IN THE LAND CLAIMS COURT OF SOUTH AFRICA

HELD AT RANDBURG

Case No.: LCC 3/98

Date: 13 June 2016

In the matter between:

RALPH DANIEL JACOBS	Claimants
(In re the Farm Uap)	
And	
THE DEPARTMENT OF LAND AFFAIRS AND SEVEN OTHERS	1st to 8th Defendants

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JUDGMENT

INTRODUCTION

1 The claimant is Ralph Daniel Jacobs ("Jacobs"). He brings a claim for restitution of rights in terms of section 2(1)(c) of the Restitution of Land Rights Act 22 of 1994 ("the Act") and section 25(7) of the Constitution of the Republic of South Africa, 1996 ("the Constitution"). The claimant acts in his own interest and also in the interests of the descendants of Abraham and Elizabeth September, who owned land in the then area of Gordonia, in the area of today's Upington in the Northern Cape. In the statement of claim there are 393 names listed as the September descendants.

2 The land in issue was previously described as Farm 28 Uap. It is situated at

Gordonia road, near the town of Upington. Today the land is known as Uap 418. It is bordered by the Orange River (south), Uitkomst 420 (west), Rouxville 605 and 406 (east) and Steenkamps Pan 418 (north). It measures 9134 morgen. It was previously a single unit of land, but has since been subdivided into 39 separate farms. In this judgment, we refer to it as the land or the farm.

3 Abraham and Elizabeth September acquired the land in terms of what were then referred to as Perpetual Quitrent from the Imperial Government of the United Kingdom, which was then in control of and in administration of the land of Gordonia. The Perpetual Quitrent was issued in 1892. The sons of Abraham and Elizabeth, about whom we discuss later, subsequently sold the land in 1906 and it was registered to the new owners in 1907. (The sale is contested and will be dealt with later in the judgment.)

4 The claimants allege that the circumstances under which the Septembers lost the land constituted a "dispossession" as a result of past racially discriminatory laws or practices as envisaged in section 2(1) of the Act. The claim is opposed by the Department of Land Affairs. It contends in the first instance that no dispossession took place. Second, should dispossession be proven, it contends that there is no connection between the dispossession and any racially discriminatory law or practice. Finally, the parties are in dispute with respect to the correct method for calculating any compensation which may be due to the claimants if we conclude that they are entitled to relief.

5 It is helpful to commence the judgment by a proper sequence of the facts.

MATERIAL FACTS

The expert evidence

6 The principal witness called on behalf of the claimants was Professor Martin Legassick[1] who was called as an expert witness on account of his training as an academic and a historian. The expertise of Professor Legassick was disputed. But, as we understand, Mr Budlender, who acted for the Department of Land Affairs, accepted that his criticism as to the expertise of Professor Legassick was confined to the opinions expressed on the conclusions reached on issues which this Court can independently to reach its own conclusions without expert assistance. We accept the correctness of the legal position as advanced by Mr Budlender.

7 Therefore, in this judgment we confine ourselves with the facts as collated and presented by Professor Legassick. We do not consider ourselves bound by his opinions and conclusions on matters which this court is able independently to arrive at conclusions. We believe that our approach is in line with the approach of the Constitutional Court which has described the function of an expert in terms:

> *"To assist the Court to reach a conclusion on a matter on which the Court itself does not have the necessary knowledge to decide. It is not the mere opinion of the witness which is decisive but his ability to satisfy the Court that, because of his special skill, training or experience, the reasons for the opinions he expresses are acceptable. Any expert opinion which is expressed on an issue which the Court*

[1] Since this case was heard, we understand that he has since passed on. This Court is indebted to his industry and research in collecting the material on which this case was argued and unearthing facts which would otherwise have never come to light.

can decide without receiving expert opinion is in principle inadmissible because of its irrelevance."[2]

8 The opinions of an expert more readily come relevant "*when the subject is one upon which the Court is usually quite incapable of forming an unassisted conclusion*".[3] The Court has an interest in preserving its fact-finding duty but that is not the main consideration behind the exclusion of expert testimony per se. it is excluded because it makes no probative contribution to the resolution of the disputes before the Court. Our conclusion is that historical facts which Professor Legassick has presented to the Court are indeed admissible and relevant.

9 But his views on two issues are inadmissible and will not be relied upon by this Court. First, his opinions on matters of law as expressed in his article, *The Will of Abraham and Elizabeth September: The Struggle for Land in Gordonia, 1898 - 1995* (published in the *Journal of African History*, 37 (1996), pp 371-418) at pages 400 to 402 do not constitute matters about which he expertise. In any event, we are to consider the legality of the sale by reference to the legislative mandate of the Court, i.e. to decide if there was a dispossession of rights in land as a result of a racially discriminatory law or practice. The second area where we shall not be making reliance on Professor Legassick is where he questions the authenticity of documents, at page 405 of his article. In fact, as explained later in this judgment, another expert was called on this issue.

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[2] *Glenister v President of the Republic of South Africa and Others* 2013 (11) BCLR 1246 (CC) at para 7

[3] *Glenister* at para 7

10 We turn then to the historical facts as established.

The historical facts as established

11 On 22 November 1892, Abraham September was granted a Perpetual Quitrent tenure in the land by the Imperial Government of the United Kingdom which was then in administration of the area then known as Gordonia. Abraham September was a freed slave and was married to Elizabeth. Professor Legassick referred to them as part of the "Baster" community.[4] He explained how the Baster community came to settle in Gordonia:

> *"Born in slavery, Abraham September had become a part of the Baster people of the Northern Cape frontier zone, some 300 families of whom, in the aftermath of the war against the so-called 'Korana' in 1878 to 1879, were given permission to settle in 'Korana Land' north of the Orange River to defend the frontier and act as a buffer for the Cape Colony against any further attacks from the interior. Any who settled at this time had fought on the side of the Colony in the war: some had lived north of the river in the 1870s, attached to a Dutch reformed mission headed by Rev C W Schroder for the Korana, and recognised as 'Burghers' by the Korana chiefs Klaas Lukas and Cupido Pofadder. There is no evidence, however, that Abraham September was among these."*[5]

12 From about 1889 the Gordonia settlement fell under the control of the British Government, as part of British Bechuanaland, hence the Quitrent titles were issued by the British government, whose local administration was the Cape Colonial Government. It was the policy of the government that the area should

[4] We do not understand the term "baster" to be pejorative. Indeed throughout the trial, the term was used. We have therefore also adopted it for purposes of this judgment on the understanding that it is a socially and historically acceptable term.

[5] Legassick, pp 373-374

be occupied "*by as much [Baster] farmers*" as were willing to settle therein.[6] The consequence was that by 1889 the majority of the people living in the area and exercising rights in the land were Basters.

13 But this did not last for long. Over time, the area because attractive to whites for reasons mainly of commerce. In his evidence, Professor Legassick demonstrated that by 1910, the area of Gordonia was almost certainly all white-occupied and white-owned. Basters had lost out. He then set out to explain the causes for the loss of land. The land was mainly "*acquired*" by whites. But beneath these acquisitions lay multiple narratives of "*indebtedness*", "*drink*" and "*deliberate trickery*".[7]

14 The Cape Times on 9 March 1923 reported that the area which had been self-governing under British rule was annexed to the Cape with the consent of the United Kingdom Imperial Government. Following the change in government:

> *"The coloured burghers began rapidly to lose their land. The new government took very lightly its implied responsibility to maintain the colour bar in respect of land alienations within the settlement, and the natural consequence ensued. The burghers were not long in succumbing to the wiles of unscrupulous whites. Store keepers pushed credit upon them, loan agents got them involved in loans and litigation, and brandy sellers further assisted their ruin. Downright fraud, such as giving a burgher's signature to a deed of sale, represented to him as merely an option to buy his farm (which happened in one case whereof the present writer was informed) was probably not often practiced".*

15 Many strategies appear to have been employed by the white farmers to take

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[6] Legassick, p 374

[7] Legassick, p 390

away the land of the Basters.

15.1 Land was sold for next to nothing, "*for an apple*";

15.2 Basters were told that they were signing lease agreements only for it later to transpire that the documents were sale agreements.

15.3 Basters with debts were made to pay off such debts by giving up their land.

15.4 People who could neither write nor read were told of documents being signed either by themselves or on their behalf when the contents of such documents were not fully explained and it later transpired that the documents were sales of land.

15.5 The value of the land "*purchased*" in such circumstances was often not given over to the Basters.

16 The Cape Times article continued:

> *"These coloured folk were in most cases easily persuaded to dissipate their substance. ...[The] white land owner himself can be successfully seduced. This is especially the case when the country implicitly, albeit not lacking in its own forms of cuteness has to match itself against the sharp practice of the towns. Squares, perhaps hundreds of the Karroo farmers are at this moment in difficulties owing to their rash purchases of company shares on the deferred payment system. The coloured Gordonian farmers were soon ruined wholesale. Of the patrimony which was worn by the plucky and loyal behaviour of the fathers – and inheritance which the Imperial Government endeavoured to make safe to their posterity forever, so far as law could do so, scarcely half a dozen farms belong to their descendants today or, indeed, are held by coloured owners at all".*

17 Professor Legassick accepted that the full extent of how the Basters lost their land in Gordonia required an indepth study. But he concluded that the loss of

land of the Septembers was in the context of a larger settlement scheme the whites and area which the then Imperial Government originally decided would be settled by Basters that overtime and through the "*sharp practices*" of certain white land owners had become owned by whites.

18 Abraham September died on 5 July 1898. He left behind his wife, Elizabeth, and their children, three sons and four daughters. Two years before his death, on 5 October 1896, he (together with his wife) had signed a Joint Will and Testament. The contents of this Will were much debated in this trial as they were shortly after the passing of Elizabeth September. The relevant portion of the Will stated:

18.1 The surviving spouse (between Abraham and Elizabeth) would remain "*in full and undisturbed possession*" of all their property left by the first dying, "*both movable and immovable*".

18.2 After the death of the surviving spouse the farm would be bequeathed:

> *"... with undivided grazing veld to our three sons, Gert, Niklaas and Abraham), subject to the following conditions.*
>
> *They shall not any of them during their lifetime sell or otherwise alienate his portion of the farm.*
>
> *During his lifetime no one shall, without the consent of all, let or alienate for debt or otherwise the portion of his farm ...*
>
> *Our three sons, Gert, Niklaas and Abraham shall further, within one year after the death of the survivor of us, pay to each of our four daughters, Helena, Elizabeth, Katharina and Johanna, or their lawful heirs, the sum of 30 Pounds Sterling, being 40 Pounds Sterling to be paid by each son."*

19 Upon the death of Abraham September, a Death Notice signed by his son, Abraham, was submitted to the Master of the Supreme Court. On 2 August 1898

Mrs September wrote to the Master of the Court applying for letters of administration of the estate of the late Abraham September. The request nominated the attorney Mr Ernst Schroder (Schroder) to attend to the administration of the estate. The letter is also witnessed by the three sons, Gert, Niklaas and Abraham. The resident Magistrate of Gordonia forwarded the Death Notice, the Will, the application form from the surviving spouse and the request for the appointment of Mr Schroder as the agent to the Master of the Supreme Court, on 8 August 1898. In the inventory of assets signed with a mark "*X*" by Mrs September. The movable and immovable assets in the estate are listed, which include the farm in issue herein.

20 For reasons which are not clear, Schroder delayed in attending to the matter. As a result on 23 March 1899 the resident Magistrate stated in correspondence to the Master of the High Court that he had "*repeatedly called upon Mr Schroder the agent in this estate to file an inventory as required*" but he had by that stage failed to comply with the request.

21 On 27 July 1900 Schroder replied to the letter of the Master confirming his appointment as agent in the estate.

22 In a subsequent letter, dated 23 August 1900, Schroder informed the Master that "*in terms of the Will of the deceased the survivor remains in full possession of the estate and that a distribution shall only take place after the death of the survivor*". There is no information from the record in regard to what transpired between 1900 and 1906 and there was no testimony given in that regard. But the role of the attorney Schroder came under some criticism. Professor Legassick

described him as part of the "*elite*" of Gordonia, not serving the interests of the Septembers (who were also his clients) but placing himself in the ubiquitous position of also representing people who were transacting with the Septembers.

23 On 16 October 1906 a Declaration was signed purportedly by Mrs September. The Declaration records that:

23.1 She is the surviving spouse of Abraham September, with whom she created a Joint Will and Testament.

23.2 She adiated under the said Will and Testament and was in undisturbed enjoyment of the life interest in the property.

23.3 She stated that she signed the Declaration to confirm her agreement to transfer in full and free property the property to their sons, Gert, Niklaas and Abraham. The transfer was subject to the terms of the Will, namely that they may not sell the property without the consent of all and that the property may not be sold for debt.

24 The Declaration stated that Mrs September confirmed that the transfer to her sons was out of love and affection and was in consequence of her age and bodily weakness and she had no intention to further remain in undisturbed enjoyment of the property. (There is a dispute about whether Mrs September signed the Declaration with the mark "*X*" which appears as the bottom of the declaration. We return to this below.)

25 On the same day, 16 October 1906, a Power of Attorney purportedly signed by

Mrs September was produced under the letterhead of Schroder. It purported to nominate Schroder as the attorney to give transfer of the property to Gert, Niklaas and Abraham. (Again the authenticity of Mrs September's signature "*X*" is in dispute.)

26 Now, the interest of Mrs September had passed to her sons, under the apparent guidance of Schroder. Thereafter, the farm was "sold" by the sons to another party, W R D Thorne.[8]

27 A Succession Duty Statement, dated 25 January 1907 was drawn up. It is not clear why this was only drawn up at this time, not soon after the death of Abraham September. Be that as it may the Succession Duty Statement was filed on 15 June 1907 with the Master. Accompanying the Succession Duty Statements were succession duty receipts signed by three daughters, Johanna, Katarina, and Elizabeth, dated 25 and 26 January 1907. (The marks on this document ostensibly made by the daughters "*X*" are disputed.)

28 The power of attorney was passed on 24 June 1907 ostensibly signed by the three sons, Gert, Niklaas and Abraham. (The marks of Gert and Niklaas are disputed). A further power of attorney dated 17 August 1907 was signed to pass transfer from the three sons to W R D Thorne. Again the marks of Gert and Niklaas are disputed.

29 The final document evidencing the transfer of the land is the Deed of Transfer,

[8] This sale is disputed and is dealt with below.

dated 10 September 1907, in favour of Thorne. The Deed of Transfer contained the condition that the sale was "*subject to a life interest in favour of Elizabeth September (born Goeiman)*".

30 The value of the farm, at that point, it was common cause was 5000 Pounds Sterling. A dispute soon ensued concerning the validity of the sale and the rights of ownership and occupation of the farm of the September family. On 7 July 1909 legal proceedings were instituted by Thorne against Mrs September and her three sons. In his Particulars of Claim to the Supreme Court of the Colony of the Cape of Good Hope, Thorne alleged:

> *"The transfer of the said farm was passed to plaintiff on the 10th day of September, 1907, but in passing the said transfer, the conveyancer acting for the sellers by error inserted the 'subject to a live interest in favour of Elizabeth September (born Goeiman)' in the deed of transfer.*
>
> *The first defendant [Elizabeth September] has wrongfully and unlawfully allowed many persons to squat on the said farm and has permitted the title, belonging to the said persons, and also to neighbouring farmers to run on the said farm to the serious detriment of the property. The first defendant further has permitted a number of valuable trees on the said property to be cut down, and on or about the 10th day of February, 1909, this Honourable Court granted an interdict restraining the first defendant and other persons from destroying any trees pending an action to be brought by the plaintiff".*

31 Thorne sought an order for the amendment of the Deed of Transfer to omit the words which stated that the transfer was subject to a life interest in favour of Elizabeth September and an interdict against the occupation of the property by persons apparently brought thereon by the Septembers.

32 The evidence given at the trial can be summarised.

32.1 Dr Phillips, who described himself as the district surgeon of Gordonia testified that he had frequently treated Mrs September, whom she believed was approximately 75 years and had formed the view that she was mentally sound. When asked about the sale of the farm, Phillips recorded Mrs September as having told him that Thorne had ordered her off the farm, but that she had returned.

> *"I told her that if Mr Phillips had bought the farm, how could she expect to remain on it. She then got angry with me and said that, whether Mr Phillips had bought the farm or not, she was going to live on it, because, she said, it was her farm. The attitude she took up was that of a person who knew what she was doing. The woman was aged, and I suppose she had been accustomed to living on the farm all her life, and was bitter against the plaintiff."*

33 Mr Coller, the Assistant Magistrate, before whom the powers of attorney had apparently been taken and in particular the Declaration of 16 October 1906 also gave evidence. He testified that he had not recently seen the declaration of 16 October 1906. But he recalled that in that year:

> *"I was asked to attest a document in which the attesting person renounced a life interest. That is the only occasion in my experience I have been asked to attest such a document. It was a unique request. Mr Schroder, an attorney at Upington, brought the person to me. At this date I am unable to recollect whether it was a male or female who was brought to me, but until this morning I was under the impression that it was a male. I have no idea of a woman in connection with it. If a man had appeared before me and given as his mark 'Elizabeth September', I would certainly have had something to say in the matter, as it would have appeared rather strange."*

34 Coller continued:

> *"I have no recollection of the declaration which I attested and the power of attorney made by the three sons of the defendant. The*

document which I attested in the presence of Elizabeth September I recollect was read over and explained in Dutch to the person named. The document was in English, but Mr Schroder translated it into Dutch for the benefit of the person who was present. I am acquainted with Dutch myself. I had no suspicion about the document in any way. It is probable that I attested a power of attorney at the same time, but I have no recollection of the facts."

35 And finally:

> *"I cannot remember whether it was an old lady, or that it was a female at all. I am only giving the Court particulars of what I can actually recollect in regard to what took place."*

36 Thorne also testified. He stated that he did not have personal knowledge of the signature of Mrs September on 16 October 1906, but remembered that Schroder the attorney, "*at that time was acting for both parties*". Concerning the question whether any financial consideration was paid directly by himself to the September's for the purchase of the farm Thorne stated:

36.1 He took up obligations of the two sons (whom he did not name) in respect of a debtor, to the value of 1250 Pound Sterling. He had no security and paid the money on 6 October 1906.

36.2 "*The sons came to me and said that they were in difficulties, and they requested me to help them. The defendant was also present at that interview and asked me to assist her.*"

36.3 He mentioned to Schroder that he wanted "*a clear title to the farm*".

36.4 After the declaration to renounce was made by Mrs September, he continued to make advances until the farm was transferred to the sons, in July 1907.

36.5 The sons "*had made an agreement to give me an option by which they were to sign to me a two-thirds share of the farm*". That was in consideration of the advances I had made to them. He then added "*it was not under that agreement that I afterwards purchased the farm for 5000 Pounds Sterling. About a month subsequent to the drawing of that agreement the sons wanted more money to purchase more stock, but at that time I could not see my way to advance it.*"

36.6 Thorne further stated that he had allowed Mrs September to stay in the property as a "*squatter*" as long as she wanted.

37 The Court granted an order permitting the rectification of the Deed of Sale. It stated that the words "*subject to a life interest in favour of Elizabeth September*" would be excised and replaced with the words "*to have for the term of her natural life the right to continue to live in her present hypertension upon the said farm and to graze thereon twelve herd of large stock and one hundred herd of small stock.*" As noted, Mrs September was interdicted from allowing other persons to leave or use the property, with the exception of her sons.

38 Professor Legassick's article notes that one of the sons, Abraham was in 1909 already denying the knowledge of the sale and was of the view that the farm still belonged to the September family. Similarly, one of the daughters, Maria (said to have been untraceable in 1907) was apparently available by 1909.

39 These events: the denial of the sale by the September's; their apparent belief that they still owned the farm by 1909; the statement by the resident Magistrate

of Upington that their grievance was that "*they did not receive the purchase price in actual cash though I am satisfied that they had understood at the time that they had received full value*" led Professor Legassick to speculate:

> *"Where all the 'marks' and the signature of klein Abraham (forged by the lawyers?) Did the family upend their marks and sign, believing the documents drawn up by the lawyers was something other than what they were? Or had the sons (or klein Abraham at least) gone into the deal in good faith in 1907, but by 1909 wishes to repudiate it?"*

40 The mainstay of Professor Legassick's evidence was that the September's were cheated out of their inheritance, had concluded a sham transaction, and their signatures (excluding Abraham) were most probably forged. In addition to the references made to the 1923 Cape Time's article, to which reference has already been made, he recounted the story evidencing the "*sharp practices*" of Schroder's law firm. One Daniel Moulton, also a Baster, aged about 76 or 77 and recovering from an illness and apparently "*very weak*" had been "*badgered for almost an hour to sign a document consenting to extend [a] furrow*" on his farm for the benefit of one of the white farmers in the area. He could neither write nor read. But he had merely touched the pen in regard to the document presented to him for his signature. Mr van Coppenhagen, the partner of Schroder, was accused of using "*undue influence*" to secure the consent of Moulton. In that case, the transaction for the extension of the furrow did not succeed because of litigation brought on behalf of Moulton.

41 Professor Legassick used the example, however, to illustrate a broader point. There were sharp and dishonest practices generally perpetrated by whites against Basters exploiting the illiteracy of the Basters for the benefit of the white

farmers. While this was not the full explanation for the reasons for the loss of land, they contributed to the full understanding and explanation of the loss of land. The agents of the state, he alleged, had failed to take appropriate steps to protect the Basters from the loss of their land. Thorne subsequently sold the farm to Manuel Agerey Holmes in 1911.

42 Mrs September died on 1 April 1918. At the time of her death, she was still living on the farm. In her Death Notice signed by her son Abraham, on 19 February 1921 it was recorded that she had left immovable property being the farm Auap, and her homestead Erf 38 Upington. By this time – 1921 – there was already a raging dispute about the ownership of the farm. The record consists of no less than ten letters written on behalf of the September's to the Master of the Supreme Court between 1920 and 1921. The gist of those letters is the continuing belief of the September's that the Master had a duty to give effect to the terms of the Will and the sale to Thorne was disputed. On 17 February 1921, the African Political Organisation, which represented the interests of the September's for instance wrote:

> *"I have been requested by Abraham September, one of the heirs in the above estate, to forward to you the enclosed death notices. The heirs in this estate are ignorant of the requirements of the law otherwise these notices would have been filed at the due time. They have received the copy of the Will of the late Abraham and Elizabeth September which you so kindly sent them. I regret to state that the heirs have not been able to get an attorney to act for them in terms of your advice.*
>
> *They maintain that they have been done out of their heritage, and I would be pleased if you could kindly advise me as to the procedure necessary in getting the estate settled in terms of the Will. The heirs are very poor and cannot afford to enter into any costly litigation in*

their endeavour to gain possession of the farm Ouap, near Upington."

43 The Master's response to the African Political Organisation was to record that the farm was passed to the sons, who subsequently sold it to Thorne. As such there was no estate to administer. In fact, Mrs September "*died a pauper*".

44 In about 1921 the sons were evicted from the farm. In the pleadings before this court it was alleged that the eviction was carried out "*by mounted police armed with shambocks, without any order of court, resulting in the imprisonment of Abraham Junior for a while*". This account was supported by Professor Legassick in his evidence.

45 While the date of the eviction was not disputed, in the cross-examination of Professor Legassick, something appeared to be made of the manner of the eviction. In our view, it is most probable that the eviction was carried out by force. There is clearly a dispute about the entitlement of the September's to stay on the farm. By 1920, some two years after the death of Elizabeth September, the sons had become assertive in asking the Master to enforce the terms of the Will. The new owners of the farm were clearly intent on clearing it of the September family. The practices of the time and the regularity with which violence was used against blacks, which would include the Basters, and the general prevailing attitudes of the white community against the Baster community are well-known. We do not need to make firm conclusions about the exact nature of the violence employed to secure the ejectment of the September's. It suffices to note that the ejectment was most probably by force. It could not have been consensual in the light of the existing dispute about the

ownership of the farm.

46 The dispute concerning the ownership has persisted to this date – with generations of the September's and their descendants claiming that the Will was never enforced as it should have and that the September's remained the legitimate owners of the farm.

JURISDICTIONAL ISSUES

47 It is apt to consider at this stage whether this Court has the necessary jurisdiction in the matter. The jurisdiction of this Court depends on two factors: a dispossession of rights or interests in land taking place after 19 June 1913 and a causal link between the dispossession and racial discriminatory laws or practices of the past.

48 We commence with the issue of the date of the dispossession. Section 25 of the Constitution restricts the jurisdiction of the Court to dispossessions which took place until 19 June 1913. Any dispossession which precedes this date is excluded. Section 25(7) of the Constitution states "*a person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an act of parliament, either to restitution of that property or to equitable redress*".

49 In giving effect to this constitutional provision sections 2(1)(a)-(c) provides:

> *"(1) A person shall be entitled to restitution of a right in land if -*

(a) he or she is a person dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices ; or

(b) it is a deceased estate dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices; or

(c) he or she is the direct descendant of a person referred to in paragraph (a) who has died without lodging a claim and has no ascendant who -

(i) is a direct descendant of a person referred to in paragraph (a); and

(ii) has lodged a claim for the restitution of a right in land."

50 Section 21(1)(e) provides that a claim for restitution must be filed by no later than 31 December 1998. No issue was made in this trial about the date for the lodgement of the claim.

Dispossession after 19 June 1913

51 It is clear that the registration of title in favour of Thorne occurred in 1907. This was some time before the 19 June 1913 cut off point. But that fact is not dispositive of the inquiry. The year 1913 was selected for a reason. On 19 June 1913 the Natives Land Act 27 of 1913 came into effect. It "*deprived black South Africans of the right to own land and rights in land in the vast majority of the South African landmass*".[9]

52 Even as 1913 is the constitutionally prescribed cut-off date, regard may be had to the events that occurred prior to this date "*if the purpose is to throw light on*

[9] *Alexkor Ltd and Another v The Richtersveld Community and Others* 2004 (5) SA 460 (CC) at para 47

the nature of a dispossession that took place thereafter or to show that when it so took place, it was the result of racially discriminatory laws or practices that were still operative at the time of the dispossession."[10]

53 The term "*dispossession*" is not to be confined to loss of registered title. The main thrust of the Act is the restoration of "*a right in land*". Particularly, section 1 states that right in land means "*any right in land whether registered or unregistered, and may include the interest of a labour tenant or sharecropper, a customary law interest, the interest of a beneficiary under a trust arrangement and beneficial occupation for a continuous period of not less than 10 years prior to the dispossession in question.*" Dispossession therefore is a term that goes beyond the "*technical question of the transfer of ownership one entity to another*".[11]

54 Therefore, whether there has been a dispossession must be determined by adopting a "*substantive approach*" having regard to the relevant statutes, practices and official conduct.[12]

55 To revert to the present facts, there is no dispute that the nature of the rights and tenure of the September's were confirmed by way of a Perpetual Quitrent given to them in 1892 under the auspices of the then Imperial Government. The joint Will added the further restrictions to the alienation of the property in 1896, when it stated that the sons were not allowed to dispose of the property without

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[10] *Alexkor* at para 40

[11] *Alexkor* at para 188

[12] *Alexkor* at para 88

the consent of all and could not do so for reasons of indebtedness.

56 The case of the claimants was that the dispossession that took the form of registration of title did not put an end to their rights in the land. They urged us to find that the sale was fraudulent, that the provisions of the Will should have been enforced; and that the loss of land was in consequence of a past racially discriminatory law or practice.

57 Therefore, we must ask whether the claimants have proven a dispossession for rights and land that took place after 19 June 1913. In doing so, the correct approach as submitted by Mr Budlender, is that formulated by the Constitutional Court in *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC).

58 On this approach:

58.1 The scope of the rights protected under section 2(1) of the Act "*go well beyond the orthodox common law notions of rights in land. They include any right in land, whether registered or not*." The legislative scheme points to a purpose to make good the ample hurt, indignity and injustice of racial dispossession of rights or interests in land that continued to take place after 19 June 1913.

58.2 In construing the Act, regard must be had to the context. Two types of contexts are relevant. The first is the historical. The legislation must be viewed in light of its history. The second is the purpose of the legislation which seeks "*to afford claimants the fullest possible protection of their*

constitution guarantees".[13]

59 What this means in our view is that the inquiry should focus on the nature of rights in land which were taken away after 19 June 1913. The events which precede this date will be material in understanding the nature and reasons of the dispossession that took place after 19 June 1913. And so will the rules, policies and practices of the time. In the earlier judgment in this matter, delivered by Gildenhuys J (to which Bam P agreed) (delivered on 28 February 2000) the following is stated:

> *"If the alienation of the farm … constitutes a dispossession resulting from a racially discriminatory practice, within the meaning which those terms have in the Restitution Act, the Court will, provided the other requirements of the Restitution Act are met, be in a position to grant restitution. It will not be necessary to set the transfers aside, if they are invalid. The rights to restitution derives from the Constitution, and is not dependent upon the exhaustion of any civil remedies which the claimants may have. Evidence of the alleged fraud will be permissible, not for the purpose of setting aside the transfers, but for the purpose of bringing the claim within the ambit of the Restitution Act, if that is possible."*[14]

60 We have noted that the sale in 1906 and the registration of title of 1907 are not decisive per se. the claimants allege that the sale and the registration were obtained by fraudulent means. As such, they attack their validity at source. But at this stage of the inquiry, we are concerned only with the date of the dispossession. Specifically, we are concerned with whether the dispossession was before or after the 19 June 1913 cut-off point. In our view, a number of factors show that the Septembers retained and continued to enjoy rights in land

[13] *Goedgelegen* at para 53

[14] At para 19 of the judgment

well beyond the 1913 cut-off point. The following factors are important. .

60.1 The September's remained in occupation of the farm for much longer after 1907 – in fact up to 1921.

60.2 The occupation of the property was expressly allowed by the new owner or owners after Thorne had sold the property to Holmes.

60.3 Mrs September had the right to remain in the property until her death, which was in 1918.

60.4 Subsequent to the death of Mrs September in 1918, her sons remained in the property for about three years until their eviction in 1921.

60.5 After the sale of the property, the sons continued to believe and assert that they were the true owners of the farm and that the Master of the High Court was duty bound to enforce the terms of the Will.

60.6 The exact point at which there was an actual physical ejectment taking place in the face of protest and resistance was in about 1921.

61 Clearly the view taken at the time was that the Septembers lost some of their rights in 1907 as a result of the registration. But it was submitted before us that the registration was fraudulent. That fraud could have been reversed at any stage after 1907 if the claim had been properly investigated and the Will given effect. If the registration of the property into Thorne was the point at which the rights of ownership were lost then those rights of ownership could have be reinstated by the enforcement of the Will by the Master of the High Court, which did not happen. It is clear however that the Septembers continued to enjoy the

rights of beneficial occupation over the property until their ejectment in 1921. For purposes of jurisdiction, it will only be satisfied that a dispossession of rights and land took place after 19 June 1913.

Cause of the dispossession

62 The Constitutional Court has rejected the "*but for test*" in cases under the Restitution Act. The correct test focuses on whether the dispossession "*was a consequence of laws or practices put in place by the State or other public functionary*".[15]

63 Actions of private entities are not irrelevant. One must ask whether the laws, policies or practices altered the landscape to a material degree to favour white people at the expense of black people to the extent that whites were able to take advantage of blacks. The Constitutional Court has held "*the racially discriminatory laws in force and the racially discriminatory practices that prevailed materially affected and favoured the ability of the Altenroxels to dispossess the applicants for their labour tenancy rights. In a normal society based on dignity and equality, a truly representative government would have had a duty to protect and respect existing rights. It would have cared about the fact that any unilateral change in those rights would have heard on the labour tenants and their families. The Altenroxels would have been compelled by law or practice not to take away the vested rights in land of others as at 1913, particularly because the original rights of the people concerned preceded the first land registration and went back generations. Simply put, without the effect*

[15] *Goedgelegen* at para 76

of the Apartheid laws, policies and practices on land rights of black people, the Altenroxels would have never had the power to do what they did."[16]

64 Gildenhuys J had found that the conduct in issue – resulting in the dispossession – must have been fraudulent conduct on the part of government officials at the time when the farm was transferred to Thorne. Moreover he concluded that the "*determinative cause of that eviction is the actions of the then owner of the farm to enforce his ownership, the occupational rights of Elizabeth September having terminated at her death*". This approach is no longer consonant with the view taken by the Constitutional Court in *Goedgelegen.* The Act does not set as a pre-condition that the State must, itself, do the dispossession. It suffices if the dispossession is "*consequent upon and facilitated by the State laws and practices and furthered avowedly racist state objectives*".[17] If the acts and omissions of the State facilitate the racist dispossession by private individuals, that would constitute a causal link necessary for purposes of section 2(1) of the Act.

65 We return then to the facts.

ASSESSMENT OF THE FACTS

The dispossession after 19 June 1913

66 We have concluded that the act of dispossession must be understood in the light of section 2(1) of the Act. Unlike the position in *Goedgelegen*, in this case

[16] *Goedgelegen* at para 71

[17] *Goedgelegen* at para 78

the allegation made is that the registration of title in favour of Thorne procured fraudulently. In cases where fraud is alleged on the part of the transaction underlying the registration the correct legal position has been stated by the Supreme Court of Appeal in the case of *Nedbank Limited v Mendelow NO and Another* 2013 (6) SA 130 (SCA) as follows: "*it is trite that where registration of a transfer of immovable property is effected pursuant to fraud or a forged document ownership of the property does not pass to the person in whose name the property is registered after the purported transfer. Our system of deeds registration is negative: it does not guarantee the title that appears in the deeds register. Registration is 'intended to protect the real rights of those persons in whose names such rights are registered in the deeds office'. And it is a source of information about those rights. But registration does not guarantee title, and if it is effected as a result of a forged power of attorney or of fraud, then the right apparently creates is no right at all*".[18]

67 The reason for the conclusion in the *Mendelow* case was two-fold. First, registration itself does not create an agreement between the seller and purchaser. The Agreement of Sale must be established by reference to the intention of the seller to pass transfer and the purchaser to receive the property. Absent that agreement ownership would not pass.[19] The second reason for the conclusion in *Mendelow* is that the role of the Registrar of Deeds is clerical in nature and not evaluative. As the judgment explains, this was always the case in the Cape. In a judgment of *The Cape of Good Hope Bank v Fischer* (1885-

[18] *Mendelow* at para 12

[19] *Legator Mckenna Inc v Shea* 2010 (1) SA 35 (SCA) at paras 21 and 22

1886) 4 SC 368 De Villiers CJ concluded that the Registrar of Deeds of the Cape Colony was entrusted with the formal duties previously performed by judicial officers but that "*his chief duties are of a ministerial nature, and consist in registering deeds and bonds duly passed before him …*"

68 As such, we conclude that if it can be shown that the title was procured by Thorne fraudulently then the ownership would not have validly passed to him and therefore the September's remained owners of the property until their dispossession in 1921. However, if fraud could be detected, then the September's would have lost their right of occupation by 1921 when they were evicted.

69 But the Act requires the cause of the dispossession to be related to the racial discriminatory laws or practices of the State. It does not matter if the dispossessor is a third party. If their conduct is aided or abetted by the acts, omissions, practices and laws of the State the conduct could constitute a dispossession within the meaning of section 2(1) of the Act. We now turn to the issue of racial discrimination as a probable cause of the dispossession.

70 To begin with, the Perpetual Quitrent system must be understood in the context of official policy at the time.

71 While the policy of the Imperial Government had initially been to allocate the land in Gordonia to Basters, this began to shift towards the end of the 1880s. An important event explaining the shift was the completion by 1885 of the Upington Canal. The area became attractive to white farmers. A Cape official

noted that while in 1880 the area was "*a worthless desert*", in the late 1880s "*this had now changed*" because of the agricultural potential. Among the whites, the official added, there were some who had become jealous and with envy upon the land that had been made "*so rich*" by the industry of the Basters. The settlement of whites in Gordonia continued, fuelled by the changing economic circumstances and the consequent change of attitudes from white farmers. Ultimately, the area was predominantly white. Basters were no longer land owners. They were landless servants.

72 We have concluded that if the sale of the farm to Thorne was a fraud, then it would be legally ineffectual. It would not be necessary for this court to set aside the registration of the property since the actions of the Registrar of Deeds in giving effect to the registration are not of an administrative nature, but merely clerical. When registering property, the Registrar performs no evaluative function. The Regulations passed under Government Notice number 1032 of 1891 regulating the functioning of the Deeds Registry office at Cape Town, Kimberley and King Williams Town with effect from 1892 which were of application at the material times confirmed the clerical nature of the functions of the Registrar's office. What is important to bring about a legally binding sale of property is the consent of the seller and the buyer evidencing their mutual intention to transfer ownership. If those preconditions did not exist, no sale could take place. And for that reason the registration would not necessarily need to be set aside.[20]

[20] See: *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* [2004] 3 All SA 1 (SCA); and *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* (77/13) [2014] ZACC 6

73 We consider next the issue of racial discrimination as the cause of the dispossession.

The laws, policies and practices in Gordonia

74 Earlier in this judgment we sketched the background regarding the occupation of the land of Gordonia. In short, land was granted to the Basters in recognition of their role during the war with the Korana.[21]

75 Official policy at the time was openly racist. Jan Smuts, who later became a leading politician and Prime Minister in the Union of South Africa published an article on 2 July 1896 in the South African Telegraph expressing himself negatively in relation to what he referred to as the half-caste problem. It described the "*half-caste*" as an outcast with the settled habits and social levels of neither white nor black. Continuing the denunciation of the half-caste, he said that they had no social level, no settled habits, no cohesive traditions, and an overdose of vanity, laziness and criminal propensity.

76 Later, in 1917, General Smuts, now already a senior politician, addressed the Royal Colonial Institute in London on the question of race relations in South Arica. He noted: "*our ideal to make [South Africa] a white man's country, but it is not a white man's country yet. It is still a black man's country.*" He described "*any mixture of white and black blood*" as a "*dishonourable thing*". The future South Africa, which he envisaged was to keep blacks and whites "*as far apart*

[21] Professor Legassick has pointed out that the great irony in this was that the Korana were dispossessed by the British, thus making the land available for distribution among the Basters.

as possible in government". Instead of "*mixing up black and white all over the country*", the solution, according to General Smuts, would be the creation of areas occupied by blacks, where the blacks look after themselves according to their own ways of life and "*in suitable parts*" white communities could be settled. Economically, he concluded, "*the native will go on working in the white areas*".

77 While Smuts was reflecting on official policy of the Cape and in the country generally, the racist attitude towards the Baster people were also present at a local level. The Civil Commissioner and Resident Magistrate of Gordonia produced the Annual Report for British Bechuanaland for the year 1894 to 1895 and recorded:

> *"The native inhabitants of the district are so-called Basters. Under the formal regime a number of these men acquired farms and other landed property and are now practically independent. This fact has an unwholesome influence on the rest of the community who, as relatives, friends or 'hangers on' of landed proprietors, are disinclined to work and are apt to take somewhat false view of their position. Good servants are therefore extremely difficult to obtain in the district".*

78 These attitudes filtered through to specific queries addressed by the Septembers. These queries are characterised by bureaucratic indifference. This is apparent from the letter of the Resident Magistrate of 10 June 1909 to the Master of the High Court which noted that Abraham September Junior and others of the family denied knowledge of the sale documents in connection with the sale of the farm to Thorne. Despite this, the Magistrate concluded that he had "*no reason*" to doubt the proprietary of the sale and he was convinced that "*no injustice*" had been done to the Septembers. The grievances, he noted "*probably arises from the fact that during the last transfer of the farm, to Mr*

Thorne, they did not receive the purchase price in actual cash". The Magistrate was nevertheless "*satisfied that they understood at the time that they received full value*". This letter, pregnant with empty assertions and latent biases, manifests a deeper problem of indifference. The Septembers made clear that they disputed the sale. But the Magistrate made no attempt at investigating the grounds for their dispute. He simply noted that although they received no actual cash in the supposed sale, they must have understood that they had "*received full value*" at the time of the sale. His latent bias is also revealed by the statement claiming that he had "*no reason*" to doubt that no injustice was done to the Septembers. If he was satisfied that they did not receive cash in exchange for the sale, it seems to us there would at least be a *prima facie* basis for conducting an investigation into the legitimacy of the sale, to establish whether or not any injustice had been done to the Septembers.

79 Enclosed with the letter of 10 June 1909 was a report purporting to record the circumstances of the sale. While providing no new insights in relation to the sale, it appears to have been the basis for the views expressed by the Magistrate in the letter to the Master. Notably, the letter itself is littered with pejorative statements consistent with the prejudices against the Basters. It concluded that Mrs Elizabeth September still resides on the farm "*much to the annoyance of the registered owner whose efforts to improve the farm are hampered by the presence of a crowd of relatives and loafers who have collected round the old woman*".

80 Another official report dated 12 January 1924 and which concerned the settlement of Basters outside of the Gordonia area – by which point settlement

pretence had shifted considerably against the Baster population – underscores the racism of the officials against the Basters. The report noted that the:

> *"Basters are scattered along the river and throughout the district. Originally all of them or their fathers owned land but were too indolent or incompetent to farm it, besides they were very easily taken in, the result is most of their land, practically all, has passed into the hands of Europeans and the Basters are in a bad way today".*

Further:

> *"[The Basters] have a routed idea that the whole of Gordonia belongs to them and that they have been done out of their inheritance by the whites and that the government is now trying to force them into the desert".*

81 The policy positions, statements and practices described above illustrate the white biases against the Baster community. The actions of Thorne, a private citizen, cannot be viewed in isolation from the prevailing norms of racism of the time. We conclude that the loss of land of the Septembers must be understood in the light of the changes in government policy in relation to the settlement of Gordonia and the racist attitude that accompanied the change in government policy. It is so that the Native's Land Act of 1913 did not apply directly to the Basters since they were not regarded as African or natives as contemplated in that Act. But the point is that as a matter of practice there was racial discrimination perpetrated against them. Their loss of land can only meaningfully be understood as located in its proper historical context.

Specific allegations on the disputed sale

82 We consider next the specific allegations made in this case. The Claimants

relied on the expert testimony of Mr Jannie Bester, a handwriting expert. The thrust of his evidence was to show that the signatures (in reality, the marks "*X*") of Mrs September, Gert and Niklaas in all the documents purporting to evidence the transaction of the sale were not legitimate. The important documents which were disputed were the following:

82.1 The Powers of Attorney of 12 and 16 October 1906;

82.2 The Declaration purportedly by Mrs September, also of 16 October 1906, in terms of which she renounced her interest in the farm;

82.3 The Power of Attorney by Gert, Niklaas and Abraham of 17 August 1907.

83 Bester confirmed that these were not the authentic marks of Elizabeth, Gert and Niklaas. This was not disputed. The cross-examination focused on the other possible ways in which the signs could have been procured. It was suggested that the conclusion that showed was the most probable reason for the signature was not justified. The case of *Matanda v Rex* 1923 AD 436 was brought to the attention of Mr Bester. In that case the Magistrate recorded the practice followed in regard to illiterate persons in Natal. He stated:

> *"The witness [comes up to me], I hand the pen to him, he touches the pen and then I make the mark for him. I hold one end of the pen and he holds the other, after he is told to what he is deposing. He is not actually holding the pen at one end while I am making the mark. I hand him the pen, holding it myself. He fingers it. Then I take it and I make the mark. That is what happened in this case".*

84 This practice described in the judgment was accepted by the then Appellate Division as the custom in Natal, and the Court noted that it was certain that

further enquiry would probably show that the practice was not confined to the province of Natal.

85 The approach to the signature by illiterate persons which is accepted in the *Matanda* case is consistent with that recorded in an early American study in a book by the author Osborne titled *Questioned Documents*, published in 1929, brought to our attention by Mr Budlender. Mr Bester did not quibble with the statements made in the book *Questioned Documents* relating to the various ways in which illiterate persons can sign the documents. As such, Mr Bester accepted that the mark of an illiterate person could be procured in one of four ways:

85.1 That the person could make the mark unassisted;

85.2 The person could be guided or assisted by a literate person holding their hand;

85.3 The literate person could hold the pen and the illiterate person could touch the pen lightly while the literate person made the mark;

85.4 The illiterate person could touch the pen and the literate person could make the mark without the illiterate person holding the pen while the mark is being made.

86 Of course, Mr Bester could not say which of these modes applied here. The import of his testimony had been to confirm that the disputed marks were not of Elizabeth, Gert or Niklaas. Even as we accept the argument made by Mr Budlender regarding the different ways in which a signature of an illiterate

person could be obtained, we must measure it against the facts that we know. The important point about the evidence of Mr Bester is that his conclusions in relation to the disputed marks were based on comparisons with other documents where Elizabeth, Gert and Niklaas actually appended their marks. So, for instance:

86.1 On 2 August 1898 Elizabeth September appended her mark in a letter to the Master of the High Court applying for letters of administration of the estate to be forwarded to Mr Schroder.

86.2 In the same letter, Abraham, Gert and Niklaas also appended their genuine marks.

86.3 In a letter of complaint to the Master, after the passing of Mrs September, Gert and Niklaas were able to append their genuine marks.

86.4 In the power of attorney of 22 April 1909, where Mrs September instructed a Mr Fred B. Andrews of Cape Town as his attorney and agent in the litigation initiated by Thorne, she was able to append her genuine mark. Mrs September was also able to append her genuine mark in the liquidation and distribution account of the estate of her late husband on 1 August 1900.

87 It seems to us that the practice referred to by Mr Budlender and referenced in the *Matanda* case was not necessarily applicable in the case of the Septembers. As a fact, although Mrs September, Gert and Niklaas were illiterate, they were not unable to make their x's where they had to sign documents.

88 We have no evidence that the practice mentioned in *Matanda* was followed in the Cape or in Gordonia. What is known for a fact is that the Septembers could sign their documents by appending their marks of "*X*" where necessary. The departure from the practice was only noticeable in the instance of the transfer of the property to Thorne. Nothing was suggested to us that would explain why there was a departure in this instance.

89 It is clear that the Septembers denied knowledge and consent of the sale shortly after the sale took place. Dr Phillips, the district surgeon, recorded Elizabeth September as having specifically stated that the farm still belonged to her. Coller, the person before whom the depositions were apparently taken was equivocal, stating that he did not recall that a woman had appeared in front of him. The direct evidence of the reaction of Abraham September junior appears in the letter of 21 April 1909, where it is stated:

> *"I translated personally the material parts of the affidavit marked A to the man A P S September and he stated that the contents were perfectly novel to him and had never been explained to him. He appeared to be speaking the truth … The bet 'BET' absolutely denies receiving the money."*

90 There are also other facts which are unsatisfactory in relation to the supposed sale. The evidence of Thorne at the trial before the Kimberley Supreme Court was unsatisfactory. He initially created the impression that the farm was "*sold*" to him in exchange for writing off a debt. Later, however, he stated that it was <u>not</u> under that agreement – the debt agreement – that he subsequently bought the farm. He gave no details about the exact nature of the sale under which he was claiming ownership of the farm. The resident Magistrate recorded in

correspondence that no money had been paid to the Septembers in consequence of the sale. Finally, there is the issue of a clear conflict of interest on the part of Schroder, the attorney who acted for the buyer and seller simultaneously.

91 We conclude that the most probable inference to be drawn is that the signatures of the Septembers were obtained by forgery. This forgery occurred in the presence of a Justice of the Peace. The public officials failed to enforce the terms of the Will. This was made possible or facilitated by the racial prejudices prevalent at the time. The exploitation of the illiteracy of the Septembers by Thorne, aided by Schroder, was only possible because of racial discriminatory practices at the time. The failure by the officials to protect the Septembers and pursue their complaints is also explained by the racist practices of the time. The climate of racism in Gordonia and in the Cape in general made this possible.

92 The dispossession accordingly falls within the ambit of section 2(1)(c) of the Act. The Septembers are entitled to equitable redress.

EQUITABLE REDRESS

93 The powers of this Court to grant just and equitable restitution flow from section 25(7) of the Constitution. That section, it will be recalled, states that a person who satisfies the requirements in this section is entitled to restitution of rights and land or alternatively equitable redress. In this case, no issue of restitution arises. The sole point of enquiry is equitable redress.

94 The starting point is section 2(2) of the Act. Under that section, a person is entitled to restitution if just and equitable compensation calculated in terms of section 25(3) of the Constitution or any other consideration which is just and equitable "*calculated as the time of any dispossession of such right*" was received in respect of the dispossession.

95 We know on the facts that no compensation was paid to the Septembers at the time of the dispossession. The purchaser of the farm, Thorne, gave evidence stating that the sale was not pursuant to the settlement of any debt owed by the Septembers. The report of the Magistrate to the Master also made it clear that no financial consideration was made to the Septembers at the time of the dispossession. As such, in terms of section 22(1)(cB) we determine that no just and equitable compensation was paid to the Septembers at the time of their dispossession.

96 Our primary function is to determine a just and equitable compensation. In doing so we are required to take into account the factors listed in section 33 of the Act. Relevant factors in a case of equitable redress include:

96.1 The desirability of remedying past violations of human rights;

96.2 The amount of compensation and any other consideration received in respect of the dispossession and the circumstances prevailing at the time of the dispossession (section 33(1)(eA));

96.3 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 (section

33(1)(eB));

96.4 In the case of an order for equitable redress in the form of financial compensation, changes over time in the value of money (section 33(1)(eC)); and

96.5 Any other factor which is relevant and consistent with the spirit and object of the Constitution and in particular, section 9 of the Constitution.

97 We must commence by examining the purpose behind equitable redress. Equitable redress is defined to mean:

> *"Any equitable redress, other than the restoration of a right in land, arising from the dispossession of a right in land after 19 June 1913 as a result of past racial discriminatory laws or practices, including –*
>
> *a) The granting of an appropriate right in alternative state owned land;*
>
> *b) The payment of compensation."*

98 Our focus in this case is on payment of compensation. The object of payment of compensation under the Restitution Act has been discussed by the Constitutional Court in the case of *Florence v Government of the Republic of South Africa* 2014 (6) SA 456 (CC). The Court set the following parameters:

98.1 Compensation "*is a constitutionalised scheme paid out of public funds in order to find equitable redress to a tragic past*".[22]

98.2 What is just and equitable must be evaluated not only from the perspective of the claimant "*but also of the state as the custodian of the*

[22] *Florence* at para 125

national fiscus and the broad interests of society as well as all those who might be affected by the order made".[23]

98.3 The purpose of the financial compensation is to provide relief to claimants in order to restore them to a position as if they had been adequately compensated immediately after the dispossession.[24]

98.4 Just and equitable compensation does not aim to restore claim in current monetary terms to the position they would have been in had they not been dispossessed, but rather the financial loss they incurred at the time of the dispossession.

98.5 Just and equitable compensation would have to reflect the change, from the time of dispossession to the time of compensation in the value of money. "*If compensation were based on the fiction of continued ownership of the property, it is possible financial trajectory of capital gain would be difficult to compute*".[25]

99 Even as the Court set this benchmark it noted that:

> *"Equitable redress must be sufficient to make up for what was taken away at the time of dispossession. The amount of compensation has to be just and equitable reflecting a fair balance between public interest and the interest of those affected after considering relevant circumstances listed in section 33 of the Restitution Act. For instance, a history of hardship caused by the dispossession may*

[23] *Florence* at para 125

[24] *Florence* at para 132

[25] *Florence* at para 133

entitle a claimant to a higher compensation award in order to assuage past disrespect and indignity."[26]

100 On the application the *Florence* principle, the baseline is clear. The value of the farm at the time of the dispossession is known. It was 5000 Pound Sterling. That this amount was the correct market value is evident from the sale of the farm from Thorne to Holmes, shortly after Thorne had acquired it from the Septembers. It is common cause that based on the consumer price index escalation between 1907 and 2015 the value of the amount which would reflect a correct monetary escalation over the period would be R2,423,000 (two million four hundred and twenty three thousand rand). That amount would be consistent with the approach adopted in *Florence*. But the Septembers are claiming an amount of R36,454,000 (thirty six million, four hundred and fifty four thousand rand) for the loss of the land and an additional R58,330,000 (fifty eight million, three hundred and thirty thousand rand) for the loss of the use of the land. (The expert valuers called to support this claim told us that these amounts were reflective of the current market value of the property and the patrimonial and financial losses suffered as a consequence of deprivation of use of land owing to the dispossession.) That approach seems to be at odds with the views endorsed by the Constitutional Court with regard to the object of compensation under the Restitution Act. The approach of the applicants is based on the "*fiction*" of undisturbed perpetual ownership and commercial exploitation of the land. If we were to adopt it, not only would we be acting in conflict with Constitutional Court authority, we would also open a vortex of speculative claims premised on unknown variables of the trajectory of the land

[26] *Florence* at para 124

and its use absent the dispossession.

101 Yet, the law is clear. The object of the exercise is to place the dispossessed person in the same financial position they would have been in immediately after the dispossession. There is logic to this view. No one knows what would have happened to the land had it not been for the racial dispossession. No one knows in what manner the value of the land would have been affected over time.

102 In our conclusion, the starting premise is that the Septembers are entitled to the amount of R2,423,000 which is today's equivalent of the actual financial loss suffered by the Septembers pursuant to the uncompensated racial dispossession. But even as we make this conclusion, we accept the invitation made by counsel on behalf of the Septembers that the *Florence* decision is not exhaustive of what might be just and equitable on the facts of each case. It sets the benchmark for the calculation of financial compensation. We must still apply the factors listed in section 33. In particular, we must still decide whether there is a reason to adjust the compensation upwards or downwards. A specific factor referred to in motivation for the upward adjustment is the hardship suffered by the Septembers. Many people who were dispossessed of land suffered hardship. But we believe that on these facts there is ample evidence justifying the upward adjustment of the compensation due to the Septembers because of the specific nature of the hardship they endured.

103 It will be remembered that what changed the course of history in relation to the settlement of Gordonia was the ingenuity of Abraham September. This is set

out in Professor Legassick's article. He begins his article by noting:

> *"While historical mythology credits the Dutch Reformed Church missionary CHW Schroder, who lived in the area from 1871 – 1889 and 1893 – 1912, with the idea of irrigating the Orange. Such historiography takes for granted that white drive, innovation, and 'know how', assisted at most by black labour, developed and 'modernised' South Africa. But, so far as irrigation of the Orange River is concerned, the above quotation sets matters straight. It is the preface to the following: Mr Scott and Mr Schroder hearing of this [Abraham September's irrigation] inspected the place, and as it seemed to them practicable to lead the water from this point up to the alluvial soil lining the river bank for many miles, even beyond the village of Upington, a meeting was called and steps were taken to begin irrigation works on a scale of considerable magnitude. Many difficulties had to be phrased, but they were all eventually overcome.*
>
> *The Upington canal was 'the largest work of its kind in South Africa at that time'. In organising its construction, Schroder and his friend, John H Scott, – special Magistrate for the Northern border stationed at Upington – took their lead from Abraham September, who had first lead water from the Orange River. Indeed, they began the canal from the very place that he had selected. The small, white painted, stone house where Abraham September lived when he undertook this work survives to this day, there the house and the land upon which it stands have long passed from the hands of the September family."*

104 This was the point in history at which the economic and agricultural potential of the land became apparent. It also marked the beginning of the change of attitudes by white farmers who had previously regarded the area as a worthless desert. The dispossession of the Septembers can only be understood as part and parcel of a broader settlement of white people in Gordonia until there were virtually no black people owning land in the area. It would be to close our eyes to the facts of history if we failed to factor in the ingenuity and creativity of Abraham September into the determination of what is to be just and equitable compensation. This is not to romanticise the past. But it is to acknowledge it in

its full facets. Although we cannot work on a fiction of ownership, we must consider the facts holistically. That Abraham September began the canal which would completely alter the trajectory of history and ultimately lead to his own dispossession is a weighty consideration.

105 There was particular hardship suffered by the Septembers as a result of this dispossession. In 1993 Professor Legassick conducted oral interviews with surviving members of the family. They gave accounts of their recollections and stories passed from generations and also their own experiences of landlessness.

106 Gert September, the grandson of Abraham September, was born in 1916 and had a personal recollection of the eviction. He was probably eight or nine years at the time of the eviction. He stated in the interview that their family were just told to pack up and leave by one Willie Van Copenhagen Holmes. (Van Copenhagen was a partner in a law firm with Schroder, the attorney appointed to administer the estate on behalf of the Septembers.) Those who resisted the eviction were "*seized*" and put in jail and on their release they had to walk away, pack up and "*span their oxen and trek*".

107 They had nowhere else to go. They went "*from the one bush to the other bush and so we simple wandered, that my father ... found a place of refuge*". The family dispersed across the Northern Cape area and some went towards Namibia. But they all ultimately had to find employment which combined with their lack of education and the limited opportunities meant that they went into exploitative employment relationships.

108 Bet Beukes, who is also one of the descendants of the Septembers, spoke of oral accounts passed on to him. He recalled that the family were cheated out of the land "*because of false account from the lawyers*". He remembered that many of the family members were forced to work for the new farm owners on land that previously belonged to the Basters.

109 In terms of section 33(f) of the Act, this Court has the power to take into account any other relevant factor in determining compensation, including the provisions of section 9 of the Constitution. Section 9 of the Constitution contains three distinct subsections. First, everyone is equal before the law (section 9(1)); second, the State may take legislative and other measures to advance persons previously disadvantaged on account of, among others, race and social origin (section 9(2)). Third, section 9(3) prohibits discrimination on the specified grounds, which include race and social origin.

110 These provisions are part and parcel of a composite scheme evidencing South Africa's commitment to achieve an equal society and to repudiate the race based inequality of the past, which continues to shape the present. The Constitutional Court has affirmed in *Minister of Finance and Another v Van Heerden 2004 (6) SA 121 (CC)* that the measures taken under section 9(2) are "*integral to the reach of our equality protection*." The provisions of section 9(1) and section 9(2) are complementary; both contribute to the constitutional goal of achieving equality to ensure "full and equal enjoyment of all rights".[27] Restitutionary measures to promote equality under section 9(2) constitute an

[27] Van Heerden at para 30.

integral component of the right to equality.

111 Unlike the Constitutions of other countries, ours is not merely formalisation of historical consensus of values and aspirations. It is a "*radical rupture*" and a "*decisive break*" from South Africa's past.[28] At the centre of the rights and obligations in our Constitution is equality. Moseneke J noted in *Van Heerden:*

> *"Our supreme law says more about equality than do comparable constitutions. Like other constitutions, it confers the right to equal protection and benefit of the law and the right to non-discrimination. But it also imposes a positive duty on all organs of State to protect and promote the achievement of equality – a duty which binds the judiciary too."*[29]

112 Substantive equality for all South Africans is the key to the transformation required by the Constitution. For this reason, equality is one of the fundamental goals fashioned by the Constitution.[30] The Constitutional Court held in *Minister of Finance and Another v Van Heerden* that:

> *"The achievement of equality goes to the bedrock of our constitutional architecture. The Constitution commands us to strive for a society built on the democratic values of human dignity, the achievement of equality, the advancement of human rights and freedom. Thus the achievement of equality is not only a guaranteed and justiciable right in our Bill of Rights but also a core and foundational value; a standard which must inform all law and against which all law must be tested for constitutional consonance."*

113 For this reason, and in light of our history, the Constitution is designed to do more than record or confer formal equality.[31] The Constitution requires

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[28] Minister of Home Affairs and Another v Fourie and Another 2006 (1) SA 524 (CC) at para 59. S v Makwanyane and Another 1995 (3) SA 391 (CC) at para 262.

[29] Van Heerden at para 24.

[30] Bato Star at para 74.

[31] South African Police Service v Solidarity obo Barnard 2014 (6) SA 123 (CC) at para 28.

restitutionary measures by the state to achieve the goal of equality.[32]

114 Thus, it is clear that equality must be viewed from a substantive, rather than a formalistic viewpoint. Equality and dignity are central to our conception of land reform. Landlessness brought about inequality of Africans. When the Constitution empowers the State, in section 9(2), to take measures to advance the position of persons previously disadvantaged by race, this includes the process of land reform. Section 25(3) of the Constitution explicitly records the country's commitment to land reform.

115 When this Court considers a just and equitable compensation, it is legislatively required to pay attention to the provisions of section 9. This recognises the clear connection between land reform and equality. A central purpose behind land reform is the achievement of equality. We must therefore take this factor into account in determining the amount of compensation to be paid. An amount which fails to pay heed to the equalising purpose behind the restitution process cannot be just and equitable. The first respondent has urged us to accept the amount of R2,423,000 as being just and equitable.

116 In our view such amount fails to have regard to the particular hardship visited upon the Septembers as a result of their dispossession and ejectment from land. It also fails to pay due regard to one of the important objects of the Act, namely, to foster conditions of dignity, equality and freedom.

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[32] National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others 1999 (1) SA 6 at para 61.

117 We repeat that compensation should be just and equitable. Market value is a factor. It is not a goal in itself. We intend adjusting the value upwards. There are two reasons why we do so. The first is the nature of the hardship suffered by the Septembers, owing to the dispossession, which we have referred to above. The second is the grossly inequitable outcome of applying the actual financial value calculated at the time of the dispossession and today's market value in the land. In our view, the public interest and the provisions of section 9 of the Constitution are considerations justifying an increase in the amount to be paid to the Septembers.

DETERMINING THE AMOUNT

118 What then, is the correct amount? We take into account that justice and equity are not reducible to financial figures. But it is the duty of the Court to decide an amount to be paid by the state as financial consideration. Although we heard no evidence from the state concerning the financial demands on the fiscus caused by claims such as the present and other public demands generally, we take into account what was said in *Florence* that the payments under the Restitution Act are not meant to replicate the market value, but should reflect the public interest. We believe that an appropriate amount, which is just and equitable is the amount of R10 million.

119 There is a further claim by the Septembers, relating to some R58m odd payment for the loss of the use of the land. We believe that this claim should also be subject to the above analysis. We do not believe that it would be appropriate to consider the claim separately from our assessment of what is

just and equitable. As such, we conclude that the amount of compensation referred to above applies equally to the claim for loss of the land. For the avoidance of doubt, our decision on the just and equitable compensation for land also applies to the loss of the use of land. The amount of R10 million we have determined as being just and equitable applies to the value of land and its use.

120 There was some debate concerning the actual persons who are entitled to the claim. The Act answers this issue for cases such as this. Only the direct descendants of Abraham and Elizabeth September are entitled to the claim. It was common cause that the class of persons who could prosecute the claim were the direct descendants, but there was no specific evidence as to the identities of those direct descendants. We make this judgment on the basis that the identities of the direct descendants are at least known to the claimants or will be capable of easy verification.

121 Costs must follow the result. The Semptembers have achieved substantial success in this litigation. They are entitled to their costs. But as we understand, the state has been funding their litigation thus far. In applying our costs order, we expect that the amount actually spent by the Septembers in litigating the matter should be set off against the amounts already paid by the state. This should not in any manner affect the agreed rates between the state and the legal representatives of the Septembers. It would, in any event, be inappropriate to adjust the agreed rates after the event.

ORDER

122 In the circumstances, the following order is made:-

1. It is declared that the claimants were dispossessed of rights in land, in respect of the farm Uap, in Upington, after 19 June 1913, as defined in section 2(1) of the Restitution Act and section 25(7) of the Constitution.

2. The Department of Land Affairs and Rural Development is ordered to pay the claimants an amount of R10 million as compensation for the dispossession of rights in land referred to in paragraph 1 above.

3. The amount referred to in paragraph 2 above must be paid within 30 days of this order.

4. The Department of Land Reform and Rural Development is ordered to pay the costs of the Claimants, on a party and party scale, such costs to be set off against any payments already made by the Government in respect of the Claimants.

NGCUKAITOBI AJ

MPSHE AJ

Acting Judges of the Land Claims Court

June 2016