THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable (in part)
Case No: 553/05

In the matter between :

HAAKDOORNBULT BOERDERY CC	**1st Appellant**
PETRUS JACOBUS BEZUIDENHOUT NO [IN HIS CAPACITY AS TRUSTEE OF THE BEZ BEZUIDENHOUT FAMILIETRUST]	**2nd Appellant**
JANETHA CHRISTOFFELINA BEZUIDENHOUT NO [IN HIS CAPACITY AS TRUSTEE OF THE BEZ BEZUIDENHOUT FAMILIETRUST]	**3rd Appellant**
JACOBUS ADRIAAN VAN STADEN NO [IN HIS CAPACITY AS TRUSTEE OF THE BEZ BEZUIDENHOUT FAMILIETRUST]	**4th Appellant**
FRANCOIS JOHANNES FURSTENBURG NO [IN HIS CAPACITY AS TRUSTEE OF THE F & S FURSTENBURG FAMILIETRUST]	**5th Appellant**
SUSANNA FRANCINA FURSTENBURG NO [IN HIS CAPACITY AS TRUSTEE OF THE F & S FURSTENBURG FAMILIETRUST]	**6th Appellant**
and	
M M MPHELA & 217 OTHERS	**1st to 218th Respondent**
MINISTER OF AGRICULTURE AND LAND AFFAIRS	**219th Respondent**

Coram : Harms ADP, Cameron, Mlambo JJA, Snyders and Musi AJJA
Heard : 8 May 2007
Delivered : 30 May 2007

Summary: Restitution of land – effect of compensation received at the time of dispossession – partial restoration.

Neutral Citation: This judgment may be referred to as Haakdoornbult Boerdery CC v Mphela [2007] SCA 69 (RSA)

JUDGMENT

HARMS ADP:

Introduction

[1] This appeal concerns the restitution of land lost by the claimants due to racially discriminatory laws and practices. The Land Claims Court ('the LCC', per Moloto J assisted by Mr G Hugo as assessor) upheld the claim and found that the claimants (the plaintiffs in the court below) were entitled to restoration of the whole of the land (which will be referred to as the farm Haakdoornbult) so lost.[1] Since the main judgment has been reported as *Mphela v Engelbrecht*[2] it will not be necessary to restate all the facts. (A further judgment by the LCC dealing with ancillary matters and containing the final order has not been reported.) Three of the four affected owners of subdivisions of the original farm appeal the judgment with the leave of the LCC. There is also a cross-appeal by the claimants to which I shall revert in due course.

[2] Mr Klaas Phali Mphela (to whom I shall refer as Phali in order to avoid confusion), the scion of the Mphela family and whose descendants are the claimants, was a pioneering farmer who was able to purchase a substantial farm on the banks of the Crocodile River during 1913 from a white farmer, and to obtain full title. The date is significant because later during that year the Black Land Act (then called the Natives Land Act) 27 of 1913 was promulgated which would have prevented him from buying land within an area designated for white ownership. He was a member of a small class of enterprising blacks who, in the face of all odds, was able to buy and pay for a farm of this size; to systematically cultivate and

[1] Had it not been for subdivisions and consolidations (to be referred to later) since the dispossession the farm would have been called the Remaining Extent of the farm Haakdoornbult 542, Registration Division KQ, Thabazimbi, Limpopo Province in extent 637,4229 ha.
[2] [2005] 2 All SA 135 (LCC).

irrigate it; to produce crops not only for own consumption but also for the market; to provide accommodation for his increasing family; and even to let a portion of the farm to whites.

[3] The farm was sold under compulsion to white farmers during 1951, the government insisting that the family relocate to a nearby farm, Pylkop. The family resisted until 1962, when they were removed to Pylkop, which the family had bought with the money received for Haakdoornbult. The removal was nevertheless traumatic and was only consented to after a night raid, arrest of the adults for trespassing and the bulldozing of their homes and kraals and kgotla tree.

[4] The main issue in this appeal relates to the extent of restitution to which the family is entitled. The LCC held that it was entitled to the restoration of the whole farm. In this judgment I conclude that this amounts to an over-compensation bearing in mind the fact that the family had sold Haakdoornbult and had bought Pylkop at market-related prices. However, I hold that the family is entitled to be restored to three of the four portions of the now subdivided farm. This equals 86 per cent of the original farm. Whether the family has to make a contribution in respect of two of these portions I cannot decide on the material before us and this issue is referred back to the LCC.

The statutory setting

[5] Section 25 of the Bill of Rights, the section dealing with property rights, provides in ss (7) for claims for restitution. It states that a person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided for by an Act of Parliament, either to restitution of that property

or to equitable redress. The relevant Act, which was enacted under the interim Constitution's corresponding provision, is the Restitution of Land Rights Act 22 of 1994 (amended from time to time).

[6] The Constitutional Court recently had the opportunity to state that s 25(7) is part of a cluster of provisions that deal with the constitutional protection of property; that the right of restitution is either to property or to equitable redress; that neither a claimant nor a community may insist as of right on the restitution of the original land that was dispossessed; that the entitlement to restitution is (according to the Constitution) to the extent provided in the Act; and that what is appropriate property restitution or equitable redress in response to historical dispossession varies depending on the specific context.[3]

[7] The right of restitution is separate and distinct from the other 'rights' that form part of this cluster. The state, for instance, is also obliged to take reasonable measures, within its available resources, to foster conditions that enable citizens to gain access to land on an equitable basis. There is further the right to secure tenure of land which belongs to those whose tenure is legally insecure as a result of racially discriminatory laws or practices. In other words, s 25(7) is not about land redistribution but about restitution. This explains provisions such as s 2(2) of the Act that provides that someone who has been dispossessed, but has received just compensation for the dispossession at the time, is not entitled to any restitution; the definition of 'restitution of a right in land' in s 1 (dealt with in the next paragraph); the wide discretion a court has in relation to the relief that it may grant (s 35); and the requirement

[3] *Concerned Land Claimants Organisation of Port Elizabeth v Port Elizabeth Land and Community Restoration Association* 2007 (2) SA 531 (CC) para 23 and 26.

that a court has to take into account the amount of compensation or any other consideration received in respect of the dispossession in making any order under the Act (s 33(eA)).[4]

[8] The entitlement to restitution is determined by s 2 of the Act. A person dispossessed of 'a right in land' after 19 June 1913 as a result of racially discriminatory laws or practices is entitled to 'restitution of a right in land'. 'Restitution of a right in land' means (a) the restoration of a right in land or (b) equitable redress. The right is, accordingly, not a right to restitution of the land in question as the Constitutional Court observed. Having said this it remains true that the umbilical cord that joins any particular community and its ancestral land is strong and has a highly emotional element that has to be respected.[5] A 'right in land' is defined to include 'any right in land whether registered or unregistered' and also a customary law interest. The right to restitution is also given to a deceased estate and to a community so dispossessed.

[9] A prerequisite for a valid claim for restitution is that a prescribed claim for restitution must have been lodged with the Commission on Restitution of Land Rights not later than 31 December 1998 (s 2(1)(e)). The claim had to include a description of the land in question, the nature of the right in land of which the claimant was dispossessed, and the nature of the right or equitable redress being claimed (s 10(1)).[6] When the present claim was filed with the Commission no forms had yet been prescribed.

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[4] Section 33 is quoted later in full.
[5] *Khosis Community, Lohatla v Minister of Defence* 2004 (5) SA 494 (SCA) para 31.
[6] The requirements were somewhat less at the time the claim was lodged but nothing turns on this.

[10] There is a limitation on the right to restitution because no one is entitled to restitution of a right in land if (a) just and equitable compensation as contemplated in s 25 (3) of the Constitution[7] or (b) any other consideration which is just and equitable, calculated at the time of dispossession, was received in respect of the dispossession (s 2(2)).

[11] A court may, inter alia, order the restoration of land or a portion of land or it may order the state to pay the claimant compensation, or grant 'any' alternative relief (s 35). However, in considering its decision the court has to take into account a number of factors listed in s 33. They include (a) the desirability of providing for restitution of rights in land; (b) the desirability of remedying past violations of human rights; (c) the requirements of equity and justice; (d) the feasibility of restoration of rights in land; (e) the desirability of avoiding major social disruption; (f) the amount of compensation or any other consideration received in respect of the dispossession, and the circumstances prevailing at the time of the dispossession; (g) the history of the dispossession, the hardship caused, the current use of the land and the history of the acquisition and use of the land; and (h) any other factor which the court may consider relevant and consistent with the spirit and objects of the Constitution, more particularly its equality provisions.

[12] If a community claims restitution, the property must be restored to the community and not to its individual members and the court may then determine the manner in which the property is to be held.[8] The court also has the power to adjust the nature of the right previously held by the

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[7] Quoted later.
[8] *In re Macleantown Residents Association: Re Certain Erven and Commonage in Macleantown* 1996 (4) SA 1272 (LCC).

claimant, and to determine the form of title under which the right should held (s 35(4)).

The parties

[13] The claimants (the main respondents on appeal) include the two executors in the estate of the late Mr Daniel Rakgokong Mphela in whose name the property was registered at the time of the dispossession. They were joined by 216 other members of the Mphela family. Daniel Rakgokong had inherited the farm during the 1930s from his father, Phali. The LCC held that the family was a community in terms of the Act and that the claim to restitution belongs to the family as a community. It disallowed the claim of the executors. I shall revert to this issue at a later stage.

[14] The proceedings in the LCC were brought under s 38B of the Act, which entitles a disaffected party to approach the LCC directly, usually because of the lack of progress on the part of the state in processing the claim.

[15] The appellants are three of the four affected owners of the original farm.[9] The farm is situated near Koedoeskop (between Brits and Thabazimbi). Its western border is the Crocodile River and the main road between the two towns bisects the original property. After the dispossession of the Mphelas the farm was subdivided and some subdivisions were consolidated with adjoining properties. The farm as described above does, accordingly, no longer exist as a topo-cadastral

[9] It is not necessary to deal with the affected mineral rights holders, bondholders or holders of servitudes.

entity. In what follows I shall refer to the properties with reference to the name of the respective owner, and sizes will be approximated.

[16] The Bez Bezuidenhout Family Trust (the Bezuidenhout Trust) owns 172 ha of the original farm, which has been consolidated with an adjoining property, Drie Jongelings Geluk.[10] This portion lies to the east of the main road and has no river frontage. The Trust (under another name and with other beneficiaries) took transfer of the property during 1992. The Bezuidenhout family's interest dates to October 2002. The Trust uses the property as a game ranch coupled with a conference centre on Drie Jongelings Geluk.

[17] The F & S Furstenburg Family Trust (the Furstenburg Trust) owns a portion of the farm measuring 271 ha since 2002.[11] It lies to the north of the Bezuidenhout property and is also to the east of the main road and accordingly has no river front. This property is being used for game and cattle farming purposes in conjunction with an unconsolidated adjoining property, Rietfontein.

[18] Haakdoornbult Boerdery CC ('the CC') owns under a certificate of consolidated title some 91 ha of the original farm.[12] This means that this land now form part of a larger farm which is not subject to any land claim. Its position will be described later. This portion (which will be referred to as 'the RE') is used in conjunction with an adjoining property for irrigation purposes. Although the RE abuts the Crocodile River, it has

[10] The former portion 3 of Haakdoornbult 542, measuring 172,5105 ha and forming part of the farm Drie Jongelings Geluk 562 through consolidated title as described in deed of transfer 85279/1992.
[11] Portion 6 (a portion of portion 2) of Haakdoornbult 542, measuring 271,6941 ha and held in terms of title deed 27844/2002.
[12] The former or last Remaining Extent of Haakdoornbult 542, measuring 90,8104 ha as described in deed of transfer 20520/1999 and held under certificate of consolidated title 20251 and forming part of portion 5 of Haakdoornbult 542.

no water rights and the water allocated to an adjoining property is used for irrigation.

[19] The balance of the farm, 101 ha in extent, belongs to the Engelbrecht family.[13] This is the northern part of the farm and is situated between the river and the road. About half of this land is used for irrigation purposes and it has a water allocation from the river. Some members of the Mphela family had utilised this riparian land for irrigation and cultivation prior to the dispossession. The Engelbrechts initially opposed the claimants claim in the LCC but at an early stage of the trial withdrew their opposition because of a lack of funds. They also did not appeal the order and are therefore not a party to the appeal. The effect of this will be dealt with later.

[20] The Minister of Land and Agricultural Affairs under whose auspices the administration of the Act falls and who has to satisfy any successful claim (whether by payment, purchase or expropriation) filed a plea in which the dismissal of the claim was sought. The Minister was represented by counsel during much of the trial but counsel did not contribute anything to the proceedings, either by questions or submissions. After some 900 pages of oral evidence and the conclusion of the claimants' case the Minister withdrew the state's defence to the claim.[14] It the light of this history it was surprising that the Minister filed heads of argument two court days before the hearing of the appeal and sought condonation.[15]

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[13] Portion 7 of the farm Haakdoornbult 542, measuring 101,1038 ha and held under certificate of consolidated title 27845/2002. This consolidated two portions of the farm in contention.
[14] There is some confusion on the record about whether or not the Commissioner had been a party to the proceedings and whether counsel also represented the Commissioner.
[15] The Minister's legal standing on appeal is doubtful since the withdrawal of the defence but in the event it is not necessary to rule on this issue.

Who and what was dispossessed?

[21] At the time of the dispossession the farm was registered in the name of the already deceased Daniel Rakgokong. His estate has (even now) not been wound up and it is accordingly common cause that the estate (represented by the executors) was dispossessed of the ownership of the farm. However, the LCC found that the executors had not filed a claim as required by s 2(1) before the cut-off date, which means that the estate was not entitled to claim restitution. (As mentioned the claimants have lodged a cross-appeal but it was against this finding.) I am of the view that the executors were not in their representative capacity claimants in the LCC because there was no claim in the LCC on behalf of the estate. Instead, the claim was for restitution to a community consisting of the Mphela family.[16] In addition, the claimants do not attack the order since it is in the terms sought by them. The cross-appeal is thus ill-founded because it is directed at a finding and not against a 'judgment or order'.[17]

[22] This then raises the question whether the family (which the LCC had found was a community as defined in the Act – a finding that has not been attacked) was dispossessed of any right in land within the defined meaning. The answer is to be found in my judgement in the terms of the family agreement of 31 March 1932 entered into shortly after the death of Phali who had died intestate.[18] The agreement is in the form of a declaration by the eldest son (the said Daniel Rakgokong) in his capacity as the lawful descendant and heir 'in terms of Native custom'. In it he gave and granted 'in terms of Native custom' the 'undisturbed right to

[16] For the importance of the distinction cf *In re Macleantown Residents Association: Re Certain Erven and Commonage In Macleantown* 1996 (4) SA 1272 (LCC).
[17] For this reason alone the cross-appeal has to be struck from the roll: *Municipal Council of Bulawayo v Bulawayo Waterworks Co Ltd* 1915 AD 611 at 631.
[18] The agreement is quoted in full in *Mphela v Engelbrecht* [2005] 2 All SA 135 (LCC) at para 5.

live and reside on the aforementioned property with their families and to use and cultivate the same and to exercise all the rights over the said property which I myself possess' to the living children of the three wives of Phali and to the children of those already deceased.

[23] He added to this an expression of a 'desire' that at the death of the last survivor among 'us' the property should be sold and the proceeds divided amongst their descendants. There is a dispute between the parties as to whether or not the 'last survivor' is still alive and whether or not the event giving rise to the sale has arrived.

[24] This dispute leads nowhere because the issue concerns the rights of the family as a community at the time of dispossession. The appellants argue that the family had personal usufructuary rights only and that these rights, not being real rights, cannot be 'rights in land' as required by the Act. The appellants may be right under Roman-Dutch legal principles but as appears from the wording of the family agreement the rights granted to the family were rights under customary law and were rights in the land equal to that of the registered owner.[19] Although the rights were not registered (which does not matter) they were to be registered in terms of a court order of 27 November 1947. Furthermore, the desire of the donor that the farm should be sold did not bind the executor or the family to sell.

[25] The second issue under this heading is whether the family as a community had lodged a claim with the Commission. The facts have been set out in great detail in the judgment of the LCC and need not be

[19] Cf *Alexkor Ltd v Richtersveld Community* 2004 (5) SA 460 (CC), 2003 (12) BCLR 1301 (CC) para 47 et seq.

restated. Because the appellants accepted during the appeal hearing that the finding of the LCC that the family had lodged an appropriate community claim, it is unnecessary to revisit this issue. The concession was correctly made.

The racially discriminatory dispossession

[26] The LCC held that the dispossession of the claimants took place over a period of time between 19 July 1951 (when the farm was sold to Messrs Botha by the then executor of the estate of Daniel Rakgokong with the consent of the family) and August 1962 (when the family was forcefully removed from the farm in circumstances set out in detail in the LCC's judgment). This finding is attacked by the appellants who argue that the dispossession took place on 19 July 1951.

[27] Although it has always been common cause that the there had been a racially discriminatory dispossession of the farm, the relevance of the date of dispossession is, at this stage of the inquiry at least, related to the question whether the family's claim is barred because it had received just and equitable compensation at the time of the dispossession, a question that will be addressed in the next section of this judgment. The appellants' argument that the community had received sufficient compensation is premised on the assumption that the dispossession had taken place on 19 July 1951 and not later.

[28] The farm was a so-called black spot within a so-called white farming area and earmarked for expropriation and removal of the family to a property within an area for black occupation. Because of demands from the white farming community the government of the day pressurized Daniel Rakgokong to sell the farm. During 1946 he entered into a sale

agreement with one Terblanche but because Daniel Rakgokong had disregarded the family agreement, litigation followed between him and other members of the family and the sale came to nought. As a result of this family members became somewhat distrustful of Daniel Rakgokong and his offspring.

[29] During the late 1940s negotiations were entered into between the government of the day and the family for the exchange of the farm for another farm. The government offered the family three options but the family chose the farm Pylkop which is some 17 km from the subject farm. It is more than three times the size of Haakdoornbult but it does not have any river front or irrigation land. The properties were valued at £ 7 558 for Pylkop and £ 5 040 for Haakdoornbult. Both valuations were done by Messrs Cronjé and Liebenberg. The government was prepared to add 20% as a solatium (something it would have done had the farm been expropriated) putting a price of £ 6 048 on Haakdoornbult, but the government was not willing to agree to an exchange without more because of the difference in value. However, the family insisted that it wanted the whole of Pylkop without any additional payment. The problem was solved when neighbours, the Bothas, offered to buy Haakdoornbult for £ 7 558. The intention was that the government would then sell Pylkop to the family.

[30] The agreement of sale with the Bothas was entered into on 19 July 1951. The family recorded its agreement to the sale. The approval by the government of the sale of Pylkop was obtained during January 1953 at the said valuation and the family were given the right to occupy Pylkop immediately.

[31] Before proceeding with the narrative it is necessary to consider the terms of the sale of the farm to the Bothas. After recording the name of the property and the price, the agreement stated that the price had to be guaranteed within three weeks and the guarantee had to be held by the Commissioner on behalf of the seller (the executor) because the money was to be used to pay for Pylkop. The Bothas did not provide a guarantee but instead deposited the full purchase sum. They were in terms of the agreement entitled to immediate occupation of the irrigation land while the family was entitled to remain in occupation of the remainder of the farm for about a year. Since the 'usufructuary' rights under the family agreement had not yet been registered and because there were minor and unborn beneficiaries, the sale was made subject to the approval of the supreme court (the provincial division).

[32] The date of dispossession must be determined in the light of the following facts. The Bothas took occupation of a valuable part of the irrigation lands soon after the sale agreement; the family resisted relocation to Pylkop and remained in possession of the dry lands, the grazing and their homesteads and kraals – in spite of their agreement – for another ten years; the court's approval to the sale was obtained on 12 April 1961; the farm was registered in the name of the Bothas on 27 October 1961; Pylkop was registered in the name of the deceased estate (the family agreement rights were reflected in the title deed) on 24 July 1962; and the Mphela family was forcibly relocated to Pylkop during August 1962.

[33] Although the family's rights were customary law rights and although the Bothas were to acquire ownership from the owner, the rights of the family were so inextricably bound to the ownership of the land that

it does not make much sense to deal with these rights as anything but ownership. Bearing that in mind it is necessary to determine what 'rights in land' remained in the hands of the family after the conclusion of the agreement with the Bothas. The answer depends in the first instance on whether the requirement of the court's approval was a condition precedent or whether the failure to obtain approval would have resolved the contract. The clause was in my judgment a resolutive condition simply because the contract contemplated that the Bothas would receive immediate occupation; that the Bothas would provide immediate guarantees for payment; and that the family would vacate the farm on a specified date irrespective of the court's approval. In other words, the parties contemplated that the agreement would take immediate effect, which in the event it did.

[34] The family (as found by the LCC) may have been morally entitled to renege on the agreement with the Bothas and morally justified to resist relocation to Pylkop for some ten years but these facts do not in my judgement affect the question of when and how they were dispossessed of their 'rights in land'.[20] Although the estate remained 'owner' of the farm until registration in the name of the Bothas, this 'ownership' had little monetary value over and above the purchase price in view of the contractual obligations. (This is so even though there remained the unquantifiable possibility that the contract could have been dissolved by the refusal of the court to consent to the agreement.) As said, the family's customary law rights were intimately linked to the registered ownership and accordingly had no value separate or over and above that proprietary right. The holding over in the face of the undertaking to vacate on a

[20] The LCC's reliance *Ndebele-Ndzundza Community v Farm Kafferskraal No 181 JS* 2003 (5) SA 375 (LCC) and *In re Kranspoort Community* 2000 (2) SA 124 (LCC), [2003] 1 All SA 608 (LCC) takes the matter no further.

specified date can only be conceptually a 'right in land' if one accepts that a possessor of this kind has a right in land or if one argues that the right not to be spoliated is a right in land. If either were correct it would follow that there was a two-stage dispossession. It is however not necessary to resolve this issue because I shall at this stage of the judgment assume in favour of the appellants that the dispossession had taken place in 1951.

The s 2(2) issue: just and equitable compensation

[35] It is convenient to turn to the question whether the claimants' claim is barred by the provisions of s 2(2) which reads as follows:

'No person shall be entitled to restitution of a right in land if—

(a) just and equitable compensation as contemplated in section 25 (3) of the Constitution; or

(b) any other consideration which is just and equitable,

calculated at the time of any dispossession of such right, was received in respect of such dispossession.'

[36] For purposes of the appellants' case one has to determine whether the price paid by the Bothas was just and equitable compensation for the dispossession of the property applying the expropriation principles set out in s 25(3) of the Constitution.[21] Compensation is by virtue of the provisions of s 25(2) and (3) a constitutional issue which means that the compensation award has to fulfil the requirements of the Bill of Rights.

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[21] 'The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including—

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

The amount of compensation has to be 'just and equitable, reflecting an equitable balance between the public interest and the interests of those affected' having regard to 'all relevant circumstances' of which market value is but one of five. Market value is in the context of this case the only factor listed in s 25(3) capable of quantification. Once the market value has been determined an upward or downward adjustment, having regard to other relevant factors, can be made.[22] I accordingly intend first to consider the market value of the farm and thereafter the other factors listed in the section.

[37] Pylkop and its comparative merit is in my judgement irrelevant at this stage of the inquiry. What s 2(2) requires is a determination of the consideration or compensation received 'in respect of' the dispossession. Pylkop was purchased at a later date from the government and although it was related to the dispossession it was not truly a consideration or compensation 'in respect of' the dispossession. The qualities of Pylkop, however, become germane at a later stage to the extent that it impacts on the s 33 factors.

[38] The claimants relied on Mr D Griffiths as their expert valuer and although the appellants had given notice of their intention to call a valuer they, in the event, did not do so. The LCC quoted the whole of Griffiths' report in the judgment and accepted the report as it stands without consideration of his oral evidence or of whether his opinions were based on fact or surmise or had anything to do with the relevant statutory test.

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[22] *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC) para 26-37; *City of Cape Town v Helderberg Park Development (Pty) Ltd; Former Highlands Residents concerning the Area formerly known as the Highlands (now Newlands Extension 2), District of Pretoria: In re Sonny v Department of Land Affairs* 2000 (2) SA 351 (LCC), [2000] 1 All SA 157 (LCC); *Abrams v Allie NO* 2004 (4) SA 534 (SCA), [2004] 2 All SA 99 (SCA).

[39] I believe that the LCC erred in its uncritical adoption of the report. Expert opinion must be fact based and the facts must justify the opinion even if the facts are difficult to establish. It is otherwise without any value. What Griffiths did was to collate a number of transactions in the vicinity concluded some 50 or 40 years ago, determine the average price per hectare and then test this against the prices paid for the farm and for Pylkop. He did other exercises but in each instance he had no evidence whatsoever that any of the properties were, at the time, in any way comparable to the farm.

[40] In any event, he concluded that the valuation of and price paid for Pylkop was market related; that Haakdoornbult had been undervalued; but that the price paid by the Bothas was probably equal to market value. He argued that had the family been expropriated they would have been entitled to a farm whose agricultural value was equal to the market value of their farm.[23] He then assumed that the agricultural value of Pylkop was much less than its market value. This led him to conclude that the claimants had not received just and equitable compensation.

[41] The appellants, on the other hand, relied on the valuations of Cronjé and Liebenberg done at the time and sought to show that Pylkop was as good as if not better than the family farm. Griffiths criticized these valuations and the LCC agreed, adding that these valuers were prejudiced against the Mphelas and therefore undervalued their farm. I have no wish to enter into this debate because it, once again, misses the mark.

[23] Relying on s 13 of the Native Trust and Land Act 18 of 1936.

[42] The farm was sold at the relevant date at £7 558. Subject to the remarks that follow, this was the best evidence of the market value of the farm at the time. Arguing that the Bothas had paid more than market value, the appellants suggest that they may have been prepared to pay a premium in order to extend their irrigation activities on their neighbouring property. Accepting that they were prepared to pay a premium, this does not explain why they were prepared to pay a third more than the actual value, recalling that the farm had been valued at £5040, and, in addition, allow the family to occupy the greater part of the farm for another year. Furthermore, the Mphelas were hardly what could be called willing sellers. They sold under the threat of expropriation and they presumably realised that if expropriated and unless they were prepared to litigate they would receive only the valuation plus 20%, namely £ 6 048, which would have been insufficient to purchase Pylkop. Having regard to these considerations and in the absence of any evidence to the contrary it is fair to conclude that the price paid was not less than the market value of the farm.

[43] That leads to the second leg of the inquiry, namely whether, having regard to the time and method of payment and 'all relevant circumstances' including any of the factors listed in s 25(3), an upward or downward adjustment is justified. Once again, Pylkop is in my judgement irrelevant because what a dispossessed person or community subsequently did with the compensation received is of little consequence in determining whether the compensation received 'in respect of' the property was adequate or not.

[44] In an emotional section of the judgment the LCC dealt with the question of the time and manner of payment. The LCC referred to the fact

that the Bothas had taken possession of the irrigation lands before transfer and did not pay occupational interest or rent. What the LCC failed to consider is that the Bothas had paid the full purchase price immediately – earlier than contemplated – and that there was therefore no reason for the Bothas to have paid occupational interest or rent. It was the Mphelas who decided not to use the money even though they were entitled to do so. What the LCC also failed to take into account is that although the Bothas had paid the full price the Mphelas retained beneficial occupation of the greater portion of the farm for more than ten years – also free of charge – while they had the whole of Pylkop at their disposal.

[45] A second fact referred to by the LCC under this heading was the fact that the farm had increased in value between the date of sale and of transfer. This factor was based on the finding that the final dispossession took place during 1962. However, the LCC did not attempt to define or quantify the value of these rights but if they are what I have assumed them to be, the rights in land that still existed at that stage had little perceivable market value.

[46] Moving to the 'current use of the property', the factor identified in s 25(3)(a), the LCC dealt with the use current at the trial date. This approach is in my judgement wrong. 'Current use' in the context of the section refers to the use current at the date of expropriation, which is for present purposes the date of dispossession. The same error was made by the LCC when it dealt with 'the history of the acquisition and use of the property' in terms of s 25(3)(b).

[47] In spite of these misdirections I am satisfied, having regard to the use put to the farm by the Mphelas, that the family was not fully and

fairly compensated. They had used the farm for irrigation purposes, for dry land cultivation, for their homes, their livestock and for traditional family purposes. The family, consisting of many households, had to relocate; they had to rebuild houses; they had to build a school; and they had to rebuild their lives on vacant land. Their houses and cattle kraals had no commercial value for a purchaser and would have been discounted by any purchaser. In short, the family lost more than the market value of the farm.

[48] In this regard I wish to paraphrase and adopt the approach of Gildenhuys AJ in *Baphiring Community v Uys.*[24] Compensation, to be fair (he said), must recompense. The purpose of giving fair compensation is to put the dispossessed, insofar as money can do it, in the same position as if the land had not been taken. Fair compensation is not always the same as the market value of the property taken; it is but one of the items which must be taken into account when determining what would be fair compensation. Because of important structural and politico-cultural reasons indigenous people suffer disproportionately when displaced and Western concepts of expropriation and compensation are not always suitable when dealing with community held tribal land. A wider range of socially relevant factors should consequently be taken into account, such as resettlement costs and, in appropriate circumstances, solace for emotional distress.

[49] The appellants argue that these concepts about relocation and restitution did not exist during the 1950s and that it would be wrong to introduce 'modern' considerations into the equation. The problem with

[24] LCC 64/98 decided on 5 December 2003 para 12. The assessor was Prof M Wiechers.

the argument is that the Constitution demands a deconstruction of historic events and a reconsideration and re-evaluation in the light of its terms. This may lead to a result that may appear to be anachronistic but that does not affect the clear purpose of the Constitution and s 2(2) of the Act.

[50] The last factor listed in s 25(3) is the purpose of the dispossession which, as mentioned, was to remove a black spot under racially discriminatory laws and practices. It was not and could not be argued that such purpose does not require an upward adjustment of what otherwise would have been reasonable monetary compensation. It is not necessary (and in any event impossible) to attempt to quantify these adjustments – it suffices to say that they would have had a material effect over and above the market value on the compensation. I accordingly conclude that s 2(2) does not serve as a bar to the family's claim.

The relief

[51] The LCC was confronted with opposing contentions. The claimants contended for restoration of the entire farm while the participating defendants asked for dismissal of the claim, alternatively granting the family equitable redress or restoration of a portion of the farm. The LCC accepted the claimant's contentions and awarded the whole farm without any conditions.

[52] The issue to consider now is whether the claimants are entitled to restoration of the land, and, if so, whether they are entitled to the return of the whole land or only a part thereof. I wish to interpose and deal with an argument of the claimants, namely that the return of only part of the farm was not an issue in the LCC. They say that had they known that that was on the cards they might have considered tendering part of Pylkop in order

to ensure that they received the whole farm. That submission appears to be an afterthought. It is clear from the record that the issue of what had to be returned was the core issue and the judgment of the LCC acknowledged its existence. As appears from the pleadings, the family always insisted on retaining Pylkop. Since the claimants sought full restitution while admitting that they had received material compensation for the dispossessed land, they had to provide all the evidence necessary justifying the exercise of the discretion of the court in their favour especially, as mentioned, they are not entitled to insist as of right to the return of the land.

[53] On the question whether land should be restored, the LCC had regard to the factors listed in s 33[25] and came to the conclusion that the claimants were entitled to restoration of at least some of the land. It has not been suggested that the LCC erred and there is accordingly no reason to discuss or interfere with the exercise of its discretion in this regard.

[25] Section 33: 'Factors to be taken into account by Court.—In considering its decision in any particular matter the Court shall have regard to the following factors:

(a) The desirability of providing for restitution of rights in land to any person or community dispossessed as a result of past racially discriminatory laws or practices;

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

(c) the requirements of equity and justice;

(cA) if restoration of a right in land is claimed, the feasibility of such restoration;

(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 protect and advance persons, or categories of persons, disadvantaged by unfair discrimination in order to promote the achievement of equality and redress the results of past racial discrimination;

(eA) the amount of compensation or any other consideration received in respect of the dispossession, and the circumstances prevailing at the time of the dispossession;

(eB) the history of the dispossession, the hardship caused, the current use of the land and the history of the acquisition and use of the land;

(eC) in the case of an order for equitable redress in the form of financial compensation, changes over time in the value of money;

(f) any other factor which the Court may consider relevant and consistent with the spirit and objects of the Constitution and in particular the provisions of section 9 of the Constitution.'

[54] I now turn to the main issue on appeal, namely whether or not the claimants have made out a case for the return of the whole farm. The question must be seen in this context. At the time of the material dispossession full market value was paid for the farm and Pylkop was subsequently purchased at its market value as in 1951. Pylkop is registered in the name of the estate and the family's rights were registered against the title deeds. The family has been on Pylkop since 1962 and there are about 200 households, most living in permanent houses, there are two schools on the property, some families conduct horticulture on the farm, and others farm with cattle or other livestock. Even if one attached some value to the 1962 valuations by Griffiths, and if one regards Pylkop as compensatory land, and if one adds to all this the unquantifiable losses and trauma suffered by the family, it is apparent that by ordering restitution of the whole of the farm, the family will be substantially overcompensated.

[55] In deciding whether or not to order the restitution of land a court is obliged to take into account 'the amount of compensation or any other consideration received in respect of the dispossession' (s 35(eA)). This aspect was brought pertinently to the LCC's attention and the LCC even thought that there is merit in the submission that the claimants were not entitled to 'double' compensation. But, as counsel for the claimants and the Minister conceded, the extent of the compensation received at the time for the dispossessed land was a weighty consideration and that the LCC eventually did not have regard to this factor – it appears to have overlooked it. In addition, the LCC did not give any reasons for its implicit finding that the family was entitled to more than it had lost. This means that the exercise by the LCC of its discretion in ordering the return

of the whole of the farm is fatally flawed and that this Court is obliged to reconsider the issue and exercise its own discretion (if possible).

[56] The LCC, in its second (and unreported) judgment, dealt with the issue whether the state could have waived its right to reclaim Pylkop and, if not, how s 33(eA) should be applied in the circumstances of the case. This was according to the LCC's formulation of the remaining issue in its order at the end of the first stage of the case. However, the second judgment then concentrated on the question whether Pylkop (said to be the compensatory land) should be returned to the state. This was not an issue between the parties: the claimants' case was that they were to retain Pylkop; the appellants did not contend otherwise; and the state never sought the return. I have, in any event, serious difficulties in understanding on what basis the state could lay claim on Pylkop.

[57] The reasons given by the LCC why Pylkop should not be returned are nevertheless significant. They include the fact that the return of the family to Haakdoornbult would cause major social disruption; the family cannot be accommodated on Haakdoornbult; the value of the improvements on Pylkop would be lost to the family; it is unlikely that the community will be able to farm Haakdoornbult to its true agricultural potential; and there are no schools on Haakdoornbult. (The other reasons given bear no relationship to the question posed.)

[58] Having reached that conclusion, the LCC omitted (as mentioned) to consider the question of the extent of restoration of the lost land and whether restoration of the whole would not amount to 'double' compensation. Neither counsel for the claimants nor for the Minister argued that the Act permits a court to over-compensate through the

exercise of a discretion and they were not able to identify any factor which justifies over-compensation.

[59] In fairness to the LCC, it mentioned three factors that increased the loss of the family over and above the value of the land. The first is that 'some' livestock was lost on the 17 km trek from the one farm to the other (all the small stock was transported by truck). The second is that they were engaged in legal proceedings against the Bothas to set the sale aside and that they were not compensated for their costs. And the third is a repeat of the point mentioned and disposed of earlier, namely that the Bothas had not paid for the use of the irrigation land. I shall only deal with the second point: there is no evidence that the family had paid any legal costs and, in addition, the Bothas had to pay their own costs in relation to abortive proceedings against them.

[60] Taking into account all the factors mentioned when dealing with the s 2(2) issue and especially the trauma around the dispossession of community land and the relocation of the family (eloquently set out by the LCC) it cannot be doubted that the return of the whole of the farm would amount to a substantial over-compensation. I do not wish to be understood as saying that there should be a mathematical calculation in rands and cents[26] or that a measure of over-compensation is necessarily excluded by the Act. On the contrary, I believe that a generous approach should be adopted and that a detailed calculation should be discouraged because it makes the restitution process expensive and is counter-productive, and it heightens emotions and leads to costly litigation which both claimants and the present-day owners can ill afford. Apart from

[26] *Abrams v Allie NO* 2004 (4) SA 534 (SCA), [2004] 2 All SA 99 (SCA).

being inappropriate it also is impossible to quantify in money terms many of the factors that have to be considered.

[61] It is for the state to use its powers under other Acts to acquire the whole of the land if it is in the public interest to restore more than what a claimant is entitled to under this Act. But redistribution cannot be done under the provisions of this Act and, in particular, courts do not have the power to redistribute land. In other words, that the claimant had received money or compensatory land in respect of the dispossession is a material factor to be taken into account in determining the extent of restitution under this Act and neither a court nor the state is entitled to ignore that fact.

[62] The allocation of the Engelbrecht's land to the family is at this stage a fait accompli and is not subject to appeal because the appellants have no standing on behalf of the Engelbrechts. This leads then to the next stage of the inquiry of whether the Engelbrecht's land amounts sufficient compensation and, if not, whether the other subdivisions should be restored.

[63] The part of the farm belonging to the Engelbrechts (marked no 7 on the attached sketch), which is held by separate title, is important in the history of the family. As said, it is the northern part of the farm abutting the river; it is the land that had been irrigated by some family members; and is the only part of the original farm that has any water allocation from the river. This is also the part of the farm which the Bothas occupied immediately after the purchase. And it is the part of the farm that is not replicated on Pylkop. According to the evidence, the family intends to settle twelve persons on the farm in order to develop and use its irrigation

potential for the benefit of the whole community. There is no other evidence concerning the family's intentions with the balance of the farm. In particular, there is no evidence to show that the land use may be changed from agricultural to, say, township.

[64] It might be useful to draw at this stage some generalised comparisons between Pylkop and Haakdoornbult. First to consider is the extent of irrigation activities conducted by the family at Haakdoornbult on the Engelbrecht portion. There was 41 ha irrigable land which was used by eleven families. This means that those households had less than 4 ha each available. Only six of these fields were flood irrigated, the rest were used for dry land cultivation. In other words, slightly more than half of the available irrigable land had been used for irrigation. (Some hand watering of a vegetable patch took place on the RE.)

[65] There was some 86 ha dry land cultivated in patches by the some 36 households on Haakdoornbult whereas there was some 200 ha of dry land available on Pylkop on soils of a better quality. That left some 510 ha grazing on Haakdoornbult against some 1 740 ha of grazing on Pylkop, bearing in mind that not all grazing on Pylkop was of the same quality as that on Haakdoornbult. At Haakdoornbult the eleven households that had irrigation land kept some cattle but the farm was over-grazed and eroded. Even at the date of dispossession the farm could not sustain the extended family. Some worked elsewhere and others had no visible income, at least not on the available evidence.

[66] Significantly, the nature of rights of the family (and of the estate) that were dispossessed was of the same as those on Pylkop: full title with

the registered servitude in favour of the family.[27] Although the mineral rights on Pylkop vested in the state while on Haakdoornbult they belonged to the land owner, there is no evidence that they had any value over and above the purchase price. I should nevertheless point out that at the time of removal in 1962, the relative values of the farms had, according to Griffiths' doubtful method of valuation, changed and the relative value of Pylkop was two-thirds of that of Haakdoornbult.

[67] Taking all these factors into account it appears to me fair to hold that by receiving the Engelbrecht property the family will not be over-compensated. It is not possible to make a more positive finding in this regard because of the lack of evidence about the value of the original farm and its component parts. There are two distinct possibilities. The one is that the return of the other parts of the farm will over-compensate and the other is it will under-compensate. The problem of over-compensation can be solved within the provisions of the Act because the Act contemplates that more than what was lost can be returned provided the claimant makes good the shortfall (s 35(2)(b)). The problem of under-compensation may also be solved under the Act which provides that the state may be ordered to pay the claimant compensation (s 35(1)(c)).

[68] Against that background I turn to consider what other portions of the farm ought to be restored to the family in the light of the remaining factors listed in s 33, the most pertinent being the question of feasibility, the point of departure being to return such a relatively small piece of land to such a large community would be counter-productive. (The other factors have been taken into account earlier.)

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[27] In this respect this case differs from *Baphiring Community v Uys* 15 September 2003 Case Number LCC 64/98.

[69] That brings me to the Furstenburg Trust property (no 6 on the sketch), which is across the road from the Engelbrecht land. As mentioned, it is a relatively small cattle and game farm bought by the Trust shortly before these proceedings began. It does not appear to have any material productive value unless farmed in conjunction with the adjoining piece of land. The old family graves are on this portion but the family has free access to them and they have been well maintained. No compelling reasons were furnished why this piece of land could not be restored. The only ground raised was the adequacy of the compensation in the light of the grant of the Engelbrecht property and the fact that the adjoining piece would become uneconomical. The latter can be set right by proper compensation to the Trust.

[70] Similar considerations apply to the Bezuidenhout Trust's farm (marked no 3). It has been consolidated with an adjoining piece and is used as a game farm. On its own it probably has relatively little income producing value and it could hardly have much emotional value for the Bezuidenhout family. The Trust has built facilities on the adjoining property and improved it knowing of the existence of the claim, something not prohibited by the Act because the family's claim had not been gazetted. It is a relatively narrow piece of land with an awkward shape but together with the Engelbrecht and the Furstenburg Trust farms it forms a convenient block of land. Also in this instance no compelling reasons have been furnished as to why this piece cannot be restored to the family. Any losses will have to be made up by means of compensation payment.

[71] Thus far I have concluded that the family is entitled to be restored to all but 91 ha out of 637,4 ha, ie, about 86 per cent of the whole. That leaves for consideration the restoration of the CC's portion (the 'RE' mentioned earlier and an abbreviation for the last Remaining Extent, and so marked on the sketch). This portion never existed as a topo-cadastral entity. It has the appearance of an appendix, a finger protruding from of the rest of Haakdoornbult. It can also be described as an isthmus surrounded by other property belonging to the CC. This other farm is Portion 1 of Haakdoornbult (a property that is not the subject of a land claim) and the strange appendix form was the result of a subdivision dating back to 1921. Having been consolidated with Portion 1, the RE now forms an integral part of Portion 1.

[72] If the RE were to be returned to the family it would mean that part of Portion 1 would be surrounded on three sides by the family's land and because its fourth side borders on the river it would mean that this part of the CC's land would become isolated. Apart from this, as mentioned before, the irrigation system used by the CC, using a water allocation belonging to another farm (because the RE has no water allocation), irrigates part of the RE. If the RE were to be restored, the land will become dry land and bearing in mind that dry land farming is no longer viable in that part of the country it means that it will probably become grazing for some 13 head of cattle since the carrying capacity of the farm is about 7 ha per large animal unit. (The water allocation belonging to the Engelbrecht land is much less than the irrigable land on that portion and it makes no sense to use that water on this piece.) Part of a huge investment in the irrigation system will become valueless because part of the system's capacity will be sterilised. By its very nature, that part of the system cannot be used elsewhere. The state will have to compensate the

CC for this loss and no one, especially not the family, will derive any tangible benefit from this payment. In addition, the family has not produced any evidence as to any productive use to which it intends to put to this part of the land. The family also has no special emotional ties to the RE. In fact, before the dispossession, the house on this part of the land had been leased to a Mr Furstenburg.

The result

[73] In my judgement, therefore, it would be counter-productive to order the return of the RE taking into account especially the question of feasibility (s 33(cA)) and the current use of the land (s 33 (eB)).

[74] Having found that the family's right to the restoration of the Engelbrecht's farm cannot be impeached and that the family is entitled to the return of the two farms belonging to the Furstenburg and Bezuidenhout trusts subject to a possible contribution, the issue that remains to be resolved is whether there should indeed be a contribution and, if so, its terms. As mentioned, there is nothing in the mass of evidence before us that places any values on the different portions or even on the whole of the dispossessed farm. Other evidence that could have been material is not only the market value but also the value of the property in the hands of the family, especially having regard to the intended use. Then one may have to know more or less what the state will have to pay to the affected owners (including the amount to make good any actual financial loss caused by the expropriation, e g, new fencing and the fact that the remainder of the property may have become over-capitalised)[28] and the extent to which such payment will benefit the community. It may also be relevant, as suggested by the claimants, to

[28] Expropriation Act 63 of 1975 s 12(1)(a)(ii).

determine whether part payment can be made by putting part of Pylkop in the pot. It might even be that the family is of the view that these portions are of no value to them and that they would rather forego the properties than have to pay anything for them. In the absence of evidence this Court cannot exercise any discretion in this regard and the matter has to be referred back to the LCC to make the necessary determination. It is not foreseen that the affected owners need to take part in this leg of the proceedings. If the presiding judge is not reasonably available another judge of the LCC may deal with the matter.

Costs

[75] The LCC ordered the participating owners to pay the costs of the proceedings. For this the LCC relied on what it perceived to be a new principle laid down by the Constitutional Court in *Richterveld*[29] and it decided to disregard its own practice of not ordering costs in land claim cases in the absence of special circumstances. The Constitutional Court did in my view not purport to lay down any rule and any such rule would in any event have been contrary to its general approach to costs in constitutional matters. The claimants agree that this exercise of its discretion by the LCC was flawed and that the order cannot be justified, and has to be set aside.

[76] That leaves the costs on appeal. This Court has not yet laid down any fixed rule and there are judgments that have ordered costs to follow the result and others that have made no orders.[30] I believe that the time has come to be consistent and to hold that in cases such as this there should not be any costs orders on appeal absent special circumstances.

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[29] *Alexkor Ltd v Richtersveld Community* 2004 (5) SA 460 (CC), 2003 (12) BCLR 1301 (CC).
[30] *Prinsloo v Ndebele-Ndzundza Community* 2005 (6) SA 144 (SCA), [2005] 3 All SA 528 (SCA).

The order

[77] In the light of the aforegoing the following order is made:

1. The appeal is upheld.

2. The cross-appeal is struck from the roll.

3. The order of the court below is set aside and the following order substituted in its stead:

'The Minister of Land Affairs and Agriculture is ordered to acquire and restore to a communal association to be formed by the claimants the following properties (including all mineral rights that are transferable but subject to existing servitudes and free of mortgage bonds):

(a) Portion 7 of the farm Haakdoornbult 542, measuring 101,1038 ha;

(b) The former portion 3 of Haakdoornbult 542, measuring 172,5105 ha and now forming part of the farm Drie Jongelings Geluk 562; and

(c) Portion 6 (a portion of portion 2) of Haakdoornbult 542, measuring 271,6941 ha.'

4. The matter is remitted to the Lands Claim Court to consider and determine

(a) whether, to what extent and in what form and on what conditions the communal association is to contribute to the acquisition by the State of the properties mentioned in paragraph 3(b) and (c) above;

(b) the conditions on which the communal association to be formed shall hold the land on behalf of the community; and

(c) whether any rights of way or other servitudes should be granted over the restored properties.

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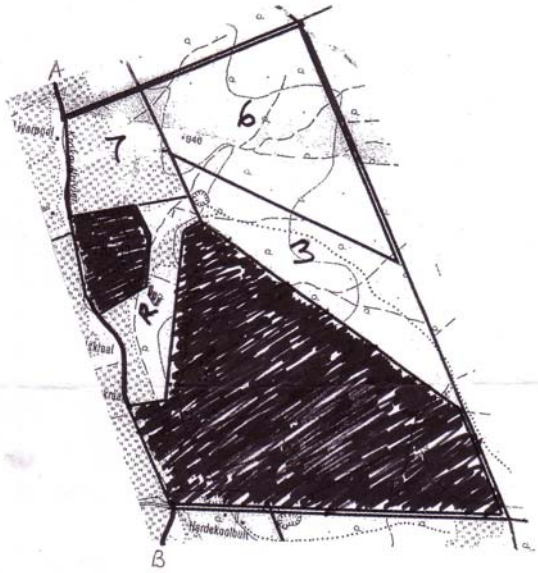
L T C HARMS
ACTING DEPUTY PRESIDENT

AGREE:

CAMERON JA
MLAMBO JA
SNYDERS AJA
MUSI AJA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