them personally once the agreements are set aside. I am not able to come to their assistance in this regard for several reasons:

23.1 For reasons which will become apparent I consider the attack on the individual agreements first. I shall for purposes of this argument assume that all the individual agreements were properly signed and that the applicants herein duly authorised by those signatories. The individual agreements expressly provide that the claimant signatory accepts the terms and conditions of the section 42D agreement signed on 16 June 2002. In annexure L[34], a copy of the proforma individual agreement, each claimant has agreed that s/he accepts the "terms and provisions" of the other relevant agreements and that "the contents have been explained and consented to." I don't believe it is necessary to set out the wording of the individual agreement in full but it is worth noting that each includes an explanation of how the value of the claim was agreed upon;[35] the exact amounts involved and how each R27782.00 half will be utilized for different purposes. Then the agreement records "The claimant consents to this arrangement and hereby accepts the above settlement." Each claimant *inter alia* also authorizes the local restitution committee to enter into further agreements necessary for further implementation of the settlement. In these circumstances it is apparent that if this agreement stands and is not set aside, then each and every signatory can be held to have agreed to it and the terms and conditions of the other agreements which have been expressly incorporated into each individual agreement, even if the section

[34] See record page 150 ff.
[35] Record page 153 at paragraph 2.

42D agreement could be set aside on any of the grounds alleged.

23.2 I therefore now turn to consider the grounds on which the applicants allege "duress and undue pressure "in respect of the individual agreements. In the notice of motion they state this comprises "denied them legal representation, the signing process lacked transparency and was calculated to financially prejudice the Claimants AND the Contracts (which were written in English) were not read out and explained in the Xhosa language to the Claimants."[36] If I allow that some or all of these circumstances could apply to every individual claimant the applicants allege duress on the following grounds,[37] in several applicant affidavits *viz*:

23.2.1 Respondent "officials threatened claimants with non payment

23.2.2 Officials rail-roaded and hustled residents into signing

23.2.3 Agreements were never read out

23.2.4 Agreements which were in the English language were not translated into the Xhosa language

23.2.5 The amount of money was not reflected on the documents at the time of signing

23.2.6 The officials didn't explain the implications and consequences of their signatures

23.2.7 The applicants were not afforded legal representation and

23.2.8 Thus did not know what they were signing

23.3 The respondents deny many of these allegations and are clear in their answering affidavit that the terms of payment were explained in each locality and are recorded within the signed agreements. Their main deponent, Linda Faleni, Regional Land Claims Commissioner in the area, has attached supporting

[36] Record page 2 – Notice of Motion paragraph 3(b).
[37] Record inter alia at pages 18, 47 , 60, 71.

affidavits from residents in each of the localities confirming that they represented their community in project steering committees involved in this land claim.[38] I am unable to find an affidavit[39] where an applicant attests that they personally experienced all or any of the above events constituting the alleged duress or have described in detail what happened to them personally so that their own agreement was due to such duress – as such I don't have to decide if any or all the alleged circumstances could constitute duress. Furthermore the deponents from each locality who have confirmed Faleni's affidavit and who are claimants themselves have attested that the documents were not signed in the circumstances alleged by the applicants. The respondents themselves have accordingly set out at some length the events leading to the signature of the individual contracts, have these versions supported by deponent in each locality and deny applicants' version. As important are the confirmatory affidavits from deponents Westaway and Grootboom[40] who as employees of independent non-government organizations confirm that they participated in the process described by the respondent in processing the claims. Finally counsel for the applicants also correctly pointed out that at no stage in the early correspondence from the applicants and their attorneys at the law clinic did anyone allege duress – rather concentrating throughout on the failure on the part of the respondents to implement the development program provided for in the section 42D agreement. As per the decision in *Plascon Evans* [41] I am obliged here where there is a dispute of fact to consider the facts averred by the applicants and admitted by the respondents, together with the facts alleged by the latter. I am satisfied that the applicants have not made out a case for

[38] See record inter alia affidavits at pages 286, 287, 290, 293, 296, 298, 301 ff.
[39] See affidavits at pages 11 to 106. Note some of these affidavits were not properly attested and as some pages were missing from the record names were missing from Annexure G.
[40] Record pages 275-280.
[41] *Plascon Evans Paints (Pty) Ltd v Van Riebeek Paints (Pty) Ltd* 1984 (3) SA 623 (A).

duress and I am able to determine this issue without referring it to oral evidence. Thus the attack on all the individual agreements fails together with the attack on each of their individual confirmations of the contents of the section 42D agreement and on this ground the application in respect of all these individual agreements are dismissed

23.4 If not correct in this regard, I turn now to consider the applicants' claim that the signatories of the section 42D agreements referred to in 20.1 and 20.3 signed without lawful authority from those they claimed to represent. The applicants have spent a fair amount of time setting out why they believed that the signatories of the 42D agreement didn't have authority to sign either the initial or the amended agreement on behalf of the claimants. They argue that the lists annexed to the respondents' papers are at best attendance lists at meetings and not an authority to represent and sign documents on behalf of the claimants. In argument Advocate Collett emphasised the difference between the authorising documents lodged by the applicants with names, identity numbers and addresses as against those with less detail used to support the mandate of the signatories in the 42D agreements. At general level this makes sense but the applicants' version in light of *Plascon Evans* founders due to the answering affidavits recording the following evidence - the independent evidence referred to above of the NGO employees; the lack of sworn testimony by applicants describing the events leading up to the signature of the 42D agreements; the presence of many of the claimants at the signing ceremony without opposition; the signature by the many claimants of individual agreements without a single sign of opposition in which they *inter alia* confirmed the mandate of the signatories to the section 42D agreement, the affidavits confirming the events as submitted by NGO's staff. Finally while the evidence of the respondents' deponents support that the signatories had a mandate, there was a further opportunity for the applicants to show the court

that the celebratory day of signature offered no opportunity to challenge what was happening. The respondents offered a video filmed on the day to confirm their version. The applicants did not take up this offer which could if presented to the court may have supported their version of the days' events.

23.5 Further, applicants have I believe misunderstood the agreement/s that they wish to have set aside – in particular the agreement for the amount of R55564.00. That was a negotiated and then agreed amount – but once agreed it was not an amount individually owed to every claimant. To properly understand this one needs to look at the purpose of the Act. It was passed into legislation so as to fulfil the constitutional provisions for the restitution of land rights of those dispossessed by discriminatory practices after 1913. A claimant sought restitution by submitting a claim before the 1998 cut-off point – and if the recipient commission considered it a valid claim it would gazette the claim.[42] Once gazetted the Commission was obliged to ensure that the claimant received restoration of the property or equitable redress if possible without the need to litigate. The route to avoiding litigation is by agreement in terms of section 42D of the Act. If such an agreement was not concluded the Commission was obliged to refer the dispute to this court [43] for resolution. Thus 2 routes exist for the resolution of land claims i.e. either via 42D or by referral of the dispute to the court. There is no other statutory route for any amount (R55564.00 or otherwise) to be legally approved. If the 42D is set aside then there is no agreement on value of the claimed land or on it being accepted as R55564.00 per claim. Accordingly should the section 42D be set aside, or any of the subsequent agreements there is no basis for money to be paid – and claimants ought to be tendering to return what they have already received so that the claim in its entirety can

[42] Section 10 of the Act.
[43] Section 14 of the Act.

be referred to this court in terms of section 14 as an unresolved dispute.

23.6 Finally I turn to the application to set aside the amended section 42D signed in 2005. The 2002 agreement provided for amendments in clause 13.[44] The Commission when they needed to amend the original 42D to deal with the problem of a local authority unable to deliver, decided to reconvene those who had signed in 2002, and they then signed the amendment. The applicants submitted that there was no legal basis for getting this "resussed group" - who they allege had no mandate and who by now were on applicants' version, simply deposed ex-leaders and still without a mandate. Thus they submitted, to sign when so much had changed, was inviting a challenge. Advocate Collett suggests that by this stage the respondents knew the process to be in serious trouble such that they should not have jumped into signing an amended 42D. She submits that they were pushing through an amended agreement without the necessary consultation or transparency because they were unable to show any developments since the 2002 agreement. However there clearly had been developments as at the very least several hundred families had received money and the third respondent (and others) had spent much time planning and contracting for numerous developments. The applicants may have been able to make out a case that the amendment didn't comply with section 13 of the initial section 42D agreement. If that had been successful the original agreement as well as the individual agreements would still have been valid. Adv Dukada SC correctly submitted that the amended 2005 agreement was concluded to substitute the implementing agent with one which could deliver and as such applicants suffered no prejudice by virtue of this amendment. In the circumstances I am not persuaded that grounds have

[44] Record at page 395.

been established for setting aside this amended section 42D agreement.

I have considered all these circumstances carefully. I am aware that there are claimants aggrieved that they have not received the money to which they believe they are entitled. No party involved in this restitution claim can be satisfied as the implementation has been exceptionally slow. The litigation here is similar to that when the aggrieved Port Elizabeth applicants[45] sought to set aside a section 42D agreement in that it has been much delayed and taken many years to reach this court. As in the Constitutional Court I too need to consider the enormous prejudice that would result to others including those not joined if the framework agreement were to be set aside. The applications to have the agreements set aside are accordingly dismissed.

24. Oral evidence: the applicants in their heads of argument applied for the issues relating to representation by the signatories and to alleged coercion to be referred to oral evidence as they could not be "resolved without oral evidence."[46] If the disputes of fact were not foreseeable before deciding to proceed by application, the applicants were correct to request a referral to oral evidence before the hearing started.[47] The parties agreed to argue the matter on the papers and to leave the issue of a referral to oral evidence in the hands of the court to be considered only after argument. As is apparent from the aforegoing I believe the matter could be resolved without referral to oral evidence and the application to refer these issues to oral evidence is accordingly dismissed.

25. Section 35A of the Act provides that:

"1) If at any stage during proceedings under this Act or any other Act conferring jurisdiction upon the Court it becomes evident that there is

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[45] *Concerned Land Claimants Organisation of Port Elizabeth v Port Elizabeth Land and Community Restoration Association and Others* (CCT29/06) [2006] ZACC 14; 2007 (2) SA 531 (CC); 2007 (2) BCLR 111 (CC) (21 September 2006).
[46] Applicants' heads of argument paragraph 3.1.4.
[47] See Civil Procedure in the Superior Courts : Harms (Lexixnexis) at B-64.

any issue which might be resolved through mediation and negotiation, the Court may make an order -

(a) directing the parties concerned to attempt to settle the issue through a process of mediation and negotiation;

(b) that such proceedings be stayed pending such process.

(2) (a) An order contemplated in subsection (1) shall specify the time when and the place where such process is to start.

(b) The Court shall appoint a fit and proper person as mediator to chair the first meeting between the parties: Provided that the parties may at any time during the course of mediation or negotiation by agreement appoint another person to mediate the dispute."

It became clear to me during the course of argument that a mediator may well be able to resolve the dispute between the applicants and respondents in a manner preferable to that possible on these papers before the Court. This would always prove to be a difficult matter to resolve all the difficulties by litigation. The applicants had to rely on and were bound by pleadings drafted by a committed but inexperienced law clinic – and this led to many irrelevant issues and papers relating to other localities being placed before the court. Pre-trial conferences could have but didn't resolve some of those difficulties. I asked the parties to advise their attitude to my issuing an order in terms of section 35A and staying the handing down of this judgment. One of the parties indicated opposition to my doing so and I accordingly have refrained from issuing such an order.

26. In light of the decision above all that remains is the question of costs. Applicants as the unsuccessful party are not entitled to their prayer for costs. Respondents in turn alleged the application to be *mala fide* and sought an order that the applicants be ordered to pay costs "on a punitive scale."[48] Respondents in their heads of argument did not persue this claim seeking that the court "discuss (*sic*) the application with costs." During argument counsel for the respondents persisted with the claim for costs on a punitive scale emphasising their view that the applicants were mendacious. It is however clear that the applicants in this matter were initially advised by and relied on the assistance of

[48] Record at page 241 paragraph 24; at page 273 paragraph 88.

the staff at a law clinic (this is common cause), that they firmly believed that their claims had not received proper and prompt attention, and that they prosecuted this application over many years before this court . The delays were caused both by the parties themselves often filing late and because this court mislaid the files at a certain stage. In such circumstances I am not persuaded that applicants have been mendacious or mala fide, or that there is good reason to depart from the ordinary approach of this court in this type of litigation where parties are seeking to enforce their constitutional rights in social litigation. I accordingly order that each party is to pay its own costs.

Accordingly :

1. The application is dismissed; and
2. Each party is to pay its own costs .

GRIFFIER, GRONDWETHOF
PRIVAATSAK/PRIVATE BAG X10060
2012 -04- 13
RANDBURG 2125
REGISTRAR, LAND CLAIMS COURT

Kahanovitz AJ

Acting Judge of the Land Claims Court

Appearances:

For the applicants

Advocate Collett

instructed by

Monaghan Attorneys

For the first & second respondents

Advocate N Dukada SC

instructed by

The Office of the State Attorney, Mthatha

For the third respondents

Mr Lang, Attorneys Smith Tabata Inc. on watching brief .