IN THE LAND CLAIMS COURT OF SOUTH AFRICA

CASE NO. 14/1996

In the matter of :

S DULABH

and

R T DULABH Claimants

Concerning :

Erf 1687, King William's Town

JUDGMENT

MEER, J :

A. INTRODUCTION AND BACKGROUND

[1] In this case we are concerned with four preliminary issues, antecedent to a claim for restitution of a right in land under section 2(1)(a) of the Restitution of Land Rights Act (Act No. 22 of 1994) (herein referred to as "the Act"), lodged by the Claimants with the Regional Land Claims Commissioner for the Eastern Cape and Free State. The claim, in which the Claimants are seeking compensation, was referred to this Court in terms of section 14(1) of the Act.

[2] The claim is one sounding in money only, for compensation in the sum of R972 526,25. The claimants, two brothers, are seeking this amount as compensation in a claim for the restitution of a right in land. Their claim pertains to financial loss allegedly suffered as a result of their grandmother being unable to take transfer of the family property out of the joint estate of herself and her late husband, the estate being legally compelled to sell the property to a white person when,

by proclamation[1] under the Group Areas Act, No. 36 of 1966 the property was declared to fall into a white group area.

[3] The Claimants, of the Indian group, are claiming in their capacity as direct descendants [contemplated at section 2(1)(a) of the Act] of a person who was dispossessed of a right in land under a racially discriminatory law or for the purpose of furthering the object of a racially discriminatory law [as contemplated at section 121(2) of the Interim Constitution[2]].

[4] The Interim Constitution deals with restitution of land rights at sections 121 to123. Given the legacy of land dispossession and wide-scale forced removals under apartheid land laws[3], which rendered millions of South Africans landless and homeless, it is hardly surprising that the Interim Constitution devoted a special sub-chapter to the subject, the objectives of which have been explained as follows[4] :

"The sub-chapter has four objectives. First, it obliges Parliament to enact legislation for realising the restitution of land rights.[5] *This has been accomplished by the Restitution of Land Rights Act No. 22 of 1994."*

"Secondly, it confers a constitutional right to restitution upon specified categories of dispossessed persons."[6]

"Thirdly, it compels Parliament to establish a commission on the restitution of land rights with competence to investigate the merits of claims, to mediate and settle disputes and to draw up

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1 Proclamation 212 dated 24 July 1968

2 References in this judgement to "the Interim Constitution" are to Act 200 of 1993. References to "the Constitution" are to Act 108 of 1996

3 This legacy can be traced through the early 17th Century Colonial "takings", followed by a long line of racially motivated legislative measures in the late 19th Century, culminating in the then Native Land Act 27 of 1913 (which demarcated only 7% of South Africa as Black territory); followed by the then Native Trust and Land Act No. 18 of 1936 which increased the scheduled areas for Blacks to 13%, the Group Areas Act 36 of 1966 (proclaiming reserved areas for particular racial groups), the Native Resettlement Act 19 of 1954, reinforced by "influx" control legislation. These laws confined 80% of the South African population to 13% of the land. For a full account see History of South African Land Laws Prior to 1991, page 3, in "The New Land Laws of South Africa", Legal Resources Centre, Durban, January 1992, revised December 1995, Metis Publications.

4 Professor John Murphy :The Restitution of Land after Apartheid : The Constitutional and Legislative Framework in Confronting Past Injustices, page 117, Butterworths 1996. (Eds M. Rwelamira and G. Werle)

5 Section 121(1).

6 Section 121(2)

reports and gather evidence for the adjudication of claims."[7]

"And fourthly it sets the parameters of the powers of the Land Claims Court to make orders of restoration and compensation.[8]*"*

[5] The Act (which commenced on 2 December 1994), provides for restitution of rights in land to persons dispossessed under racially-based legislation and has as its stated purpose the protection and advancement of persons who were disadvantaged by unfair discrimination.[9]

[6] The relevant provisions of the Interim Constitution which create the right to restitution, and call for the passing of the Restitution of Land Rights Act, are set out below for ease of reference.

"RESTITUTION OF LAND RIGHTS

Claims

121. *(1) An Act of Parliament shall provide for matters relating to the restitution of land rights, as envisaged in this section and in sections 122 and 123.*

(2) A person or a community shall be entitled to claim restitution of a right in land from the state if -

(a) such person or community was dispossessed of such right at any time after a date to be fixed by the Act referred to in subsection (1); and

(b) such dispossession was effected under or for the purpose of furthering the object of a law which would have been inconsistent with the prohibition of racial discrimination contained in section 8(2)[10]*, had that section been in operation at*

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7 Section 122

8 Section 123

9 The Preamble to the Restitution of Land Rights Act states :

"WHEREAS the Constitution of the Republic of South Africa, 1993 (Act No. 200 of 1993) provides for the restitution of a right in land to a person or community dispossessed under or for the purpose of furthering the objects of any racially based discriminatory law;

AND WHEREAS legislation for this purpose is to be designed to promote the protection and advancement of persons, groups or categories of persons disadvantaged by unfair discrimination, in order to promote their full and equal enjoyment of rights in land;"

10 *"8.(2) No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular : race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language."*

the time of such dispossession.

(3) The date fixed by virtue of subsection (2)(a) shall not be a date earlier than 19 June 1913.

(4) . . . .

(5) No claim under this section shall be lodged before the passing of the Act contemplated in subsection (1).

(6) . . . .

[7] Section 2 of the Act states :

"Enforcement of claim for restitution.

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

(a) he or she is a person or community contemplated in section 121(2) of the Constitution or a direct descendent of such a person;

(b) the claim is not precluded by section 121(4) of the Constitution; and

(c) the claim for such restitution is lodged within three years after a date fixed by the Minister by notice in the Gazette.

(1)(A) No person shall be entitled to enforce restitution of a right in land if just and equitable compensation as contemplated in section 123(4) of the Constitution, calculated at the time of any dispossession of such right, was paid in respect of such dispossession.

(2) Subsection (1) shall be deemed to have come into operation on 2 December 1994."

[8] It is the Claimants' case that theirs is a valid claim for restitution of a right in land under the Interim Constitution and the Act. The land in question is Erf 1687 King William's Town (herein referred to as "the property"), purchased by the Claimants' grandfather in 1953. The family lived on and conducted the business of a trading store from the premises. The claim is an interesting and indeed unusual one in that the Claimants and their family did not physically move off the property after it was declared to be a white group area. Instead, the property was sold to the Community Development Board in 1973, and they continued to live on and trade from the premises as tenants of the Board. The Board later sold the property to a member of the white group, and the family leased the property from the subsequent owner. In this way they avoided being evicted from the property even though the area had been declared for members of the white group only, in which they could not own property. Thus, because of their determination to remain on the property, the

Claimants' family, whilst ceasing to own the property, continued to retain possession thereof as tenants under a series of tenuous and short leases, first with the Community Development Board and later with the subsequent owner. The family lived on and traded from the property in the lesser status of tenants until 1994, when, with the passage of time and the abolition of racially based legislation, it became possible for them to revert to the status of owner, and the Claimants "repurchased" the property together with an adjacent property, Erf 1688, for the sum of R200 000,00.

[9] After "repurchasing" the property the Claimants lodged a claim for restitution with the Land Claims Commissioner in Pretoria claiming compensation in the sum of R972 526,25. Physical restitution was not included in the claim as this had already been achieved by the Claimants themselves.

[10] On 7 June 1996 the Chief Land Claims Commissioner referred the claim to this Court in terms of section 14(1) of the Act. The referral contains the full report and investigation of the claim by the Regional Land Claims Commissioner for the Eastern Cape and Free State, to whom the Court is indebted. I am satisfied that the Regional Land Claims Commissioner has adequately complied with the provisions of sections 11, 12 and 14 of the Act pertaining to the lodgment, investigation and referral of the claim.

[11] The Commission at paragraph 1.1 of its report suggests the following options for a Court order :

- ruling that restitution has already taken place and making no award; or
- ruling that some compensation is due to the Claimants; or
- any other ruling the Court considers appropriate.

[12] Following agreement between the parties at a pre-trial conference on 21 January 1997, the Court heard the following issues only (which go to determine the validity of the claim), on 3 February 1997 :

- Whether the two Claimants are the only descendants of the late Pali Vassen Jewan and the only potential claimants.

- Whether a dispossession has occurred.

- Would the fact that the Claimants reacquired the property after it was compulsorily sold, exclude a compensation claim?

- Has the claim possibly been filed/lodged earlier than permitted under section 121(5) of the Interim Constitution and if so, would that exclude the validity of the claim?

The Court's decision on these issues will determine whether the Claimants have a valid claim for restitution and may proceed with their compensation claim.

[13] This case was pending before the Court when the Constitution took effect on 4 February 1997 and the hearing (dealing only with the above four issues as it did, the issue of the amount of compensation, if any, remaining), was held in King William's Town on 3 February 1997. The claim therefore, being one that was pending when the Constitution took effect, falls to be dealt with under the Interim Constitution. Section 17 of Schedule 6 of the Constitution (which deals with transitional arrangements), states, *"all proceedings which were pending before a court when the new Constitution took effect, must be disposed off as if the new Constitution had not been enacted."*

[14] At the hearing, the legal representatives for the Claimants and the Department of Land Affairs addressed the Court on each of the issues and evidence was presented on behalf of the Claimants. Before I proceed to consider the issues I shall set out briefly the history of the ownership of the property and the Claimants' family's involvement therewith.

B. THE HISTORY OF THE OWNERSHIP OF ERF 1687 KING WILLIAMS TOWN AND THE CLAIMANTS' FAMILY'S INVOLVEMENT THEREWITH

[15] In 1953, under Deed of Transfer No. 980/1953, Vassen Jewan, the Claimants' maternal grandfather, bought and took transfer of the property for the sum of , 2 000,00. Vassen Jewan resided with his family on the property and conducted the business of a general dealer under the name "V.J. Parbhoo", thereon.

[16] On 21 November 1971 Vassen Jewan, also known as V.J. Parbhoo, died leaving a

will appointing his wife Pali Vassen, to whom he was married in community of property, as his sole heiress.

[17] Shortly after the death of Vassen Jewan, the area in which the property was situated was proclaimed a White group area and the property could not be transferred to Pali Vassen, as executrix of the joint estate of herself and her late husband, she being of the Indian group[11]. Pali Vassen, who resided on the property together with her daughter and two grandsons, the Claimants, then minors, was advised by her lawyer to auction the property so as to get the best price for it. However, the highest price offered on auction, R2 000,00, was rejected by her as too little.

[18] As a last resort Pali Vassen sold the property for the sum of R4 000,00 to the Community Development Board and immediately entered into a lease agreement to remain on and rent the property from the Board for the sum of R45,00 per month.

[19] The property was transferred to the Community Development Board in 1973 from Pali Vassen Jewan in her capacity as Executrix in the joint estate of herself and her late husband.

[20] On 25 April 1975, the property was sold and transferred by the Community Development Board to Andreas Christou Pouroullis for the sum of R5 500,00.

[21] The family continued to rent the property by entering into an agreement with the new owner, who refused to bind himself to a fixed term lease. For the greater part of 20 years the family traded without a written lease.

[22] With the passage of time and the abolition of racially-based legislation, it became possible for members of the Indian group to once again own property in the area where the property was situated in King William's Town. Accordingly, on 12 January 1994 the Claimants bought and took transfer of the property and the adjacent Erf 1688 from the widow of Andreas Christou Pouroullis for the sum of R200 000,00. Thereafter they lodged the present claim and on 7 June 1996 the Chief Land Claims Commissioner referred the claim to the Court.

[23] Although there are different spellings and versions of names of some of the "actors" in this case,

11 Section 27 of the Group Areas Act prevented a disqualified "intending" transferee from acquiring land by testamentary disposition.

they refer to the same persons. For example, Vassen Jewan also went under the name of Vassen Jewan Parbhoo. His wife, Pali Vassen is also known as Pali Vassen Jewan Parbhoo. The business name under which Vassen Jewan and later Pali Vassen Jewan traded was "V.J. Parbhoo" and the Claimants still trade under this name. Mani Dulabh, the Claimants' mother, was born Mani Vassen. The name "Vassen Jewan" is also spelled "Vassim Jewin", and an identity document extract of the latter refers to "Jeewan Vassan". For convenience, this judgment adopts the names Vassen Jewan, Pali Vassen Jewan and Mani Vassen/Dulabh.

[24] Against this background of the history of the ownership of the property and the Claimants' family's involvement therewith, I consider the four issues which must be determined at this hearing.[12] The Order in which I have chosen to address each issue is, I believe, more conducive to determining the validity of the claim (than the order in which they were formulated or heard).

C. HAS A DISPOSSESSION OCCURRED?

[25] Mr Clark asserted on behalf of the Claimants that there had been a dispossession as contemplated by section 121 of the Interim Constitution. He elaborated thereon with reference to a memorandum handed into Court (part of Exhibit A), which sets out the following:

- Section 23 of the Group Areas Act No. 36 of 1966 provided for the proclamation of group areas in terms of which specific delineated areas were reserved for specific racial groups as provided for in section 12 of the Act. Proclamation 212 of 1968 proclaimed the area in which the property was situated to be a white group area.

- Section 27 of the Group Areas Act prevented disqualified persons[13] from acquiring land and similarly, an intending transferee was prevented from acquiring land by way of intestate succession or by testamentary disposition.

It was in these circumstances that Pali Vassen Jewan was prevented from taking transfer of the property.

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12 * Whether the two Claimants are the only descendants of the late Pali Vassen Jewan and the only potential claimants..
* Whether a dispossession has occurred?
* Would the fact that the Claimants reacquired the property after it was compulsorily sold exclude a compensation claim?
* Has the claim possibly been filed earlier than permitted under section 121(5) of the Interim Constitution and if so, would that exclude the validity of the claim?

13 As defined by section 23 and the definitions section of the Act.

[26] From the uncontested evidence of Suresh and Mani Dulabh, the Deeds of Transfer in respect of the property and other documents handed into Court, it is clear that the Group Areas Act and Proclamation 212 of 1968 promulgated thereunder deprived the late Pali Vassen of her common law right to inherit and take transfer of the property. As a result she was forced to sell the property to the Community Development Board when the area was proclaimed a white group area. The fact moreover that she continued to rent the premises from the Community Development Board initially, and thereafter from the subsequent owner, and that her descendants "repurchased" the property at the first opportunity, indicates that there was never any intention to dispose of the property voluntarily.

[27] An enquiry as to whether a dispossession of the property occurred, is rendered somewhat intriguing by the fact that at no stage was either Pali Vassen or any of her descendants physically dispossessed of the property. There can be no doubt that the late Vassen Jeewan had a “right in land” as defined in the Act, being the right of ownership of the property prior to the sale to the Community Development Board. Thereafter, that right vested in the joint estate of the late Vassen Jeewan and Pali Vassen, and although the late Pali Vassen continued to be in possession of the property her status was that of tenant. The coming into effect of the Group Areas Act and Proclamation 212 of 1968 and the forced sale of the property to the Community Development Board as a consequence, dispossessed her of the right to take transfer of the property, to inherit it, and ultimately of the right of ownership. Instead she was forced to accept the lesser right of tenant.

[28] In the light of the above, it must be considered whether, given the circumstances, a dispossession of a right in land as contemplated under section 121(2)(a) of the Interim Constitution had occurred. Neither the Act nor the Interim Constitution defines the concept of dispossession. I was not able to find a definition of dispossession in any South African legal dictionary. The word is defined in some English and American dictionaries as follows :

- According to Jowitt's Dictionary of English Law,[14] dispossession means 登uster徹uster is defined as follows :

  "Dispossession, a wrong or injury which may be sustained in respect of hereditaments, corporeal or incorporeal, carrying with it the deprivation of possession, for thereby the wrongdoer gets into the actual occupation of the land or hereditament and obliges him who has a right, to seek his legal remedy in order to gain possession and damage for the injury

14 Page 627

sustained. An ouster may either be rightful or wrongful. A wrongful ouster is a disseisin."[15]

"Ouster of the freehold is effected by abatement, intrusion, discontinuance of deforcement."

- Black's Law Dictionary[16] defines dispossession as follows :

"Ouster, a wrong that carries with it the amotion of possession. An act whereby the wrongdoer gets the actual occupation of the land or hereditament. It includes abatement[17]*, intrusion*[18]*, disseisin*[19]*, discontinuance*[20]*, deforcement*[21]*."*

[29] The literature on dispossession pertaining to the context of land reform tends to contemplate dispossession in relation to ethnic groups that have suffered a particular kind of deprivation : the confiscation and denigration of their resources and culture under imperialism and colonial exploitation.[22]

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16 Abridged 6th Edition, published in 1991 at page 326,

17 *"A reduction or decrease or diminution. The suspension or cessation in whole or in part of a continuing charge such as rent."* [Page 5]

18 *"The act of wrongfully entering or taking possession of the land of another."* [Page 642]

19 *"To dispossess, to deprive."* [Page 377]

20 *"Ending, causing to cease, ceasing to use, giving up, leaving off, refers to the termination of a project, structure, highway or the like."* [Page 372]

21 *To withhold wrongfully, to withhold the possession of lands from one who is entitled to them."* [Page 347]

22 In this context, for example, the Maori people of New Zealand are regarded as a dispossessed people by virtue of New Zealand's colonial legacy which robbed them of their language, culture, land and resources. (See E. Stokes : "The treaty of Waitangi and the Waitangi Tribunal : Maori Claims in New Zealand in Indigenous Land Rights in Commonwealth Countries", Commonwealth Geographical Bureau Workshop, page 66. Editors, G. Cant, J. Overton and Pawson, 1992).

A similar colonial legacy has rendered the aboriginal people of Australia, Canada and the United States, dispossessed people.

An interesting example of a people that are regarded as dispossessed are the Vedda people of Sri Lanka. This small group of people traditionally lived in jungle areas where they hunted, gathered and practised shifting cultivation. More and more land was opened up for settlement and irrigation purposes. The maintenance of their traditional lifestyle became increasingly difficult. In terms of a Government scheme they were required to move and resettle, which they did voluntarily. They are nevertheless regarded as a dispossessed people, with entitlements to their traditional land and culture. This is in accordance with the very wide meaning of dispossession. (See Chandrasena, V.A., The Struggle for the Survival of an Aboriginal Group : The Veddas of Sri Lanka, in Indigenous Land Rights in Commonwealth Countries, Commonwealth Geographical Bureau Workshop, page 13, Editors G. Cant, J. Overton and Pawson, 1992)

[30] The meaning and the context of the word "dispossession" as discussed above, embracing both individual and community dispossessions is, I believe, compatible with the spirit of the Interim Constitution and the Act, and lends itself aptly to the present case. The qualification that is placed upon dispossession at section 121(2)(b) of the Interim Constitution, namely that "such dispossession was effected under or for the purpose of furthering the purpose of a law which would have been inconsistent with the prohibition of racial discrimination contained in section 8(2) had that section been in operation at the time of such dispossession", applies equally to the present case.

[31] The prohibition of the transfer of the property to Pali Vassen Jewan and the subsequent sale thereof to the Community Development Board, constituted a dispossession of her right in land, more specifically her right to inherit and take transfer of the property. Pali Vassen Jewan was dispossessed of such right in land by section 23 of Act No. 36 of 1966 (the Group Areas Act), a racially discriminatory law, and Proclamation 212 dated 24 July 1968 which delineated the property to fall within a white group area. I am satisfied that Pali Vassen Jewan was dispossessed of a right in land and that such dispossession was effected under a law which would have been inconsistent with the prohibition of racial discrimination contained in section 8(2), had that section been in operation at the time of such dispossession.

D. WOULD THE FACT THAT THE CLAIMANTS REACQUIRED THE PROPERTY AFTER IT WAS COMPULSORILY SOLD, EXCLUDE A COMPENSATION CLAIM?

[32] This issue is concerned with the concepts, "restoration", "restitution" and "compensation". It poses the related questions, can a claim for restitution of a right in land by way of compensation be permitted where physical restoration of the land has already been acquired by the Claimants through their own means? Does the Interim Constitution and/or the Act exclude a claim for compensation under these circumstances? The answer to this question is of great importance to all restitution claims.

[33] The crisp issues to be decided by this Court are :

- whether the wording of section 123(3) of the Interim Constitution (the section which provides for the granting of compensation by the Court in a

restitution claim), expressly or by implication excludes a claim for compensation where physical restoration of the land has already been achieved by the Claimants themselves;

- whether the meaning of the words "enforce restitution" in section 2(1) of the Act and "claim restitution" in section 121(2) of the Interim Constitution can include a claim for compensation only, in a situation where physical restoration has already been achieved by the Claimants through their own means.

[34] In addressing the issue, the legal representatives for both parties considered whether the word "restitution" at sections 121 and 123 of the Interim Constitution could be interpreted to include a claim for compensation only, in a case such as the present.

[35] Mr Smith, for the Claimants, argued for a wide and purposive interpretation of the word "restitution" to include compensation in a situation where physical restoration had been achieved by a claimant through his/her own means, relying on the following cases which call for a liberal construction of a Constitution with a Bill of Rights :

> **Attorney General v Moagi 1982 (2) Botswana LR 124** per Kentridge AJ at 184; **R v Big M Drug Mart Limited 1985 (18 DLKI) (4)** per Dixon J at 321; **Minister of Home Affairs (Bermuda) v Fisher 1979 (3) ADR** at 21; **S v Zuma and Others 1995 (4) BCLR 401 SA** per Kentridge AJ at 410 and 411,

[36] Advocate Havenga, for the Department of Land Affairs, presented two mutually exclusive arguments, in the alternative. He argued for a narrow interpretation of the word "restitution" so as to exclude a claim purely for compensation, contending that section 123(3)(b) permitted an award for compensation only where a claimant prefers alternative relief to restoration (of a right in land).

In the alternative, he argued for a *"purposive but generous"* interpretation of the Interim Constitution, conceding that the measures envisaged at section 8 of the Interim Constitution might include the granting of compensation under section 123(3) of the Interim Constitution, irrespective of whether the claimant was already the holder of the right in land dispossessed.

[37] The Court's function in deciding this issue is an interpretative one, requiring an interpretation of :

- the provisions of section 123(3) of the Interim Constitution;

- the word restitution as it appears in the Act [at section 2(1)(a)] and the Interim Constitution [at section 121(2)[23] and section 8[24]];

in the context of the broad principles of the Act and Interim Constitution, and deciding whether the Act and/or the Interim Constitution expressly or impliedly excludes a claim only for compensation in a case such as the present.

[38] The word "restitution" as it appears in the Interim Constitution [section 121(2) and section 8] and the Act [section 2(1)(a)], does not lend itself effortlessly to the interpretation that a claim for restitution of a right in land embodies a claim for compensation, where the claimant has already achieved restoration through his or her own initiatives. Nor do dictionary meanings of the word "restitution" throw much light on its meaning in this context.

[39] The relevant portion of section 123 which refers to compensation in a case such as the present states :

"123

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23 These sections are quoted at paragraphs 6 and 7 above respectively.

24 ***"Equality***

8. *(1) Every person shall have the right to equality before the law and to equal protection of the law.*

(2) No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular : race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.

(3) (a) This section shall not preclude measures designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms.

(b) Every person or community dispossessed of rights in land before the commencement of this Constitution under any law which would have been inconsistent with subsection (2) had that subsection been in operation at the time of the dispossession, shall be entitled to claim restitution of such rights subject to and in accordance with sections 121, 122 and 123;

(4) Prima facie proof of discrimination on any of the grounds specified in subsection (2) shall be presumed to be sufficient proof of unfair discrimination as contemplated in that subsection, until the contrary is established."

Court orders

(1) Where a claim contemplated in section 121(2) is lodged with a court of law and the land in question is -

(a) in the possession of the state and the state certifies that the restoration of the right in question is feasible, the court may, subject to subsection (4), order the state to restore the relevant right to the claimant; or

(b) in the possession of a private owner and the state certifies that the acquisition of such land by the state is feasible, the court may, subject to subsection (4), order the state to purchase or expropriate such land and restore the relevant right to the claimant.

(2) . . . .

(3) If the state certifies that any restoration in terms of subsection (1)(a) or any acquisition in terms of subsection (1)(b) is not feasible, or if the claimant instead of the restoration of the right prefers alternative relief, the court may, subject to subsection (4), order the state, in lieu of the restoration of the said right -

(a) to grant the claimant an appropriate right in available alternative state-owned land designated by the state to the satisfaction of the court, provided that the state certifies it is feasible to designate alternative state-owner land;

(b) to pay the claimant compensation; or

(c) to grant the claimant any alternative relief.

[My underlining.]

[40] I believe that it is clear from the ordinary and grammatical wording of section 123(3) that a Court may order the State to pay compensation to a claimant (for restitution of a right in land), who elects to claim alternative relief instead of restoration (as in the present case, where the alternative relief claimed is compensation). The only condition which section 123(3) imposes upon such a claim is that it be subject to section 123(4), which sets out how compensation must be determined as just and equitable.

[41] Nowhere at section 123(3) is a claim for compensation expressly or impliedly excluded where a claimant through his or her own initiatives has already effected restoration. It is also clear from the wording of section 123(3) that a claim for restitution of a right in land can embody a claim purely for compensation. Section 123(3) does not suggest that a claim for compensation can be entertained only as an

alternative to restoration; nor does it suggest that a claim for restitution is restricted to a claim for physical restoration alone.

[42] A reading of section 121(2) in conjunction with sections 123(1) and 123(3) also supports the view that restitution includes both restoration (physical return of the relevant right in land) and compensation. Section 121(2) entitles a claimant to claim restitution of a right in land. Section 123(1) refers to such a claim under section 121(2) and then sets out the circumstances where a Court may order restoration in respect of such a claim [at section 123(1)(a) and (b)]. Section 123(3), in providing for an award of alternative relief instead of restoration in respect of such a claim, includes a right to compensation, not as an alternative to restitution, but flowing from the claimant's basic right to restitution.

[43] It should be noted that section 25(7) of the Constitution (as opposed to the Interim Constitution), refers to a right to "restitution" of property "or equitable redress". The meaning of "restitution" in this context could possibly be restricted to "restoration" (as opposed to "restoration" and "compensation" in the context of the Interim Constitution). "Equitable redress" could be interpreted to include compensation. I make no finding on these matters, as indeed I am not here required to do. The Constitution does not apply in this case, and "restitution" in the context of section 25(7) thereof cannot detract from the meaning of "restitution" in the context of the Interim Constitution, as discussed above.

[44] The term "restitution" has a variety of different meanings in different legal contexts. Given that the concept of restitution of a right in land is a novel one in South African jurisprudence, it is hardly surprising that South African legal dictionaries offer no definition of restitution in this context, but only that of *restitutio in integrum* in relation to the law of contract.[25]

[45] Black's Law Dictionary[26] lists other meanings of restitution beyond the context of *restitutio in integrum* :

> *"Restitution - an equitable remedy under which a person is restored to his or her original position prior to the loss or injury or placed in the position he or she would have been in had the breach not occurred. The act of making good or giving equivalent for any loss, damage or injury. The act of restoring something to the rightful owner. Compensation for the wrongful taking of property. Restoration of the status quo, the amount which would put the plaintiff in as good a position as he would have been in had no contract been made and*

25 See for example Claasen's Legal Dictionary, Volume 4, page 14

26 Black=Law Dictionary (footnote 16 *supra*) at page 910

restores to the plaintiff the value of what he parted with in terms of the contract".
[My underlining]

[46] To fully determine the ambit of restitution, one should reach beyond the immediate linguistic context of the word "restitution", its ordinary and grammatical meaning, as contained in the Interim Constitution [sections 123(3), 121(2) and 8] and the Act [section 2(1)], to its wider legal and jurisprudential context so as to give effect not only to the purpose of the legislation[27], but also to the sense, spirit, ethos, morality and fundamental principles of the Interim Constitution and the Act.

[47] Lord Reid explained this process succinctly when he said, *"we are seeking not what Parliament meant, but the true meaning of what they said"*[28]

[48] Despite the legacy of a literal positivistic theory of statutory interpretation in South Africa, our Courts have in recent times reflected a willingness to go beyond the linguistic text and place greater emphasis on jurisprudence and less on the technical aspects of interpretation.[29]

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27 See Devenish, Interpretation of Statutes, Juta & Company Limited, 1992, at pages 288 - 290

28 **Black-Clawson International Limited v Papierwerka Waldhof-Aschaffenburger AG 591 at 613**

29 This approach to interpretation has been called the value-coherent/teleological theory of interpretation, which requires the judiciary to perform *"a creative and moral function as opposed to merely a technical function".* See Devenish, ibid, page 288.

"It distinguishes between the sense or spirit of the Statute, and its words, and justifies the Judges in extending or restricting the operation of the latter." Corry, JA, "Administrative Law and the Interpretation of Statutes" (1935-36), University of Toronto Law Journal, 286 at 296 (cited at Devenish, ibid, page 40).

Blackstone, in his Commentaries on the Laws of England, stated, *"from this method of interpreting laws, by reason of them, arises what we call equity; which is thus defined by Grotius, `the correction of that, wherein the law (by reason of its universitality) is deficient'".* Sir William Blackstone, 1765 (1) at page 62 (cited at Devenish, ibid, at page 40).

Lord Denning, referring to the use of this approach by European Judges, contended in the case, **James Buchanan and Company Limited v Baabco Forwarding & Shipping (UK) Limited (1977) 2 WLR 107 at 112**, *"[they] adopt a method which they call in English by strange words - at any rate they were strange to me - the `schematic and teleological' method of interpretation. It is not really so alarming as it sounds. All it means is that the Judges do not go by the literal meaning of the words or by the grammatical structure of the sentence. They go by the design or purpose which lies behind it. When they come upon a situation which is to their minds within the spirit - but not the letter - of the legislation, they solve the problem by looking at the design and purpose of the legislation - and the effect it was sought to achieve. They then interpret the legislation so as to produce the desired effect. This means they fill in gaps, quite unashamedly, without hesitation. They ask simply : what is the sensible way of dealing with this situation so as to give effect to the presumed purpose of the legislation. They lay down the law accordingly."* Cited with approval by Friedman J in **Baloro and Others 1995 (8) BCLR 1018 at 1061H-J**.

And closer to home, Mureinik has stated, *"interpretation does not merely involve the relevant section of the Statute but also includes a dialectical process of giving expression to*

[49] The generous interpretation accorded to Constitutions in foreign jurisdictions[30] have been warmly received and integrated into South African constitutional jurisprudence. A full account of some of these interpretations is to be found in the Judgment of Friedman JP in **Nyamakazi v President of Bophuthatswana (1994) 1 BCLR 92 (B),** which Kentridge AJ has described as *"a veritable thesaurus of international authority"*.[31]

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the law, including the common law, its ethos and morality. This involves a process of harmonising statute law with common law. This theory postulates that in an apartheid country value-coherent interpretation is the Judges' chief weapon against legislative injustice". 1986, 103 SALJ 615 at 624 (cited at Devenish, ibid, at page 45).

30 In the Indian case, **India v Sankalchand Himatalal Sheth AIR 1977 SC 250**, Judge Bhagwati stated, *"When the Court interprets a Constitution, it breathes life into the inner words used in the founding document. The problem before the Constitutional Court is not a mere verbal problem. The Court cannot interpret a provision of the Constitution by making a fortress out of the dictionary. The significance of the constitutional problem is vital, not formal. It has to be gathered not simply by taking the words to dictionary but by considering the purpose and intention of the framers as gathered from the context and the setting in which the words occur".*

In Canada in the oft-quoted, **R v Big M Drug Mart Limited 18 DLR (4th) at 321, 395-6**, Dixon J (later Chief Justice of Canada) said, with reference to the Canadian Charter of Rights, *"the meaning of the right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interest it was meant to protect. In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concept enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be . . . a generous rather than legalistic one, aimed at fulfilling the purpose of a guarantee and securing for individuals the full benefit of the Charter's protection".*

In the United States Warren CJ, in **Trop v Dulles 356 US 86** stated as follows : *"The provisions of the Constitution are not timeworn adages or hollow shibboleths. They are vital, living principles that authorise and limit governmental powers in our nation. They are rules of government. When the constitutionality of an act of Congress is challenged in this Court, we must apply those rules. If we do not, the words of the Constitution become little more than good advice."*

In Botswana, Aguda J, in **The Attorney General v Dow 1994 (6) BCLR 1 (Botswana) at 41F-G**, observes : *"In my view the first task of a Court when called upon to construe any provisions of the Constitution is to have a sober and objective appraisal of the general canvas upon which the details of the constitutional picture are painted. It will be doing violence to the Constitution to take a particular provision and interpret it one way which will destroy or mutilate the whole basis of the Constitution when by a different construction the beauty, cohesion, integrity and healthy development of the State through the Constitution will be maintained."*

In Nigeria, Sir Udo Udoma said in **Nafiu Rabiu v F (1981) 2 NCLR 293 at 326** : *"I do not conceive it to be the duty of this Court so to construe any of the provisions of the Constitution as to defeat the obvious ends the Constitution was designed to serve where another construction equally in accord and consistent with the words and sense of such provisions will serve to enforce and protect such ends."*

31 **S v Zuma and Others 1995 (4) BCLR 401 (SA) at 410**

[50] This approach to interpretation has also been reflected in a rich and lively discussion by our Courts on the interpretation of the South African Interim Constitution[32]. There is no need to traverse the relevant dicta of these cases, save to say that by and large they accord with the sentiments of Froneman J in **Qozoleni v Minister of Law and Order and Another at page 80H**, *"if the Constitution is to fulfil its stated purpose it must not only be interpreted in such a manner to give clear expression to the values it seeks to nurture for a future South Africa, but this should be done in a way which makes it a living document for all the citizens of the country and not only for the chosen few who deal with it in courts of law."*

[51] There is authority also for the view that, in interpreting a Statute (as opposed to a Constitution), the purpose and background of the legislation must be considered. In **Jaga v Donges NO and Another 1950 (4) SA 653 (A) at 662 G-H**, Schreiner JA stated, *"Certainly no less important than the oft-repeated statement that the words and expressions used in a Statute must be interpreted according to their ordinary meaning is the statement that they must be interpreted in the light of their context. . . . Often of more importance is the matter of the Statute, its apparent scope and purpose, and, within limits, its background."*

[52] The spirit of the Interim Constitution is perhaps best captured by these words in the postamble (taken from the provisions on National Unity and Reconciliation) with which the Interim Constitution concludes:

> *"This Constitution provides an historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.*
>
> *The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles and violent conflicts and a legacy of hatred, fear, guilt and revenge.*
>
> *These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation.*
>
> *. . . with this Constitution and these commitments we , the people of South Africa, open a*

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32 See S v Makwanyane and Another 1995 (6) BCLR 665 (CC); S v Zuma 1995 (4) BCLR 401 (SA); Matiso v Officer Commanding Port Elizabeth Prison and Others 1994 (3) BCLR 80 at 86 - 92; Matinkinca and Another v Council of State, Ciskei and Another 1994 (1) BCLR 17 (Ck) at 25 - 35; Ntenteni v Chairman, Ciskei Council of State and Another (1994) (1) BCLR 168 (Ck) at 171 - 177; Park-Ross and Another v The Director, Office for Serious Economic Offences 1995 (2) BCLR 198 (C) at 208 - 209; Phato v Attorney-General, Eastern Cape and Another; Commissioner of South African Police Services v Attorney General, Eastern Cape and Others 1994 (5) BCLR 99 (E) at 106 - 118; Nortje and Another v Attorney-General of the Cape and Another 1995 (2) BCLR 236 (C) at 247 - 250; Qozoleni v Minister of Law and Order and Another (1994) (1) BCLR 75 (E) at 78 - 86.

new chapter in the history of our country.

Nkosi sikelele iAfrika. God seN Suid-Afrika.
Morena boloka sechabasaheso. May God bless our country.
Mudzimu fhatutshedza Afrika. Hosi Katekisa Afrika."[33]

[53] The break with the past is eloquently commented upon by Mohamed J in **S v Makwanyane and Another 1995 (6) BCLR 665 (CC) at page 677**, *"the South African Constitution . . . retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos, expressly articulated in the Constitution".*

And at **758 ,** *"The Constitution expresses in its preamble the need for a `new order . . . in which there is equality between . . . people of all races'. The past was redolent with Statutes which assaulted the human dignity of persons on the ground of race and colour alone. . . . What the Constitution expressly aspires to do is to provide a transition from these grossly unacceptable features of the past to a conspicuously contrasting future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex."*

[54] Madala J at page 754 in the same case explains the concept of ubuntu as one which carries in it the ideas of humaneness, social justice and fairness, which permeates the Interim Constitution generally.[34]

[55] The spirit of the Act is reflected in the following words from the preamble::

"Whereas the Constitution of the Republic of South Africa, 1993 (Act No. 200 of 1993), provides for the restitution of a right in land to a person or community dispossessed under or for the purpose of furthering the objects of any racially-based discriminatory law;

And whereas legislation for this purpose is to be designed to promote the protection and advancement of persons, groups or categories of persons disadvantaged by unfair discrimination, in order to promote their full and equal enjoyment of rights in land."

The Act, in providing for restitution, clearly aspires to redress the wrongs of the

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33 Provisions on National Unity and Reconciliation, postamble to the Interim Constitution. Section 232(4) of the Interim Constitution provides that for the purposes of interpreting the Constitution this provision shall be deemed to be part of the substance of the Constitution, and shall not have a lesser status than any other provision of the Interim Constitution. Section 35(3) instructs a Court to have due regard to the spirit, purpose and objects of the Fundamental Rights chapter, in interpreting any law and the application and development of the common law and customary law.

34 Paragraph E-F

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

[56] An approach to interpretation, which goes beyond linguistic context to the broad principles and spirit of the legislation lends itself aptly for adoption by the Land Claims Court, instructed as it is at section 33 of the Act to take into account amongst other factors, the requirements of equity and justice in considering its decision in any particular matter.[35]

[57] Bringing to bear upon this issue the ethos, spirit, and values of the Interim Constitution and the Act, as well as the factors which the Land Claims Court must take into account in arriving at its decisions, I am satisfied that :

- Both the grammatical and literal meaning of the wording in section 123(3) as well as its wider jurisprudential context within the Interim Constitution permits the present claim.

- The word "restitution" in section 121 of the Interim Constitution in relation to a right in land dispossessed *"under or for the purpose of furthering the object of a law which would have been inconsistent with the prohibition of racial discrimination contained in section 8(2), had that section been in operation at the time of such dispossession"*, cannot in the circumstances but be widely interpreted to include a claim purely for compensation in a case where restitution has already been achieved by the claimant through his or her own means. To limit the award of compensation only to instances where it is claimed in preference to restoration (of a right in land) under section 123(3)(b) or as alternative relief, would in my view be contrary to the spirit of the Interim Constitution. I am satisfied that an award for compensation independently of restoration (of a right in land), accords with the spirit and ambit of the Interim Constitution; and

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35 Section 33 of the Act states:
"In considering its decision in any particular matter, excluding the review of a decision in terms of section 15, the Court shall, in addition to the matters referred to in section 121, 122 and 123 of the Constitution, have regard to the following factors :

(a) The desirability of providing for restitution of rights in land or compensation to people who were dispossessed of their rights in land as a result of or in pursuance of racially based discriminatory laws;

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

(c) the requirements of equity and justice;

(d) the desirability of avoiding major social disruption;

(e) any provision which already exists, in respect of the land in question in any matter, for that land to be dealt with in a manner which is designed to achieve the goals contemplated in section 8(3)(a) of the Constitution;

(f) any other factor which the Court may consider relevant and consistent with the spirit and objects of the Constitution and in particular the provisions of section 8 of the Constitution."

- Likewise, the meaning of the word "restitution" as it appears in section 2 of the Act cannot but be interpreted to include a claim purely for compensation where the Claimants have achieved restoration themselves. To find otherwise would be contrary to the spirit and ethos of the Act as set out in its Preamble.

[58] A narrow meaning of restitution to exclude a claim purely for compensation in a case like the present, would be prejudicial precisely to those people whom the Interim Constitution and the Act seek to protect from the past injustices of discriminatory legislation. It would exclude the Claimants in this case, just because they have, through their own initiative, bought back property from which they were unfairly dispossessed, and it would take no cognisance of the hardship and unfair discrimination foistered upon them by law.

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

[60] The Claimants fall squarely within the ambit of persons whom the Act seeks to protect and advance and for whom the interim Constitution seeks to create *"a future founded on the recognition of human rights, democracy, peaceful co-existence and development opportunity"*[36]. To deny their claim for compensation simply because they themselves effected restitution of their right of ownership would be absurd, and tantamount to punishing them twice. It would make a mockery of the spirit of the Interim Constitution and the Land Restitution Act.

[61] For, as Froneman J states in **Qozoleni v Minister of Law and Order and Another (1994) (1) BCLR 75 E at 86C**, *"The Constitution is envisaged as a bridge from a despairing past to a hopeful*

36 Provisions on National Unity and Reconciliation, postamble to the Interim Constitution

future, not as an extended bypass to the old road to prevent one from ever getting to the bridge". The Claimants must, of course, be allowed to get to the bridge.

[62] It is worth noting that the foreign jurisprudence consulted on the subject recognises land claims for compensation independently of physical restoration. The land claims policies of the United States37, Canada38, New Zealand39, Australia40 and Germany41 all permit claims purely for monetary compensation.I could find no foreign authority supportive of the view that a compensation claim be excluded where the claimants have reacquired the property after it was

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37 United States :

In 1946, the United States was sufficiently impelled by the horror of the Second World War to consider the human rights dimensions of Native Americans. A Land Claims Commission was established with jurisdiction to award monetary compensation only, Congress alone being empowered to award physical restoration. Since 1970 the United States Government is said to have restored some 540 000 acres of tribal land.

One of the better known restorations was the return of the Blue Lake to the Tao Pueblo people in New Mexico by Congress, despite the risk of creating expectations for those tribes who had received monetary compensation only. Congress restored the land partly because of its religious significance to the people of Tao Pueblo.

Not surprisingly, a recent development in the United States has been the demand by some tribes for both restoration and compensation - and its award in several cases. In 1988, the Maine tribes, for example, insisted on and received as part of their land restoration settlement, a fund of $54 million for the purchase of valuable timber land within their aboriginal territory. [Maine Indian Claims Settlement Act, 25 US C 1721, 1724 (1988)]

Thus the restoration of land and monetary compensation are compatible within single settlements, referred to as restitution settlements in the United States. [Newton Nell Jessup, Compensation, Reparations and Restitution : Indian Property Claims in the US, 28 Georgia Law Review (1994) 543]

38 Canada :

Under the Canadian Government's current land claim policy, first nations must research and submit specific claims (based on breach of treaty) to the Government. The Government then decides whether to accept a claim for compensation negotiations. In 1991 the Indian Claims Commission was established to expedite the process.

The negotiation of validated claims may result in compensation for first nations, but restoration is currently severely restricted by Government criteria.

An example of such negotiations is the Chippewas of Thames case. [Indian Claims Commission Annual Report, 1994/5, page 25] The claim involved two lots of land in Caradoc township on which the village of Muncey is situated. The Band received $5,4 million in compensation which they may use to purchase their lands back from innocent third parties. [Indian Claims Commission (Submission Guide), 1995, pages 1 - 10]

39 New Zealand :

The land claims process in New Zealand arises out of the Treaty of Waitangi, signed in 1840 by representatives of the British Crown and more than 500 Maori chiefs.

dispossessed.

E. THE TWO CLAIMANTS ARE THE ONLY DESCENDANTS OF THE LATE PALI VASSEN JEWAN

[63] Mr Smith, for the Claimants, conceded at the outset that the Claimants were not the only descendants of the late Pali Vassen Jewan as had been alleged. He informed the Court that it had subsequently come to his knowledge that the Claimants' mother, Mani Dulabh, the daughter of Pali Vassen, was alive.

[64] Claimant Suresh Dulabh testified that he and his brother Rasiklal Dulabh were the grandsons of the late Vassen Jewan and his wife the late Pali Vassen Jewan. Vassen Jewan and Pali Vassen Jewan had two children, namely Mani Dulabh (born

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The Waitangi Tribunal was established in 1975 to hear Maori claims and provide the Government with a report on the issue and recommendations for possible solutions. Awards have included both restoration and compensation independently, as well as restitution and compensation within single settlement orders, referred to as restitution settlements. [Treaty Negotiations in New Zealand, 1955, pages 1 - 4 (a New Zealand Government publication)]

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Australia :

In Australia the Native Title Act of 1993 provides the mechanism to determine and protect the existence of Native title. The National Native Title Tribunal was established, pursuant to the Native Title Act, for the purpose of mediating applications made to it. Recognition and protection amounts to restoration. Where Native title has been extinguished or impaired, the Act provides for just compensation. A compensation application may be made by persons seeking compensation for any loss, diminution, impairment or other effect of an act on Native title rights and interests since the enactment of the Racial Discrimination Act, 1975. [Native Title (Legislation with Commentary by the Australian Attorney General's Legal Practice), 1994, pages C - C22]

41 Germany :

A landmark in the German restitution process was the Joint Declaration of both German Governments dated 15 June 1990, later incorporated into the Unification Treaty, which laid the foundations for the German Property law and the Land Restitution process. Restitution in Germany refers both to physical restoration of land and monetary compensation. However, the principle adhered to is "restitution before compensation" which establishes that rehabilitation in kind has precedence over rehabilitation in money. [G. Fieberg, "Legislation and Judicial Practice in Germany : Landmarks and General Issues in the Property Question" in "Confronting Past Injustices" (Eds M. Rwelamira and G. Werle) 1996, 83 - 88]

In practice, a German applicant for restitution has the option to elect physical restitution or compensation once the claim is endorsed at a Property Office. If restitution is the preferred option, the applicant applies to the local Land Registry to be entered as a proprietor in the Land Register. Applicants for compensation proceed to the local valuation office. [Reference : D. Southern, "Restitution or Compensation : The Land Question in East Germany", 42 International and Comparative Law Quarterly (1993) 694]

Jewan), the Claimants' mother, and another child who passed away in childhood without issue. Mani Dulabh, their mother, left the family home, situated at the property, when she married, and went to live in East London where the Claimants were born. When Suresh Dulabh was approximately 5 years old his parents separated and Mani Dulabh moved back into her family home with her two sons, the Claimants. Suresh Dulabh lived on the property from the age of 5 years and continues to live there. When his grandfather died, Suresh Dulabh was 16 years old. He was not personally involved in negotiations and discussions concerning the sale of the property.

[65] At the request of the Court, the Claimants' mother, Mrs Mani Dulabh, was called to testify. Her evidence, interpreted from Gujarati, corroborated the evidence of her son Suresh Dulabh in every respect. She described the attempts her late mother had made to "save" the property after it was declared to be in a white group area. She herself was party to discussions about the property at the time.

[66] Mrs Dulabh testified that she was born in India of the late Pali Vassen Jewan and the late Vassen Jewan, and that she did not possess a birth certificate. She testified moreover that she was the mother of the Claimants, that she was aware of their claim for compensation and she herself did not intend to lodge a claim for restitution in respect of the property in her capacity as a descendent of the late Pali Vassen. She was satisfied that her sons pursue the claim, she herself not wishing to claim compensation. A signed statement by Mani Dulabh was handed into Court, stating that in the event of her sons being granted relief in the form of compensation, she would waive any claim she has in terms of the Constitutional provisions providing for restitution in land rights.

[67] The Court found both Mrs Mani Dulabh and the claimant Suresh Dulabh to be reliable witnesses. In the absence of a birth certificate in respect of Mani Dulabh, the Court is prepared to accept her oral evidence that she is the daughter of the late Vassen Jewan and Pali Vassen Jewan. This is supported by the contents of the Codicil to the Will of the late Vassen Jewan (page 4 of Exhibit B handed in to Court). The codicil describes Mani Vassen as the daughter of the Testator, Vassen Jewan, and appoints her as sole heiress of Vassen Jewan in the event of his wife,

Pali Vassen Jewan predeceasing him.

[68] From the evidence of Suresh Dulabh, corroborated by that of his mother, Mani Dulabh, and on the basis of birth certificates subsequently furnished to the Court in respect of the Claimants, the Court accepts that the Claimants Suresh Dulabh and Rasiklal Treebhuwn Dulabh are the sons of Mani Dulabh (born Jewan), the grandsons of the late Vassen Jewan and Pali Vassen Jewan, and accordingly their direct descendants. The Court is satisfied that the Claimants are descendants of the late Pali Vassen as contemplated at section 2(1)(a) of the Act and are accordingly entitled to bring the claim.

F. HAS THE CLAIM BEEN FILED (LODGED) EARLIER THAN PERMITTED UNDER SECTION 121(5) OF THE INTERIM CONSTITUTION, ACT 200 OF 1993?

[69] Section 121(5) of the Interim Constitution states : *"No claim under this section shall be lodged before the passing of the Act contemplated in sub-section 1"*. The Act contemplated in section 121(1) is the Restitution of Land Rights Act No. 22 of 1994, which has as its date of commencement, 2 December 1994. Accordingly, section 121(5) does not permit the lodging of a claim for restitution of a right in land before 2 December 1994.

[70] It is common cause that a letter was written to the "Commissioner, Commission on the Restitution of Land Rights", on 26 January 1994 by Senator Ray Radue on behalf of the Claimants, setting out their fully motivated claim. This letter was addressed to the Commission before the Commission (on Restitution of Land Rights) was established by the Act (which commenced on 2 December 1994). The claim, as contained in the letter, was accepted by the subsequently established Commission and referred to the Court. The parties ask the Court to determine whether by the writing of this letter, the claim had been lodged earlier than permitted by the Interim Constitution, and the effect thereof on the validity of the claim.

[71] The minutes of the pre-trial meeting of 16 October 1996 referring to this issue state, *"if there is a technical difficulty in this connection, the parties will meet and endeavour to agree on any condonation which may be necessary"*.

[72] The Court was not informed of a meeting between the parties in this regard. In a memorandum handed in to Court (as part of Exhibit A), it was stated that argument would be presented to the effect that the Claimants are not debarred in any way, notwithstanding the date of submission of the claim. Mr Clark for the Claimants argued that the claim was lodged by the submission of the claim form to the Commission. Mr Havenga for the Department of Land Affairs did not take the point that the claim was prematurely lodged.

[73] It now falls to the Court to decide whether the claim had indeed been filed (lodged) earlier than permitted under the Interim Constitution.

[74] I am of the view that the writing of the letter on 26 January 1994, could not have constituted the lodging of the claim with the Commission on Restitution of Land Rights, that body not having been established at that date. Instead, it was the completion of the Commission's prescribed claim form by the Claimants on 10 April 1995 and the acknowledgement of receipt thereof by the Commission on 2 August 1995, after the passing of the Act on 2 December 1994, which constituted the lodgment of the claim.[42] This, which I believe to be the correct view, rescues the Claimants from the dilemma of the early lodgment of the claim. I accordingly find that the claim has not been lodged earlier than permitted under section 121(5) of the Interim Constitution. The claim was lodged timeously in accordance with the Interim Constitution.

[75] It should be mentioned that had the Claimants lodged their claim prior to the commencement of the Act, with the former and now defunct Commission on Land Allocation[43] (the "predecessor" as it were to the Commission on Restitution of Land Rights), the present dilemma would not exist. Section 41(2) of the Act provides that claims lodged with the former Commission on Land Allocation are deemed to have been lodged with the Commission on Restitution of Land Rights.

G. CONCLUSION

[76] I have determined the four preliminary issues, identified for this hearing, in the Claimants' favour. None of the points raised by way of preliminary issues precludes the Claimants from claiming compensation. The hearing on all other outstanding issues will continue on 16 May 1997.

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42 These documents appear in the Court file

43 Established by the Abolition of Racially-based Land Measures Act, No. 108 of 1991

JUDGE Y S MEER

I agree.

JUDGE A GILDENHUYS

16 April 1997

Mr E S Rivett-Carnac, assessor in the above matter, agrees with this judgment insofar as it contains findings on matters which are not questions of law