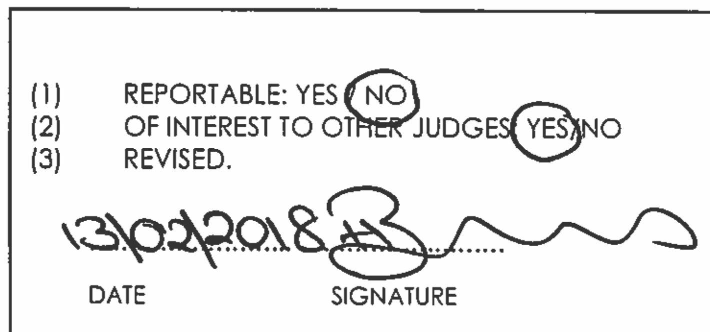
IN THE LAND CLAIMS COURT OF SOUTH AFRICA

HELD AT RANDBURG

Case No: LCC 20/2016



(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

13/02/2018

DATE SIGNATURE

Heard: 23 June 2017
Order: 14 December 2017
Reasons: 13 February 2018

In the matter between:

KROMKRANS COMMUNITY	First Applicant
THEMBA SHABANGU	Second Applicant
EZEKIEL LINDA MLOTSHWA	Third Applicant
PRUDENCE NGWENYA	Fourth Applicant
GIDEON MAHLANGU	Fifth Applicant
MPHIKWA PATRICK ZULU	Sixth Applicant
NANA MLANGENI	Seventh Applicant

PHYLLIS ZODWA MSIBI	Eighth Applicant
SONTO MABIZELA	Ninth Applicant
MSESI JEANETTE MHLANGA	Tenth Applicant
LUCKY SELBY GWEBU	Eleventh Applicant
MAKETSI ABEL MOKOENA	Twelfth Applicant
SABELO MABUZA	Thirteenth Applicant
QUEEN DUDUZILE NKOSI	Fourteenth Applicant
STANLEY HLATSHWAYO	Fifteenth Applicant
SAM PARKS	Sixteenth Applicant
MIRRIAM NKOSI	Seventeenth Applicant
BALUNGILE NGWENYA	Eighteenth Applicant

and

GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
MINISTER OF RURAL DEVELOPMENT AND LAND REFORM	Second Respondent
REGISTRAR OF DEEDS, MPUMALANGA	Third Respondent
DIRECTOR-GENERAL: DEPARTMENT OF RURAL DEVELOPMENT AND LAND REFORM	Fourth Respondent
COMMUNAL PROPERTY ASSOCIATION, REGISTRATION OFFICER	Fifth Respondent

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REASONS

BARNES AJ

1. On 14 December 2017, I handed down the following Order:

1.1 *The first and second respondents' counter-application is dismissed.*

1.2 *The second respondent is ordered to comply with its obligations in terms of the agreement concluded between the applicants and the second respondent in terms of section 42D of the Restitution of Land Rights Act 22 of 1994, on 25 May 2004 ("the agreement").*

1.3 *The second, fourth and fifth respondents are ordered forthwith to take all steps necessary to ensure that the first applicant is registered as a Communal Property Association in accordance with the provisions of the Communal Property Associations Act 28 of 1996 ("the Kromkrans Community Communal Property Association").*

1.4 *The Constitution of the Kromkrans Community Communal Property Association shall make provision for the inclusion of the persons contemplated in clause 4.7 of the agreement.*

1.5 *The first, second and third respondents are ordered to effect transfer and register the transfer of the properties referred to in the agreement in the name of the Kromkrans Community Communal Property*

Association, namely:

1.5.1 *Portion 4 of the Farm Kromkrans 208, IS, in extent 233 5235 ha;*

1.5.2 *Portion 44 of the Farm Kromkrans 208, IS, in extent 88 0116 ha;*

1.5.3 *Portion 45 of the Farm Kromkrans 208, IS, in extent 88 0587 ha;*

1.5.4 *Portion 46 of the Farm Kromkrans 208, IS, in extent 257 1024 ha;*

1.5.5 *Portion 57 of the Farm Kromkrans 208, IS, in extent 165 1831 ha;*

1.5.6 *Portion 59 of the Farm Kromkrans 208, IS, in extent 110 0734 ha;*

1.5.7 *Portion 61 of the Farm Kromkrans 208, IS, in extent 468 241 ha; and*

1.5.8 Portion 18 of the Farm Vaalwater 173, IS, in extent 45 3969.

1.6 *The first and second respondents are ordered to pay the costs of the application and the counter-application jointly and severally, the one paying the other to be absolved, such costs to include the costs of two counsel."*

2. These are my reasons.

Introduction

3. This application concerns 23 land claims lodged in terms of the Restitution of Land Rights Act 22 of 1994 ("the Act") in respect of Portion 61 of the Farm Kromkrans 208 IS, in the District of Carolina in Mpumalanga Province. The claims were lodged prior to the deadline of 31 December 1998[1] and gazetted in terms of section 11(1) of the Act on 11 February 2000. In this judgment they will be referred as 'the claims" and the persons who lodged them as "the Kromkrans claimants."

4. The first applicant is the Kromkrans Community. It has adopted a Constitution and is an Association. The second to eighteenth applicants are either the individuals who lodged or the direct descendants of the individuals who lodged

[1] In terms of section 2(1)(e) of the Act prior to amendment.

19 of the 23 claims.[2] The second to eighteenth applicants are also members of the first applicant.

5. In 2003, the Department of Rural Development and Land Reform ("the Department"), stated in its Annual Report that it had settled the claims and that pursuant thereto, the Kromkrans claimants had received 2146 hectares of land. The relevant excerpt from the Department's 2003 Annual Report states as follows:

> "Kromkrans 208 IS
>
> In 1978 Kromkrans in the Carolina District was expropriated in terms of various notices by the former Department of Co-operation and Development and the now defunct Department of Bantu Affairs. After expropriation, the land was transferred to the state.
>
> The community consisted of various individuals who held title and entered into an agreement of sale on the farm Kromkrans 208 IS, in the Ermelo Magisterial District, around 1917.
>
> Some 400 households who were affected by the dispossession have received 2146 hectares of land. The restored land will be used for agricultural purposes such as grazing, livestock farming and crop production. A housing project will also be established. The settlement celebration was held in August 2002. The value of the claim was R1.5 million." (Emphasis added)

6. The Department's Annual Report misstated the position. Despite the fact that the Department purchased land, in 2003 and 2005, purportedly in settlement

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[2] The applicants filed a table in which they set out the link between each of the second to eighteenth applicants and the claimants listed in the Government Gazette Notice of 11 February 2000 (GG No 20885).

of the claims, no land has been restored to the Kromkrans claimants to date.

7. The applicants bring an application for specific performance in which they seek orders compelling the respondents to comply with their obligations under what they contend to be the agreement concluded in settlement of their claims. The application is opposed by the first and second respondents, the State and the Minister of Rural Development and Land Reform ("the Minister"). The first and second respondents also bring a counter-application in which they seek to review and set aside the Minister's decisions to approve the settlement agreements in respect of the claims.

8. The relevant facts are undisputed. They are set out below.

The Relevant Facts

9. During 2000, the Commission on the Restitution of Land Rights for Mpumalanga ("the Commission") met with the Kromkrans claimants and informed them that it did not have the resources to attend to each claim individually and that for this reason the claims would be processed as a community claim.

10. The Kromkrans claimants were assured by the Commission that they would not be prejudiced as a result of this and that their rights would be protected.

11. The Kromkrans claimants indicated that they were amenable to their claims being processed as a community claim as they had always regarded themselves as a community. They pointed out in this regard that all the individuals who lived on Portion 61 of the Farm Kromkrans had, prior to their forced removal, used one post box, namely, P O Box 61, Breyten. They also stated that there was a school on Portion 61 of the Farm Kromkrans which had been known as the Kromkrans Community School.

12. In terms of section 42D of the Act, the Minister may, if satisfied that a claimant is entitled to restitution of a right in land in terms of section 2 of the Act, award land to such claimant in settlement of his or her claim.

13. On 3 June 2002, the Commission submitted a formal request in terms of section 42D of the Act for Ministerial approval of a settlement agreement between the State and the "Kromkrans Interim Communal Property Association" ("the 2002 42D Request").

14. The 2002 42D Request stated that the Kromkrans Interim Communal Property Association was established by the Kromkrans Community which had adopted a Constitution and which was comprised of individuals who had lodged claims arising from their dispossession of rights in Portion 61 of the Farm Kromkrans, in other words "the Kromkrans claimants."

15. The 2002 42D Request recorded that the Commission's investigations into the

claims had established that the Kromkrans claimants had been dispossessed of rights in land after 13 June 1913 as a result of racially discriminatory laws (and that they therefore met the requirements of section 2 of the Act). The 2002 42D Request stated as follows in this regard:

> "The Kromkrans Community consists of various individuals who held title, and entered into an agreement of sale in about 1917, on the farm Kromkrans 208 IS in the Ermelo Magisterial district. The Land was first acquired by black individual Land owners from white friends who fought together in the Anglo-Boer War. They are currently represented by the Kromkrans interim CPA.
>
> The Kromkrans Community was dispossessed in terms of section 13(2) of the Development Trust Land Act no 18 of 1936, read together with the 1913 Land AND (sic) Expropriation Act of 1975. The land was regarded as a so-called Black-spot from which black people were to be moved since the land did not fall under the so-called Scheduled Areas in terms of the Native Land Act 1913."

16. In 2002, Portion 61 of the Farm Kromkrans was owned by Boeta Boeta Trust which was unwilling to sell. However, one L J Potgieter who owned certain portions of the Farm Kromkrans and a portion of the Farm Vaalwater 173, IS, was willing to sell.

17. The 2002 42D Request recommended that Potgieter's aforesaid farms[3] be purchased at a cost of one million five hundred thousand Rand (R1 500 000.00) and awarded to the Kromkrans Interim Communal Property

[3] Namely, the following portions of the Farm Kromkrans 208 IS: Portion 4, in extent 233 5235 ha, Portion 34 in extent 233 5192, Portion 44 in extent 88 0116 ha, Portion 45 in extent 88 0587 ha, Portion 46 in extent 257 1024 ha, Portion 57 in extent 165 1831 ha, Portion 59 in extent 110 0734 ha; Portion 18 of the farm Vaalwater 173 IS in extent 45 3969 ha and the Remaining Extent in extent 1027 8434 ha.

Association.

18. The 2002 42 Request recorded that the Kromkrans Community had on 11 April 2002 adopted a Constitution and that the State would take the necessary steps to register it as a Communal Property Association in terms of the Communal Property Associations Act 28 of 1996:

> "The Kromkrans Community has on 11 April 2002 adopted the Constitution and the state will take the necessary steps to register the CPA in terms of legal entity in terms of section 8(3) of the Communal Property Associations Act, 1996, as amended in order to settle the claim and take transfer of the farm."

19. The 2002 42D Request recommended that the Minister: *"approve the settlement between the state and the purchaser, L J Potgieter"; "approve the settlement agreement between the state and the Kromkrans Interim Communal Property Association"* and *"approve the financial implications"* set out in the Request, being the purchase price of the Potgieter owned farms at R1.5 million.

20. During June and July 2002, the above recommendations were approved in writing by the Regional Land Claims Commissioner, the Chief Land Claims Commissioner, the Chief Financial Officer of the Department and the Director General of the Department.

21. Thereafter, on 15 July 2002, the Minister approved the above

recommendations in writing.

22. Pursuant to the above, the State purchased at least 6 of the portions of the Farm Kromkrans owner by Potgieter as well as the portion of the Farm Vaalwater.[4] Registration of these farms in the name of the Department took place on 9 April 2003.[5]

23. Some time after this, the Boeta Boeta Trust became willing to sell Portion 61 of the Farm Kromkrans.

24. On 30 March 2004, the Commission submitted a further Request in terms of section 42D of the Act for Ministerial approval for a further settlement agreement between the State and the Kromkrans Interim Communal Property Association ('the 2004 42D request").

25. The 2004 42D Request recommended that Portion 61 of the Farm Kromkrans be purchased by the State, at a cost of Five Hundred and Twenty Thousand Rands (R520 000.00), and awarded to the Kromkrans Interim Communal

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[4] It is not clear from the papers whether the remaining two portions of the Farm Kromkrans, namely Portion 34 in extent 233 5192 ha and the Remaining Extent, in extent 1027 8434 ha, were purchased by the State. It would appear not as they are not referred to in the 2004 42D Request. In any event these portions are not sought by the applicants in their notice of motion.

[5] Portion 4 was registered in the name of the Department on 9 April 2003 under title deed T41058/2003; Portion 44 on 9 April 2003 under title deed T41057/2003, Portion 45 on 9 April 2003 under title deed T41057/2003, Portion 46 on 9 April 2003 under title deed T41057/2003, Portion 57 on 9 April 2003 under title deed T41058/2003, Portion 59 on 9 April 2003 under title deed T41058/2003 and Portion 18 (of Vaalwater) on 9 April 2003 under title deed T41057/2003.

Property Association.

26. The 2004 42D Request recorded that the award of Portion 61 would be in addition to the award of the Potgieter owned farms which had been settled previously.

27. The 2004 42D Request recorded the following agreements between the State and the claimants:

"4.3 **Agreements**

4.3.1 The **STATE** agrees to restore, with all improvements, portion 61 of the farm Kromkrans 208 IS situated in the Ermelo Magisterial district Mpumalanga Province in extent 468, 241 ha.

Hereinafter, the **PROPERTY,** in full and final settlement of all claims that the **CLAIMANTS** lodged on the farm, **in addition the properties already awarded to the Claimants**, subject to clauses 4.4 and 4.5 hereunder.

4.3.2 The **STATE** shall take all necessary steps to obtain and transfer the **PROPERTY** to the **CLAIMANT** in accordance with the Deeds of Sale to be entered into with the present owners of the **PROPERTY**, or expropriation in terms of sections 35(5)(b) and 35(5A) of the Restitution of Land Rights Act, 1994, as amended.

4.3.3 The parties record that the **PROPERTY** will only be transferred in the name of the **CLAIMANT** after the **STATE** is able to obtain the **PROPERTY** from the current owners.

4.3.4 The **PARTIES** further record that the **CLAIMANT** will take occupation of the **PROPERTY** only after completion of a detailed plan for the use and development of the **PROPERTY** and approval of the plan

by the **STATE** or its delegated agent.

4.3.5 The claimants have agreed in their constitution to hold the land communally and the state is willing for the settlement purpose to assist with the Businessplan development and implementation of the plan. Towards that end TORs have been advertised nationally and the process of appointing a service provider is at an advanced stage."

4.3.6 ACCEPTANCE OF AN OFFER

The **CLAIMANT** hereby accepts the offer in clause 4.3 above, subject to the conditions therein contained." (Emphasis in original)"

28. The 2004 42D Request described the properties to be awarded to the Kromkrans Interim Communal Property Association as follows:

"2.2 Property Description

The property concerned is Portion 61 of the farm Kromkrans 208 IS situated the Ermelo Magisterial District Mpumalanga Province in extent 468 241 ha held by Boeta Boeta Trust in terms of title deed T85967/1989.

2.3 The above property is restored in addition to Portion 4, in extent 233, 5535 ha, Portion 57, in extent 165 1831 ha, Portion 59 in extent 110 0734 ha, Portion 46 in extent 257 1024 ha, Portion 44 in extent 88 0116 ha, Portion 45 in extent 88 0587 ha, Portion 18 of the farm Vaalwater 173 Registration Division IS Mpumalanga in extent 45 3969 ha, which was settled previously."

29. The 2004 42D Request recorded that the Kromkrans Communal Property Association had not yet been registered and that the State would take all the

necessary steps in this regard:

> "The Kromkrans Community has on 11 April 2002 adopted the Constitution and the state will take the necessary steps to register the CPA in terms of legal entity (sic) in terms of section 8(3) of the Communal Property Associations Act, 1996, as amended, in order to settle this claim and take transfer of the farm. The technical matters that prevented the CPA from being registered is now being attended to by the Regional Land Claims Commission."

30. The 2004 42D Request provided further in clause 4.7 as follows:

> "The **CLAIMANT** shall make provision in the constitution of its legal entity for the inclusion therein of any person who proves to be an heir; and/or direct descendant of a claimant; or a member of the original dispossessed person or community; or a person generally accepted as a member of the Kromkrans Community; and undertakes to uphold such provisions in the constitution of the legal entity."

31. The 2004 42D Request recommended that the Minister: *"approve the settlement between the state being the Purchaser and Boeta Boeta Trust, the Seller"*; *"approve the settlement agreement between the state and the Kromkrans Interim Communal Property Association"* and *"approve the financial implications"* set out in the Request being the purchase price of Portion 61 of the Farm Kromkrans at R520 000.00.

32. During March and April 2004, the above recommendations were approved in writing by the Regional Land Claims Commissioner, the Chief Land Claims Commissioner, the Chief Financial Officer of the Department and the Director General of the Department

33. Thereafter, on 25 May 2004, the Minister approved the above recommendations in writing.

34. Pursuant to the above, the State purchased Portion 61 of the Farm Kromkrans. Registration of Portion 61 in the name of the Department took place on 7 June 2005.[6]

<u>The Applicants' Case</u>

35. The applicants plead that having regard to the above, on 25 May 2004, they concluded a written agreement with the second respondent as contemplated in section 42D of the Act ("the Agreement").

36. The applicants plead that the material terms of the Agreement are the following:

36.1 The State would do all things necessary to register the first applicant as the Kromkrans Communal Property Association.

36.2 The State would transfer to the Kromkrans Communal Property Association the property as defined in clause 2.2 of the 2004 42D

[6] Under Title Deed T75055/2005.

Request ("the Property").

36.3 The Property would only be transferred to the Kromkrans Communal Property Association after the State had acquired the Property.

36.4 The applicants would only take occupation of the Property after the State had approved a plan for the use and development of the property ("the Plan").

37. The applicants plead that in compliance with the Agreement:

37.1 The State approved the Plan. As proof of this, the applicants attach to their founding affidavit a document entitled *"A Concept Development Plan (Business Plan) for the Kromkrans Community on Kromkrans Farm No 208 IS"* dated May 2004; and

37.2 The State acquired the Property.

38. The applicants plead that notwithstanding repeated requests and demands from 8 August 2002 until the launch of their application in February 2016 (a period of 14 years), the respondents have failed to:

38.1 Register the Kromkrans Communal Property Association; or

38.2 Transfer the Property to the Kromkrans Communal Property Association.

39. The applicants accordingly seek orders compelling the respondents to do so.

40. Before considering the respondents' opposition to the application and whether, in the light thereof, the applicants are entitled to the relief they seek, it is necessary to consider the respondents' counter-application

The Respondents' Counter-Application

41. The first and second respondents launched their counter-application on 24 March 2017. In it, they seek orders in the following terms:

> "1. Reviewing and setting aside the [Minister's] decision (dated 15 July 2002) to approve the settlement agreement between the [State] and the Kromkrans Interim Communal Property Association in terms of section 42D of the Restitution of Land Rights Act 22 of 1994"; and
>
> 2. Reviewing and setting aside the [Minister's] decision (dated 25 May 2004) to approve the settlement agreement between the [State] and the Kromkrans Interim Communal Property Association in terms of section 42D of the Restitution Act."

42. It is apparent from the above, and Prayer 2 in particular, that the

respondents effectively concede the Agreement contended for by the applicants.[7] I will return to the implications of this below.

43. At this stage however, what is immediately strikingly apparent is the inordinate length of time that has passed between the decisions of the Minister that are sought to be impugned and the launch of the review application.

44. In the case of the Minister's approval of the settlement agreement in the 2002 42D Request, the delay is 14 years and 8 months. In the case of the Minister's approval of the settlement agreement in the 2004 42D Request, it is 12 years and 10 months.

45. There is a dispute between the parties as to whether or not the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") applies, with the respondents contending that the Minister's decisions constitute administrative action and the applicants contending that they do not. If PAJA does apply then the respondents' review application was required to have been brought within 180 days of the Minister's decisions having been taken.[8]

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[7] The position may have been different if the respondents had brought their counter application on a conditional basis. They did not.
[8] Section 7(1) of PAJA.

46. Even if PAJA does not apply, the principle of legality may have served as a sufficient basis for the review application. I am prepared to assume in the respondents' favour that this would have been the case. In that event, while PAJA's 180 day time limit would not have been applicable, the delay rule at common law would still apply.

47. It is well established at common law that review to set aside or correct is a discretionary remedy that may be refused if the applicant delays too long in bringing the application. The judicial discretion helps to ensure that finality is achieved.[9] Finality is important not only because delay may cause prejudice to the respondent but also because of the public interest in certainty.[10]

48. All applications for review must be brought within a reasonable time. This includes legality reviews.[11] What is reasonable depends on the circumstances.[12] Where the delay is found to be unreasonable, the court may nevertheless decide to condone it if the applicant can give a satisfactory explanation for it. The court will also take into account other

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[9] See *Yuen v Minister of Home Affairs* 1998 (1) SA 958 (C) at 968 J – 969A.
[10] *Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A) at 41E-F.
[11] *Khumalo v MEC for Education: Kwa-Zulu Natal* 2014 (5) SA 579 (CC). See also *City of Cape Town v Aurecon South Africa (Pty) Ltd* 2017 (4) SA 223 (CC).
[12] Hefer JA in *Setsokosane Busdiens (Edms) Bpk v Voorsitter, Nasionale Vervoerkommissie* 1986 (2) SA 54 (A) at 86D-E. See also *City of Cape Town v Aurecon South Africa (Pty) Ltd* 2017 (4) SA 223 (CC).

relevant factors, including prejudice caused to the other party.[13]

49. Counsel for the respondents, Mr Majozi, emphasised that the review application is brought as a collateral challenge. I accept this. However, what is of great significance here is that the respondents are seeking to review not the decisions of a third party but their own decisions.

50. In these circumstances, I am of the view that the delay in this case is *prima facie* unreasonable and that a satisfactory explanation is required.

51. The respondents' explanation for their delay in bringing their review application is set out in their founding affidavit in support of their counter-application as follows:

> "As explained hereinabove, the decision to restore the abovementioned portions to 'the Kromkrans Community' could not be implemented for the reasons stated. For a prolonged period it was anticipated that the claimants would acquiesce to the review of the section 42D memoranda, which would then ensure that there is a proper verification of the Claimants. This would also ensure that publication of the remaining claims takes place.
>
> In this case that it (sic) did not happen, but the claimant's intentions became clear when the applicants instituted this application. The applicants filed an opposing affidavit on 6 July 2016, wherein they indicate (sic) that the relief sought is founded on the impugned 42D memoranda which is inconsistent with the Act and susceptible to a review application, and that such application would be lodged

[13] See *Huen v Minister of Home Affairs* (n 9 above).

sometime in July 2016.

Due to the fact that the [respondents] seldom bring collateral review applications, an opinion was sought from senior and junior counsel on whether or not the [respondents] were bound to bring a review of decisions to review (sic) award of land to claimants in terms of section 42D once those decisions have been published. The memorandum was only received by the [respondents] office on 1 November 2016.

From 1 November 2016 discussions ensued between the respondents' legal representatives and the applicant's legal representatives whereafter it was arranged that the matter be set down for argument. Parallel thereto, information pertaining to the claimants' registered rights was sought from *inter alia* the Deeds Office in Mpumalanga. Unfortunately, this information was delayed and it is, at date hereof still not complete.

....

The title deeds annexed hereto could only be furnished to the [respondents'] legal representatives on 17 March 2017."

52. The respondents do not say when they sought the opinion from counsel but it appears that it was after the main application was filed in 2016. It also appears that the title deeds were sought in 2016.

53. What then is the explanation for the delay between 2002 and 2004 and 2016? The nub of it appears to be the contention that *"the decision to restore the [land] to the Kromkrans Community could not be implemented for the reasons stated."* It is not entirely clear from the review application what these reasons are.

54. The respondents contend (in their review application but not in opposition to the main application) that *"approximately 15 other claimants who have a direct and substantial interest in the Kromkrans claims are still waiting in the wings with potential overlapping and/or competing claims."* It is not clear who these alleged claimants are. Earlier in the same affidavit the respondents accept that of the claims lodged with the Commission prior to the deadline of 31 December 1998, only 23 (those gazetted on 11 February 2000) were found by the Commission to be valid. If the respondents intend to refer to claimants who purported to lodge claims after 31 December 1998, they provide no details about them. Furthermore, and in any event, as the applicants point out, these undisclosed claimants have not been joined by the respondents despite that fact that they would (on the respondents' version) have a direct and substantial interest in the subject matter and outcome of the review application.

55. The respondents also contend that the claims were erroneously settled as a community claim and that the decision to award the Potgieter owned lands to Kromkrans claimants was erroneous. These are also raised as grounds of opposition in the main application. For the reasons set out below, they are without merit.

56. But whatever the merits of the respondents' contentions in this regard, they themselves do not explain the delay. One would have expected the

respondents, at the very least, to have disclosed when they first suspected that the Minister's decisions were susceptible to review, what steps were taken in relation thereto and when such steps were taken. The respondents provide none of this information.

57. The respondents state that *"for a prolonged period it was anticipated that the claimants would acquiesce to the review of the section 42D memoranda."* This suggests that the respondents were of the view that the Minister's decisions were susceptible to review *"for a prolonged period."* No further detail is however provided.

58. The respondents attempt to shift responsibility onto the applicants by stating that for this *"prolonged period"* it was *"anticipated that the applicants would acquiesce in the review."* Even if this were correct, it is difficult to see how this could assist the respondents. But in any event, this averment is wholly unsupported by the evidence. There is no evidence whatsoever on the papers or in the record to suggest that the respondents: advised the applicants that they considered the Agreement to be incapable of implementation; advised the applicants that they considered the Minister's decisions to approve the settlement agreements to be reviewable or indicated to the applicants that they intended to bring a review application, prior to 2016.

59. Having regard to the above, there is no real explanation for the respondents' delay in seeking to review the Minister's decisions, let alone a satisfactory one. In these circumstances the unreasonable delay cannot be condoned and the review application falls to be dismissed for this reason.

<u>The Respondents' Opposition to the Main Application</u>

60. In their answering affidavit in opposition to the main application, the respondents deny the existence of the Agreement contended for by the applicants. They do so on the basis that *"since the award was not implemented, no agreement was entered into."*

61. The respondents' denial is surprising given that the undisputed facts set out above, in particular the terms of the 2004 42D Request and the approval and endorsement thereof by the Regional Claims Commissioner, the Chief Land Commissioner, the Chief Financial Officer of the Department, the Director General of the Department and finally the Minister himself on 25 May 2004. None of this is disputed by the respondents. In the light thereof, the respondents' denial of the Agreement simply cannot be sustained.

62. It is also not correct that the "award" was not implemented as the

respondents contend. On the contrary, it is undisputed that the state has purchased all the land identified in the 2004 42D Request.[14]

63. Finally, and in any event, as stated above, the respondents' Prayer 2 in their notice of motion in support of their counter application amounts to a concession that the Agreement was concluded.

64. While not explicitly pleading this in the alternative, the respondents go on in their answering affidavit to contend that the Agreement is unenforceable.

65. As counsel for the applicants, Mr Daniels, correctly submitted in argument, it is well established that the enforceability of an agreement can be challenged in circumstances where the agreement is prohibited as a result of initial impossibility or illegality or where the agreement was concluded as a result of misrepresentation, fraud, duress, undue influence or mistake.

66. The respondents contend that the Agreement is unenforceable on the basis that the claims were *"settled erroneously"* for two reasons. The first is that the claims were *"individual claims"* as opposed to *"a community claim"* and *"at no point during the investigation of this land claim did the Commission accept the claims lodged as a community claim."*

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[14] Earlier defined herein as "the property."

67. As has been set out above, it is undisputed that the Commission approached the Kromkrans claimants in 2000 and advised them that it did not have the resources to process each claim individually and that the claims would therefore be processed as a community claim. The Commission assured the Kromkrans claimants that this would not prejudice them in any way. The Kromkrans claimants indicated that they were amenable to this as they had always regarded themselves as community in any event. This is the background to the Kromkrans Community adopting a Constitution and resolving to hold the Property through a Communal Property Association.

68. The 2004 42D Request records however that the claims themselves were lodged by individual members of the Kromkrans Community. Thus paragraph 3.2 of the 2004 42D Request records that *"And the Regional Land Claims Commissioner for Mpumalanga has accepted this claim by various individual family members of the Kromkrans Community."*

69. The various officials, including the Minister, who approved and endorsed the recommendations in the 2004 42D Request, were therefore aware of the correct position. Indeed there is no suggestion by the respondents that they were not. There is therefore no factual basis for this complaint by the respondents. Even however if there were, it is highly doubtful that this could as a matter of law, render the Agreement unenforceable.

70. The second reason the respondents contend that the claims were *"settled erroneously"* and the Agreement is unenforceable is expressed as follows: *"it is clear that the individual claimants were never dispossessed of any rights in land as it relates to the nine portions of land contained in the section 42D memorandum approved by the Minister in 2002"* and *"from the above, it becomes manifestly clear that the land claims were settled erroneously."*

71. This complaint then is that because the Kromkrans claimants were not dispossessed of the Potgieter owned lands, those lands were wrongly awarded to them. This complaint has no legal foundation. It is clear from the Act that land claimants may receive land different from the land of which they were dispossessed.[15]

72. Finally and in contradiction to their contentions that the Agreement is unenforceable, the respondents allege that *"attempts at complying with the conditions specified in the 2002 Section 42D memorandum was (sic) frustrated by certain members of the community."* This claim is unsupported by the evidence. In the first place the respondents do not spell out what their attempts at complying with the Agreement consisted of. Secondly, the documents that the respondents seek to rely on to demonstrate that their attempts at compliance were frustrated by the applicants, simply do not bear this out. What the evidence does show, overwhelmingly, is that the applicants requested, demanded and pleaded with the respondents month after month,

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[15] See for example section 42E of the Act read with section 6(2)(b).

year after year, for the Agreement to be complied with. There is therefore no merit in this contention by the respondents either.

Conclusion and Relief

73. In the result there is no impediment to the enforcement of the Agreement and the applicants are entitled to the relief that they seek.

74. The respondents deny in their answering affidavit that the Plan has been approved by the State as required by clause 4.3.4 of the Agreement. In terms of clause 4.3.4 occupation of the Property may not take place until such approval has been effected. Whatever the correct factual position here, this does not constitute an impediment to the relief sought by the applicants which pertains to the registration of the Communal Property Association and the transfer of the Property.

75. The Order I granted requires that the Property be transferred, not to the first applicant as prayed, but to the Kromkrans Communal Property Association for that is what the Agreement provides.

76. As I have indicated above, the second to eighteenth applicants are responsible (either directly or through their direct descendants) for only 19 out of the 23 claims gazetted in respect of Portion 61 of the Farm Kromkrans. It is for this reason that I made specific provision in my Order for the inclusion of

the persons contemplated in clause 4.7 of the Agreement in the Constitution of the Kromkrans Communal Property Association.

Costs

77. Costs are not ordinarily awarded in matters in this Court which generally fall within the genre of social litigation. However, the considerations in this case are different.

78. In *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd* 2014 (3) SA 481 (CC), the Constitutional Court held as follows:

> "There is a higher duty on the state to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights. Government is not an indigent or bewildered litigant, adrift on a sea of litigious uncertainty, to whom the court must extend a procedure-circumventing lifeline. It is the Constitution's primary agent. It must do right, and it must do it properly."[16]

79. In this case the state has through its failure to comply with the Agreement which it concluded with the applicants, failed to give effect to the constitutional obligations which it owes the applicants. This has been severely prejudicial to the applicants who have been unable to obtain the benefit of their constitutional rights to restitution for 14 years. The state's failure in this regard remains unexplained and its opposition to the applicants' application for

[16] At para 82.

specific performance proved to be without factual or legal foundation.

80. For these reasons I ordered the first and second respondents to pay the costs of the application and the counter-application, jointly and severally, the one paying the other to be absolved, such costs to include the costs of two counsel.

Barnes AJ

Acting Judge of the Land Claims Court

Appearances:

For the Applicants: Adv J Daniels with Adv C de Villiers-Goldring instructed by Baker & McKenzie

For the First and Second Respondents: Adv Majozi with Adv Loxton instructed by the State Attorney