THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable
Case no: 091/03

In the matter between:

TRANSVAAL AGRICULTURAL UNION	Appellant
and	
THE MINISTER OF AGRICULTURE AND LAND AFFAIRS	1ST Respondent
THE CHIEF LAND CLAIMS COMMISSIONER NO	2nd Respondent
THE REGIONAL LAND CLAIMS COMMISSIONER FOR MPUMALANGA AND NORTHERN (NOW 'LIMPOPO') PROVINCE NO	3rd Respondent
THE REGIONAL LAND CLAIMS COMMISSIONER FOR THE PROVINCES OF NORTH WEST AND GAUTENG	4th Respondent
THE MINISTER OF FINANCE NO	5th Respondent
THE AUDITOR GENERAL OF THE REPUBLIC OF SOUTH AFRICA NO	6th Respondent
THE NATIONAL LAND COMMITTEE	*Amicus Curiae*

Coram: *Scott, Zulman, Navsa, Mthiyane et Van Heerden JJA*

Date of hearing: **25 February 2005**

Date of delivery: **23 March 2005**

Summary: **Restitution of Land Rights Act – appellant alleged irregular exercise of statutory powers by first four respondents – non-joinder of essential parties –appellants seeking guidance in general terms and in isolation and in the face of disputed facts – held that in circumstances of case court correctly refused to grant declaratory orders.**

JUDGMENT

NAVSA JA:

[1] This is an appeal against a judgment of the Land Claims Court (the LCC), whereby an application by the appellant for a number of declaratory orders relating to the interpretation and application of the Restitution of Land Rights Act 22 of 1994 (the Act) was dismissed with costs by Gildenhuys AJ (Moloto AJ concurring). Leave to appeal was granted by that court.

[2] The appellant is the Transvaal Agricultural Union (TAU), a voluntary association of farmers, with its head office in Silverton, Pretoria. TAU claimed that it brought the application in the LCC pursuant to a mandate received from its more than 5000 members, acting either directly or through their affiliated farmers associations and district agricultural unions.

[3] Before turning to deal with the basis of the application in the LCC, I set out in the paragraphs that follow a brief description of the respondents.

[4] The first respondent is the Minister of Agriculture (the Minister), the responsible Minister referred to in the Act, whose role in the present case will become clear as the relevant facts unfold.

[5] The second respondent is the Chief Land Claims Commissioner (the CLCC) appointed in terms of s 4(3) of the Act and who directs the work of the Commission on Restitution of Land Rights (the Commission), established in terms of s 4(1) of the Act. In terms of s 7 the CLCC may delegate any of his or her powers (inter alia) to a regional land claims commissioner.

[6] The third respondent is referred to as the Regional Land Claims Commissioner for Mpumalanga and the former Northern Province (now Limpopo), two relevant geographical areas. I will for the sake of convenience refer to the latter province by its former name. Whereas there was formerly one regional commissioner for both geographical areas, there is presently a regional commissioner for each.

[7] The fourth respondent is the Regional Land Claims Commissioner for the North-West and Gauteng Provinces, two other relevant geographical areas.

[8] When I refer to the first to fourth respondents collectively hereafter, I will, for the sake of convenience, describe them as the respondents.

[9] The fifth and sixth respondents are the Minister of Finance and the Auditor General of the Republic of South Africa, cited as respondents because of the allegations by TAU that, in exercising their powers improperly, the first, second, third and fourth respondents were financially irresponsible. No orders were sought against the fifth and sixth respondents. They chose to abide the decision of the court below and adopt the same position in respect of the present appeal.

[10] The National Land Committee (NLC) was admitted to the proceedings in the court below as *amicus curiae*. It continued in that role in this Court.

[11] TAU initially sought more than 20 declaratory orders in the LCC. This was finally reduced to five. Before us TAU conceded that it was unable to persist (because of the provisions of the Act) in arguing any entitlement to the fifth declaratory order sought in the LCC. Thus, the appeal is limited to a consideration of TAU's entitlement to the

first four of the five declaratory orders sought in the LCC, which are as follows:

‘1. That the right to possess and inhabit State land forms part of just and equitable compensation as intended by Section 2(2) of Act 22 of 1994 where such right of possession and inhabitation was historically granted to claimants as compensation for dispossession of the rights to land claimed in terms of Section 2(1) of Act 22 of 1994.

2. That Second, Third and Fourth Respondents are obliged by Section 11 of Act 22 of 1994 and the Rules to:

2.1 Investigate and determine which subdivisions of land or farms are subject to restoration claims, prior to publishing a notice in terms of Section 11(1) of Act 22 of 1994; and

2.2 Specify clearly in such notice in terms of Section 11(1) which subdivisions are subject to a land claim, and which claimant claims which subdivisions.

3. That owners of land which is subject to land restoration claims are entitled to participate in investigation of such claims prior to publishing of notice in terms of Section 11(1) of Act 22 of 1994, and are entitled to access to such information relating to such claim as may come into possession of the Second, Third and Fourth Respondents.

4. That owners of land which is subject to land restoration claims are entitled to make representations to the Land Claims Commissioner prior to publication of the land Claim.’

[12] In its founding affidavit TAU set out the basis on which it purported to represent its members' interests in seeking these orders. TAU commenced by stating that the large majority of its members were knowledgeable only in farming operations and did not have the individual financial resources, the specialised knowledge or the time to undertake wide-ranging investigations to deal with land claims affecting them and therefore relied on its assistance. TAU submitted that in dealing with numerous current disputes in relation to claims for the restoration of rights in land, in respect of which their members have an interest, the Commission and the respondents misconstrued their statutory powers and duties and this led to uncertainty. The orders sought, if granted, would allegedly facilitate the work of the institutions established by the Act to deal with claims for the restoration of rights in land and promote certainty as regards the rights and obligations of all parties to land disputes.

[13] In support of these contentions TAU presented five examples of claims for the restoration of rights in land involving the respondents and which it submitted, illustrated the need for the orders sought. I will deal with these examples in due course.

[14] In opposing the application the respondents accepted that, in the discharge of their functions in terms of the Act, they were bound by the Constitution, the common law and judicial precedent.

[15] At the outset, however, the respondents contended that TAU lacked *locus standi* to seek the relief in question. They submitted that TAU had no interest in its own right which might be affected by the outcome of the litigation, but that it was rather TAU's members in their individual capacities that had a real or potential interest in such litigation.

[16] The respondents also took the view that the failure to join essential parties was fatal to TAU's case. They referred to the five examples used as by TAU as a springboard for the application in the LCC and submitted that a wide range of allegations had been made involving disputants who were not joined as parties to the suit. Claimants, farmers and/or owners all had a direct and substantial interest in the subject matter and outcome of the litigation and should have been cited. Furthermore, they pointed out that one of the examples on which TAU relied was a part-heard matter in the LCC and submitted that it was therefore inappropriate for relief to be

sought in separate litigation. In addition, the respondents denied the essential facts on which TAU relied (in the examples provided) to demonstrate that they had exercised their statutory powers improperly.

[17] Gildenhuys AJ found that TAU had no direct and real interest in the outcome of the application and that it was up to its members to engage in litigation. The learned judge was dismissive of TAU's submission that it was entitled to litigate on behalf of its members, stating that, apart from its bare allegation of a mandate on behalf of its members, it had failed to establish that it had any specific authority to litigate on behalf of those members who themselves might qualify as interested parties. Neither those members nor other affected parties would in the event of an order given against TAU be bound by the terms of that order. Thus he held that TAU lacked *locus standi*.

[18] In dealing with the question of *locus standi* the learned judge did not consider whether s 38 of the Constitution operated in favour of TAU. For reasons that will become apparent it is also not necessary for us to consider that question.

[19] Gildenhuys AJ stated that it is not the court's function to give legal advice in the form of declaratory orders. He held that the questions of law in respect of which the LCC was entitled to make an order must involve a case in which rights and obligations must be decided and interested parties must be cited. In the present case all the persons who had a direct and substantial interest in the outcome of the litigation were not cited and that was reason enough to dismiss the application. Considering all the circumstances of the case the learned judge was, in any event, loath to exercise his discretionary power to grant any of the declaratory orders in favour of TAU.

[20] I turn to consider the gist of the examples provided by TAU and the respondents' answers to TAU's allegations in this regard.

[21] The first relates to the farm **Levubu** 15 LT (Levubu) in the Northern Province, which has approximately 400 subdivisions with well-developed settlements and facilities such as shops, churches and schools. A number of claimant communities had lodged claims in respect of Levubu. A claim by the Ravele community in respect of 117 subdivisions, mainly on the western side of Levubu, had been

published in the Government Gazette of 7 April 2000 (Government Notice 1528/2000).

[22] According to TAU, the third respondent had thereafter made limited information available to owners and farmers from which it had not been possible to determine precisely who was claiming what in respect of each subdivision. It was therefore difficult to clarify the exact nature and extent of claims affecting each individual current landowner or farmer. TAU alleged that there was insufficient information about possible competing and further claims, which might be published later in the Government Gazette.

[23] In the information imparted to TAU reference was made to two communities who had called on the Commission to expedite their claims. I interpose to state that in terms of s 6(2) the Commission is charged with ensuring that priority is given to claims that affect a substantial number of persons. According to TAU there was no further elaboration on the status of these two communities as claimants to parts of Levubu. In the information supplied there was reference to a Sotho community and to other communities who had been dispossessed of land without any details having been provided.

[24] The information provided to TAU relating to Levubu referred to compensatory land, allegedly without any further detail. Furthermore, TAU alleged that the third respondent ignored or declined its requests for further information made to enable its members to prepare for and deal with this and other land claims affecting their interests.

[25] TAU alleged that claims relating to Levubu and those in the further examples alluded to were not being properly investigated and assessed against the criteria set out in s 2(1) of the Act (which provides the basis of entitlement to restitution of rights in land).

[26] In terms of the scheme of the Act, no person is entitled to restoration of a right in land if just and equitable compensation was received at the time of dispossession. TAU contended that ss 2(2), 22(cB) and 33(eA) of the Act and Rule 5(e) of the Commission, relating to the consideration of compensation awarded at the time of dispossession of the rights in land, were as a matter of policy being ignored by the Commission. It alleged that this applied to the claims relating to Levubu and to other claims for the restitution of rights in land.

[27] Furthermore, according to TAU, the third respondent had not considered, in cases where restitution was not feasible, making recommendations to the Minister, in terms of s 6(2)(b) of the Act, concerning appropriate alternative relief. In this regard TAU contended that it could never be feasible to expropriate hundreds of subdivisions on Levubu on which farmers had invested heavily and that doing so would have an astronomical negative impact on the entire economic lifeblood of the region.

[28] TAU submitted that the third respondent was intent on processing claims in relation to Levubu in a piecemeal fashion and was set on ignoring the provisions of s 12(4) of the Act which provides:

'If at any stage during the course of an investigation by the Commission, the Chief Land Claims Commissioner is of the opinion that the resources of the Commission or the Court would be more effectively utilised if all claims for restitution in respect of the land, or area or township in question, were to be investigated at the same time, he or she shall cause to be published in the *Gazette* and in such other manner as he or she deems appropriate, a notice advising potential claimants of his or her decision and inviting them, subject to the provisions of section 2, to lodge claims within a period specified in such notice.'

[29] The next example involves the farm **Biesjiesvallei** 149 Registration Division IO (Biesjiesvallei) in the district of Lichtenburg, North West Province, which comprises 104 subdivisions. TAU had a number of complaints regarding the manner in which claims were processed. First, it complained that the Commission had not given notice to owners of the publication of claims in the Government Gazette. Second, that the initial notice published in the Government Gazette was erroneous and, even though later amended, was never withdrawn. Third, that the acceptance criteria for claims, referred to in s 11(1) of the Act, were not applied. Fourth, that claims were not being properly investigated. This was allegedly demonstrated by the fact that even a cursory examination of Deeds Office data revealed that portion 34 of Biesjiesvallei had never been owned by anyone connected to the claimant. TAU alleged that no investigation of any sort had been conducted in respect of portion 35. Further complaints were made which for present purposes it is not necessary to explore.

[30] The following example concerns claims within the third respondent's jurisdiction relating to the farm **Brakfontein** 187 Registration Division JS (Brakfontein), in the district of Groblersdal. The claims by the Matsepe and Mampuru communities in relation to

Brakfontein are presently the subject of litigation in the LCC. TAU claimed that both communities had received compensatory land but that this relevant fact (which in terms of the Act must be taken into account in assessing whether just and equitable consideration had been received) had not been investigated in terms of the Act. According to TAU the claimants *had* received just and equitable consideration and their claims were thus disqualified in terms of s 2(2) of the Act. TAU alleged that the trial had been postponed for this issue to be considered.

[31] According to TAU this example illustrated that it was the third respondent's policy, contrary to the provisions of the Act, not to investigate the historic circumstances of the dispossession of rights in land. TAU stated that it was the Commission's policy to accept, without investigation, that claimant communities had *not* received fair and equitable compensation at the time of dispossession and that they could retain compensatory land over and above having their prior rights restored. TAU repeated its complaint referred to in para [28] above that s 12(4) of the Act was not being complied with by the Commission.

[32] In respect of the farm **Venetia** 103 Registration Division MS Northern Province (Venetia), TAU complained that pursuant to the promulgation of the regulations in terms of the Promotion of Access to Information Act 2 of 2000 (PAIA), interested and affected landowners applied, without success, for access to the records of the third respondent in relation to claims not yet gazetted in terms of s 11 of the Act. The third respondent adopted the attitude that the information would only be supplied after the claims were gazetted. TAU submitted that the third respondent's policy in this regard is in violation of their rights to access to information and to fair administrative action.

[33] The last example is that of the case of intended expropriation of property currently owned by one of TAU's members, Mr Willem Pretorius, namely, Portions 1, 2, 3 and 4 of the farm **Boomplaats** No 29 Registration Division JT (Boomplaats) in the district of Lydenburg, Mpumalanga. TAU alleged that, here too, the claimant community had received compensatory land at the time of dispossession. TAU complained that, despite this, the Minister had entered into an agreement with the claimant community that provided for restoration of rights in land and developmental assistance and that the

agreement excluded Mr Pretorius. According to TAU Mr Pretorius had applied to the LCC to have the expropriation notice issued by the Minister in respect of the farm set aside. The Minister subsequently withdrew the notice.

[34] According to TAU the Minister's policy is to assume, to the exclusion of the LCC, the right to decide whether s 2 of the Act had been complied with. The Minister wrongly, so it was contended, entered into agreements with claimants providing for an award by her of rights in land, agreeing, without reference to current owners or current holders to rights in land, to acquire or expropriate land. Furthermore, TAU was of the view that, in reaching settlement agreements with claimant communities, the Minister wrongly contracted for open-ended State liability and that this was financially reckless.

[35] TAU alleged that it was the Commission's policy not to properly draw a distinction between restoration and equitable redress and to ignore or minimise farmers' rights. TAU submitted that, in acting as they did and as they continue to do, the respondents are usurping the

function of the LCC, excluding it from its rightful and unique role in the adjudication of land claims disputes.

[36] An excessive number of pages in the founding affidavit on behalf of TAU simply repeated the complaints referred to in the preceding paragraphs. Contrary to the practice directions this Court's attention was not drawn to those repetitive parts and to other parts of the record not relevant to the appeal.

[37] In the paragraphs that follow I deal briefly with the respondents' answer to TAU's allegations and submissions.

[38] In respect of TAU's contention that some of its members lacked the resources or knowledge to address the entire field of disputes applicable to them, necessitating the application for the declaratory orders, the respondents referred to the obligation imposed on the Commission and its officials to investigate each claim so as to ensure that disputes were fully and properly ventilated in the appropriate forum. They pointed out that s 29(4) of the Act provides that, where a party is unable to afford legal representation the Commissioner may take steps to arrange such representation, either through the State

legal aid system, or at the expense of the Commissioner ─ TAU's members therefore had access to the necessary resources.

[39] The respondents explained that disputes concerning land claims often differ fundamentally, both in relation to the factual background and legal issues. A vast number of claims were lodged in terms of the Act. Each claim, whether for restitution or equitable redress, required individual consideration. The position of each claimant, whether an individual or community, frequently differed ─ often markedly so ─ in relation to the circumstances of the alleged dispossession and its consequences, the availability and suitability of alternative State-owned land as well as the extent of compensation, if any, which would be appropriate. The respondents submitted that these factors, which are not exhaustive, should not be decided in the abstract, divorced from the factual specifics against which claims were made and resisted. The respondents contended that to do so would be unfair to all affected parties. They were of the view that the relief sought by TAU would have that effect.

[40] The respondents pointed out that the Commission was frequently faced with a range of competing interests which required

investigation. In claims involving communities there might very well be competing interests within those communities. On occasion more than one person or community laid claim to a particular tract of land, requiring an investigation of the merits of each claim.

[41] The respondents stated that there were numerous examples of claims to land comprising many subdivisions and that identifying specific tracts of land was sometimes difficult. In some instances dispossession had taken place in the distant past at a time when the land in question had not necessarily been subdivided. Claimants were often unable to identify the tracts of land to which they laid claim with any precision. Where there were difficulties in locating boundaries and subdivisions, particularly where there were uncertainties, all affected parties were afforded adequate opportunity to advance evidence in support of their contentions. This had been the case with the parties referred to in the examples provided. The scheme of the Act provided mechanisms for the mediation and negotiation of disputes and ultimate adjudication by the LCC. These were applied in appropriate circumstances. If however, upon investigation, a claim was found to be entirely without substance, a

referral to the LCC was uncalled for and the claim could be rejected summarily.

[42] The respondents pointed out that if, as claimed by TAU, irregular claims had been lodged with the Commission, parties affected thereby had the right in terms of s 11(A) of the Act to approach the relevant regional land claims commissioner to withdraw or amend a notice published in the Government Gazette. The Commissioner, in investigating a claim, could, if there was reason to believe that the criteria for claims as set out in s 11 had not been met, publish in the Government Gazette and send by registered post to the parties involved, a notice stating that if, within a specified period, cause to the contrary was not shown, the notice of the claim previously published would be withdrawn. This was yet another mechanism that an aggrieved party had at its disposal.

[43] In relation to TAU's complaint about the respondents' refusal or failure to provide information, the respondents submitted that TAU's demands had been extravagant. They pointed out that TAU's attorney had retained an investigator who had been charged with the task of obtaining access to relevant information contained in

government archives. Furthermore, in appropriate circumstances, affected persons requiring information had the right to invoke the remedies provided for in PAIA.

[44] The respondents stated that relevant information in their possession was always made available on request, subject only to any lawful reason to withhold it. On one occasion TAU's attorneys had been invited to inspect the relevant files in possession of the respondents. Information sought by TAU falling outside the contents of the files was not in the Commission's possession. Information in the possession of other State departments or institutions of State should have been sought where they resided.

[45] In respect of the complaint by TAU, particularly in respect of Venetia, that the respondents had a rigid and inflexible policy in terms of which they refused to make information available to interested and affected parties before the publication of a notice of a claim in the Government Gazette, the respondents replied as follows. In general the Commission did take the view that claims that had not yet been published in the Government Gazette were not open to opposition – it may well transpire that the claim had no validity in which event the

exercise would have been futile. However, this view was not cast in stone. Each case was individually considered and, in appropriate circumstances, this general view may well be changed. The respondents pointed, once again, to the dangers of a generalised or abstract approach divorced from the facts of a particular case.

[46] The respondents submitted that meetings held with TAU's representatives, coupled with the invitation to TAU to inspect the relevant files and the procedures available in terms of the Act negated TAU's claim that they were intent on not observing the *audi alteram partem* rule. Furthermore, it was pointed out that in litigation before the LCC a party has available all the procedural rights that the adversarial system provides.

[47] In respect of TAU's complaint that the question of compensatory land was ignored when the Commission investigated claims, the respondents stated that, in respect of the examples provided, State land had never been given to any claimant community as compensation for their dispossession. The statements ascribed by TAU to officials of the Commission, which the former

alleged demonstrated that compensation was not investigated, were strenuously denied by the relevant actors.

[48] In respect of the allegations by TAU concerning the feasibility of restoration of rights, the second and third respondents alleged that they were busy investigating models for sustaining the agricultural viability of the areas concerned and that their investigation was not complete. According to the respondents all options would be explored, having regard to the nature of existing activities being conducted in the area, including the nature and scale of existing investments. No final decisions had been taken and all legitimate objections would be taken into account and considered. In the event that no amicable settlement could be reached, the matters would be resolved, if necessary, by adjudication before the LCC.

[49] In respect of Levubu the respondents pointed out that 23 farmers, who own approximately one third of the land in question, were cooperating with the Commission and had indicated that they were prepared to sell their farms to resolve the disputes.

[50] In response to TAU's allegations concerning Biesjiesvallei, the respondents stated that not all the farmers could be served with

notices because many do not reside on their farms ─ only two farmers were found living on farms. Enquiries were made but no success was achieved. The best and most convenient form of notifying farmers was by putting up notices at the nearest post office, police station and business complexes. This had been done and the notice was consequently brought to the intention of TAU and its members.

[51] The mistake made in the notice published in the Government Gazette, in respect of Biesjiesvallei, was admitted. The respondents stated however, that the claims were published anew under the rubric ‘Amendments’ in the relevant Government Gazette.

[52] In answer to TAU’s complaint that a particular claimant had no historical title to the part of Biesjiesvallei claimed by him, the respondents stated that sufficient evidence had been placed before the Commission to substantiate the claim. If TAU or any of its members disputed the claimant’s rights, that question should rightly be addressed upon the referral of the claim to the LCC. In any event, the respondents referred to a letter by TAU to the second and fourth

respondents in which TAU itself alleged that the claimant had owned the land in question and had sold it to a member of TAU.

[53] The respondents pointed out that it was fallacious to refer to the status of investigations conducted by the Commission's officials as final. It was open to an interested party, at the appropriate time and in the appropriate forum, to submit evidence for purposes of the adjudication of a dispute. When a claimant presented evidence of an entitlement and the Commission's preliminary investigations pointed to the validity of the claim, it was accepted subject to the right of other parties to present countervailing evidence for consideration by the Commission. The call by the Commission for countervailing evidence referred to by TAU had been mistaken by the latter as a reversal of the legal burden of proof — in context it should have been seen as an invitation to make submissions and to submit evidence to the Commission.

[54] In respect of Brakfontein, the dispute, as stated earlier, is pending before the LCC. The respondents took the view that it was an abuse of the process of court for TAU to have embarked on the present litigation. The respondents challenged TAU's assertion that

the claimant communities had received compensatory land. They pointed out that the land on which these communities presently found themselves was a place to which they had been moved and which they share with other communities. Their claim was in respect of land from which they had been removed.

[55] In respect of the withdrawal by the Minister of an expropriation notice in relation to Boomplaats the respondents stated that land-owners had not disputed the merits of the claims but that problems arose concerning the price at which the land was to be acquired by the State. When negotiations with Mr Pretorius concerning the price stalled, the Commission and the Department of Land Affairs considered expropriation the appropriate next step. This led to the prospect of protracted litigation. It was then considered necessary to withdraw the notice. Thereafter Mr Pretorius substantially reduced his asking price and concluded a written settlement agreement with the Minister.

[56] In respect of TAU's assertion that the respondents sought to exclude the LCC, the respondents replied that, should the interpretation and application of the Act arise in any particular case,

the LCC would, if a case was properly set down before it, be the appropriate authority to decide the matter.

[57] The respondents insisted that all claims for the restoration of rights in land *were* being processed in accordance with the requirements of the Act and denied the policies attributed to them by TAU which the latter alleged involved non-observance or breaches of the provisions of the Act, other legislation, or any other law. According to the respondents it was apparent that TAU had artificially created disputes where none existed.

[58] In *Transvaal Agricultural Union v Minister of Land Affairs and Another* 1997 (2) SA 621 CC at para [33] the underpinning of the Act (in relation to the interim Constitution) and the competing rights of owners and claimants were described as follows:

'The Restitution of Land Rights Act recognises that certain persons and communities have a legitimate claim to the restitution of land rights which were lost as a result of past discriminatory laws. Legislation to provide for this is specifically sanctioned, and indeed required, by the provisions of ss 121 to 123 of the Constitution. It is clear from these provisions that existing rights of ownership do not have precedence over claims for restitution. The conflicting interests of claimants and current registered owners are to be resolved on a basis that is just

and equitable, “taking into account all relevant factors, including the history of the dispossession, the hardship caused, the use to which the property is being put, the history of its acquisition by the owner, the interests of the owner and others affected by any expropriation, and the interests of the dispossessed.” ’

[59] At para [36] of the *Transvaal Agricultural Union* case the Constitutional Court said the following:

‘The restitution of land rights is a complex process in which the rights of registered owners and other persons with an interest in the land must be balanced against the constitutional injunctions to ensure that restitution be made where this is just and equitable. Parliament is given a discretion by the Constitution to decide how this process is to be carried out. Provisions in such legislation that are designed to protect claimants and maintain the *status quo* **pending determination of a claim** serve a legitimate purpose.’

(Emphasis added.)

[60] In *Mahlangu NO v Minister of Land Affairs and Others* 2005 (1) SA 451 (SCA) at para [1] this Court set out in broad terms a description of the institutions created by the Act to manage the restitution process:

‘. . . The principal institutions that are created to manage the process are the Commission on Restitution of Land Rights (the commission) and the Land Claims Court (the LCC). The function of the commission, broadly speaking, is to receive

and to investigate claims for restitution and to attempt to resolve them through mediation and negotiation. If a claim cannot be resolved by those means it must be referred by the commission to the LCC for the LCC to exercise its wide powers of adjudication. The LCC may, amongst other things, order the restitution of land or a right in land to the claimant, or order the State to grant the claimant an appropriate right in alternative State-owned land, or order the State to pay compensation to the claimant, or order the State to include the claimant as a beneficiary of a State support programme for housing or the allocation and development of rural land, or it may grant the claimant alternative relief (s 35).'

Paragraphs [3] to [7] of the judgment are, with respect, useful in their description of the process for initiating a claim for restitution, the advisory functions of the Commission and the instances in which a direct claim to the LCC is possible.

[61] It is against that background that the LCC's power to grant declaratory orders, as set out in s 22(1)(cA) of the Act should be seen. It provides that the LCC shall have the power, to the exclusion of any court contemplated in s 166(c), (d) or (e) of the Constitution:

'(*c*A) at the instance of any interested person and in its discretion, to grant a declaratory order on a question of law relating to section 25(7) of the Constitution or to this Act or to any other law or matter in respect of which the Court has

jurisdiction, notwithstanding that such person might not be able to claim any relief consequential upon the granting of such order.'

Section 25(7) of the Constitution provides that persons or communities dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices are entitled, to the extent provided by an Act of Parliament, either to restitution of the property or to equitable redress. The Act was promulgated to that end.

[62] In para [8] of his judgment, Gildenhuys AJ correctly stated that the LCC's power to grant declaratory orders was subject to the restrictions described hereafter. First, the party seeking the order must have *locus standi*. Second, all persons whom the order seeks to bind must be cited as parties to the suit. Third, the court had a discretion and must be satisfied that it is desirable to grant the order. As stated earlier, on each of these issues he found against TAU.

[63] TAU's application in the LCC was ill-conceived and badly structured. The orders sought by TAU seem to have been considered by it to be the solution to a myriad of problems ─ the equivalent to the retail slogan: 'one size fits all'. Even if the *locus standi* and non-

joinder questions were decided in TAU's favour, it would still face an insuperable obstacle namely, the critical facts on which it relied are, as demonstrated in earlier paragraphs, denied with substantiation. I record that no replying affidavit was filed in response to the answering affidavit by the respondents.

[64] In *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) this court said the following (at 659):

'Indeed it seems clear to me that the Court has consistently refrained from dealing with issues in which a third party may have a direct and substantial interest without either having that party joined in the suit or, if the circumstances of the case admit of such a course, taking other adequate steps to ensure that its judgment will not prejudicially affect that party's interests.'

[65] Towards the end of the *Amalgamated* judgment (at 663) Fagan AJA said the following:

'It is clear to me that the Council should have been cited as a party in the first instance. The difficulty is to know what to do now that the matter has reached the appeal stage. One wishes to avoid, as far as it may be at all possible, the necessity of causing the parties unnecessary trouble, expense and delay. The furthest, however, that I think we are able to go to meet the parties is to let the final judgment in this matter stand over so as to give them an opportunity of ascertaining from the Council whether it is to prepared to file . . . a consent to be

bound by our judgment notwithstanding the fact that it has not been cited as a party. If . . . no such consent is filed . . . we shall give directions as to the course the proceedings will then have to take.'

It was not suggested that such a direction could be given in the present circumstances. In my view, it is in any event impractical to do so.

[66] In *Herbstein & Van Winsen's The Civil Practice of the Supreme Court of South Africa* (4th ed) by Van Winsen, Cilliers and Loots (edited by Dendy), the learned authors, at page 172, supply a useful summary of the approach of this Court in the *Amalgamated Engineering* case in determining, by way of two tests, whether a third party had a direct and substantial interest in the outcome of litigation. Concerning the two tests the learned authors state as follows:

'The first was to consider whether the third party would have *locus standi* to claim relief concerning the same subject matter. The second was to examine whether a situation could arise in which, because the third party had not been joined, any order the court might make would not be *res judicata* against him, entitling him to approach the courts again concerning the same subject matter and possibly obtain an order irreconcilable with the order made in the first instance.'

[67] No claimants and no owners of land or farmers affected by the claims in the examples provided by TAU were joined in the proceedings before the LCC. TAU had challenged claimants' title to land from which they were allegedly dispossessed. It alleged that even those who may have had title had lodged defective claims. It alleged that claimants had been preferentially treated by the Commission and had received compensation not due to them. According to TAU claimants were parties to agreements with the Minister that were irregularly concluded. The factual matrix against which TAU sought the relief claimed is replete with allegations involving the rights of claimants and farmers and/or owners. It is claimed that the latter were treated unequally and that they were prejudiced. There is no question that farmers and/or owners and particularly claimants had a direct and substantial interest in the subject matter and outcome of the application by TAU and should have been joined. More importantly, their involvement in the litigation might have provided a proper factual basis upon which a decision could be made. We might very well have had the benefit of their submissions on some of the legal issues raised.

[68] It was suggested on behalf of TAU that the order sought would serve as a guideline to all parties involved in land disputes. In *Radio Pretoria v Chairman, Independent Communications Authority of South Africa, and Another* 2005 (1) SA 47 (SCA)[1] this Court said the following at para [41]:

'Courts of appeal often have to deal with congested court rolls. They do not give advice gratuitously. They decide real disputes and do not speculate or theorise…Furthermore, statutory enactments are to be applied to or interpreted against particular facts and disputes and not in isolation.'

The same is true for courts of first instance.

[69] In respect of the declaratory orders sought it was submitted before us that TAU's entire case was premised on the third declaratory order set out in para [11]. It was submitted that owners of land subject to claims have the right to participate in the investigation of claims prior to the publication of a notice in terms of s 11(1) of the Act and are entitled to access to all information relating to the claim in the hands of the respondents at that stage. So, it was contended, the right claimed in the fourth declaratory order, namely the right to make

[1] The approach adopted by this Court was confirmed in an as yet unreported judgment of the Constitutional Court refusing leave to appeal to it. See *Radio Pretoria v Chairperson of the Independent Communications Authority of SA and Another* – Constitutional Court case 38/04 – judgment delivered on 8 December 2004.

representations to the Commission prior to publication of a notice in terms of s 11(1) of the Act, would have meaning only if information was imparted beforehand. It was conceded by TAU that, should it be held that it was not entitled to the third declaratory order, its entitlement to the other orders sought would be diluted, if not nullified.

[70] It is clear from the complaints and submissions recorded in the founding affidavit on behalf of TAU that they are aggrieved mainly about events preceding publication of the notice in terms of s 11 of the Act. They appear to regard the actions and decisions by the Commission before that occurrence as being final or binding.

[71] Section 10 of the Act deals with the lodgement of claims with the Commission. The procedure for the handling of claims is set out in s 11. Section 11A refers to circumstances under which a claim may be withdrawn or amended. Section 12 deals with the Commission's power of investigation and the process through which it may acquire information. Section 13 deals with mediation. Section 14 deals with the referral of the claim to the LCC in circumstances where it is ripe for a hearing. None of the procedural steps which might culminate in a hearing before the LCC is clothed with absolute finality.

[72] Under the heading *Audi alteram partem* the Constitutional Court in the *Transvaal Agricultural Union* case, supra, at para [27] stated that the Act contemplates that regional land claims commissioners will scrutinise claims lodged with them to satisfy themselves that they comply with the formal requirements of the Act, and are not frivolous or vexatious. At para [28] of that judgment the court stated that the registration of a claim in the deeds registry in terms of s 11(6)(b) of the Act does not in itself detract from the rights of the land owner or other persons interested in the property. Registration is no more than notice to the world at large that the land in question is subject to a claim, which is information that a land owner would in any event have been obliged to disclose to any potential buyer or mortgager.

[73] It should be borne in mind that any party aggrieved by any act or decision of the Minister, Commission or any functionary acting or purportedly acting in terms of the Act may, in terms of s 36 of the Act, have such act or decision reviewed by the LCC.

[74] It is clear that TAU mistakenly viewed the steps taken at an early stage by the Commission as adjudicative rather than investigative. That it is the latter rather than the former is clear from

the provisions of the Act (see *inter alia* para [71] above], the *Transvaal Agricultural Union* case and the decisions of this Court in *Gamevest (Pty) Ltd v Regional Land Claims Commissioner, Northern Province and Mpumalanga, and Others* 2003 (1) SA 373 (SCA) and the *Mahlangu* case, supra.

[75] At para [30] of the *Transvaal Agricultural Union* case the Constitutional Court said the following:

'In deciding whether the constitutional requirement that there be procedurally fair administrative action requires notice to be given by regional land claims commissioners to the landowners before issuing a s 11(1) notice, or whether their interests are sufficiently protected by notice given to them after such claims have been accepted, various matters would have to be considered by the Court. Without attempting to lay down what will be involved in such an enquiry, it seems clear that a Court would have to weigh up the interests of the claimants against those of the landowners, and consideration would have to be given to issues such as the temporary nature of the impediment; the purpose served by the *status quo* provision of s 11(7); whether there is a need for expedition in securing that purpose once a claim has been lodged; the harm done to landowners by the impediments placed upon them by s 11(7) and (8); the vulnerability of the claimants and the harm that might be suffered by them if the *status quo* is not preserved; and the fact that there is an unrestricted right to approach a different official, the Chief Land Claims Commissioner, for authority to evict a claimant or

interfere with improvements on the land. It might also be necessary to consider whether the Act reasonably requires claims to be processed expeditiously.'

[76] In the present case the explanation by the respondents as to why, in general, they consider it necessary to withhold information before publication of the notice in terms of s 11 is persuasive. They provided detailed explanations of the painstaking steps taken by officials of the Commission to process and expedite claims against a background of attendant complexities. The phase before the publication of the notice is investigative and not adjudicative. There is thereafter a further investigative stage in which interested and affected parties are entitled to participate. TAU submitted in support of the proposed fourth declaratory order that, if supplied with information prior to the publication its members might seek to make representations to prevent publication. I agree with the NLC's contention that this approach would require an 'infinite regression' along the following lines:

1. In order to be able to publish a section 11 notice of a claim, a hearing must be given;

2. in order to be able to give parties a pre-section 11 hearing, a notice must be issued inviting interested parties to identify themselves and make representations;

3. because a pre-section 11 notice will itself cause prejudice, in order to be able to publish that notice, a pre-section 11 hearing must be given;

4. in order to give that pre-section 11 hearing, a notice must be published . . .[2]

[77] As pointed out in para [30] of the *Transvaal Agricultural Union* case, in order to decide whether in any specific case procedurally fair administrative action requires notice to be given by regional land claims commissioners to land owners before the publication of a s 11(1) notice, various factors might have to be taken into account. In the present case the respondents disavow an inflexible policy in respect of making information available prior to publication of the notice. They accept that there may be circumstances in which it is necessary to make such information available. In the absence of

[2] Gildenhuys AJ referred with approval to this formulation of an infinite regression by Mr Budlender representing the NLC in the court below.

common cause or undisputed facts this Court cannot, in isolation, make the order sought.

[78] If one were to have regard to the first declaratory order sought it is clear that, in order to arrive at a just decision, one would have to consider the historical context of the habitation and possession of State land and consider whether it qualified as just and equitable compensation in terms of the Act. The respondents alleged that, in respect of the examples provided, State land had *not* been provided as compensation for dispossession. In one instance the State explained that the State land on which the community found itself was land to which it had been moved and that it shared with other communities. It is clear that claimants require to be heard on this aspect and that a general decision cannot be made in isolation. In respect of the second declaratory order sought the respondents were adamant that they endeavoured as best they could to investigate and determine which subdivisions of land are subject to restoration claims and that their best efforts were directed at determining the perimeters and boundaries of land in respect of which claims had been lodged. This was done with the participation of all affected and interested parties. Aside from the problem of claimants and farmers not being

heard on this aspect, I fail to see how the applicants can succeed in obtaining this order against what is alleged by the respondents and what an order in the terms sought would achieve.

[79] In my view, for the reasons stated in preceding paragraphs, Gildenhuys AJ was, in the final analysis, correct in refusing the application.

[80] There was an application by TAU for condonation for the late filing of heads of argument. The respondents did not persist in their initial opposition to the application and we accordingly granted the application.

[81] The following order is made:

The appeal is dismissed with costs including the costs of the application for condonation.

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MS NAVSA
JUDGE OF APPEAL

CONCUR:

SCOTT JA
ZULMAN JA
MTHIYANE JA
VAN HEERDEN JA