



IN THE LAND CLAIMS COURT OF SOUTH AFRICA
HELD AT RANDBURG

Case no: LCC08/2021

In the matter between:

**BAKGATLA-BA-KGAFELA COMMUNAL PROPERTY
ASSOCIATION**

Applicant

and

CHIEF LAND CLAIMS COMMISSIONER

First Respondent

**MINISTER OF RURAL DEVELOPMENT AND LAND
REFORM**

Second Respondent

**DIRECTOR-GENERAL OF DEPARTMENT OF RURAL
DEVELOPMENT AND LAND REFORM**

Third Respondent

**REGIONAL LAND CLAIMS COMMISSIONER
NORTH WEST**

Fourth Respondent

BAKGATLA BA KGAFELA TRIBAL AUTHORITY

Fifth Respondent

JUDGMENT

COWEN J:

Introduction

1. The applicant is the Bakgatla Ba Kgafela Communal Property Association (the BBK CPA). The BBK CPA approached this Court for orders declaring that the Department of Rural Development and Land Reform (the Department) owes it R74 444 882.20¹ in terms an agreement concluded on 30 August 2006 in terms of section 14(3) and section 42D of the Restitution of Land Rights Act 22 of 1994 (the Restitution Act) and directing its payment with interest.

2. The amount is made up as follows:
 - 2.1. R29 535 021.10² being financial compensation as contemplated by section 42D(c) of the Restitution Act (the financial compensation).

 - 2.2. R44 905 561.10³ described as a restitution and development grant (the restitution and development grant).

¹ Seventy-four million four hundred and forty-four thousand and eight hundred and eighty-two rands and twenty cents.

² Twenty-nine million five hundred and thirty-five thousand and twenty-one rands and ten cents.

³ Forty-four thousand nine hundred and five thousand and five hundred and sixty-one rands and ten cents.

3. There are six respondents. The first to fourth respondents are State respondents. The first respondent is the Chief Land Claims Commissioner of the Commission of Restitution of Land Rights (the Commissioner and the Commission). The second respondent is the Minister of Rural Development and Land Reform (the Minister). The third respondent is the Director-General of the Department of Rural Development and Land Reform (the DG). The fourth respondent is the Regional Land Claims Commissioner for the North West (the Regional Commissioner). The fifth respondent is cited as 'the Bakgatla Ba Kgafela Tribal Authority' and the sixth respondent is Acting Chief Ramono Pilane. Only the State respondents are participating in the proceedings.

4. The application was instituted on 26 January 2021. Lengthy discussions then followed, but the parties were unable ultimately to resolve their differences. On 26 July 2021, the State respondents delivered an affidavit which, although styled an explanatory affidavit, in substance recorded opposition to aspects of the relief sought. The affidavit was deposed to by Mr Kenneth Matukane, a Director of Operational Management who discharges his duties under the supervision of the Regional Commissioner. Mr Matukane explained the State respondents' stance being, in effect that they accept the monies are payable but providing information they contended the Court should consider when deciding if the relief should be granted in the form sought. Regarding the financial compensation, he indicated that the State respondents contend that the funds should be paid to the 3461 verified households that make up the claimant community saying that it was for them that the restitution award was approved. Alternatively, the monies can be

paid to the BBK CPA if there is a resolution from all of the households agreeing thereto. Regarding the restitution and development grants, Mr Matukane contends that the Applicant failed to obtain a proper resolution from the General Council of the BBK CPA to approve a development and business. The contention, stated in very general terms and unsubstantiated, is that some beneficiaries were not permitted to participate in the vote. In any event, he continues, the development and business plan shows that a large portion of the restitution and development grant, if paid, will be used to pay service providers which is not their intended purpose. The affidavit is confirmed by the Regional Commissioner, Mr Lebjane Maphutha.

5. The applicant replied on 9 August 2021. In doing so, the applicant provided a lengthy exposition of events that ensued subsequent to the institution of proceedings to say, amongst other things, that the General Council meeting had approved the development and business plan and decided how the full amount of R74 444 882.20 may be spent. This was done, the applicant says, with the involvement of the Department and Commission. Strident criticism is advanced in the affidavit of the Department and Commission about an alleged change in their initial stance, which had informed the manner in which the General Council meeting had proceeded. The allegedly new demand for a resolution of all verified households is said to be absurd and would, if required, generate chaotic results.
6. The application came before me on 13 October 2021. Mr Ramaili appeared for the BBK CPA. Mr Mathebula appeared for the State respondents. Mr Mathebula confirmed that the State respondents were not opposing the application but rather requesting the Court to issue appropriate directives governing the payment of the

funds. However, it soon became apparent that relief could not be granted on the papers as they stood, with both parties falling short of what is required. The applicants had not supplied the agreement that they sought to enforce and the proof offered that the funds were owing as sought did not substantiate the case. Moreover, the explanatory affidavit in which Mr Matukane explained what had been approved and for what purpose contained material errors and material annexures were omitted, including the underlying approvals obtained for purposes of the agreement. And importantly, the Court was then informed that the relevant State functionary's approval had not yet been obtained in respect of some R21 446 867.00⁴ affecting both the financial compensation and the restitution and development grant. Regarding the State's respondents' request that directives be imposed regulating the payment of the funds, there was an absence of sufficient relevant information, which also stood in the way of any effective relief being granted. And there was a need to narrow the issues for determination in order to seek to resolve the true ongoing disputes between the parties.

7. However, both parties sought the Court's ongoing assistance to enable the due payment of the funds, and accordingly, I decided to place the matter under case management to enable the disputes between the parties to be properly ventilated with reference to further evidence. The case management process commenced on 13 October 2021 when I removed the matter from the roll and converted the hearing to a conference with the purpose of facilitating the expeditious, cost-effective and efficient disposal of the matter.⁵ The minute and resultant directives

⁴ Twenty-one million four hundred and forty-six thousand eight hundred and sixty-seven rands.

⁵ Rule 30(1) provides: 'The presiding Judge may, of his or her own accord or at the request of any party before or during the hearing of any case, convene one or more conferences of the participating parties to promote the expeditious, economic and effective disposal of the case.'

are contained in a document dated 19 October 2021 (the October 2021 minute and directives).

8. During the course of the conference, the parties agreed that that Court may, in the exercise of its inquisitorial powers receive further information it may require in order to facilitate the outstanding disputes.⁶ In the circumstances of this particular case, I regarded this approach as preferable to exercising my powers in terms of Rule 33(9) of the Rules of the Court by making no order and granting leave to the applicant to renew the application.
9. The October 2021 minute and directives record the two issues that the parties agree require resolution by the Court by way of appropriate declaratory relief to be as follows.

9.1. First, whether the financial compensation of R29 539 021.10 is payable to the 3461 verified households who make up the claimant community either directly or via the applicant (as the State respondents contend) or whether the financial compensation is payable to the applicant to be used for any lawful purpose of the BBK CPA (as the applicant contends). In this regard, the State respondents contend further that if the financial compensation is to be used for any lawful purpose of the BBK CPA, the individual households must consent thereto.

9.2. Second, whether the Minister may lawfully refuse to make payment of the restitution and development grant in circumstances where a) it is intended that

⁶ Section 32(3)(b) of the Restitution Act; *Mlifi v Klingenberg* [1998] ZALCC 7 (3 August 1998).

the financial compensation is to be used for the general purposes of the BBK CPA and not distributed to the verified households, b) the applicant intends to use a portion of the funds to pay for operational expenses as reflected in item 4 of the development plan (p543 of the record) (the operational expenses)⁷ and / or c) this includes payment of professional fees including, specifically, legal fees (incurred on contingency) to secure the implementation of the settlement agreement, professional fees to prepare the development plan and forensic investigators. In this regard it warrants emphasis that the State respondents have every intention of making payment of the full restitution and development grant once satisfied that the BBK CPA intends to use it for its lawful purposes.

10. In response to the October 2021 minute and directives, an initial set of further affidavits was supplied on 25 October 2021 and 27 October 2021 from the State respondents and the applicant, respectively.⁸ The State respondents' affidavit was again deposed to by Mr Matukane. Two approvals granted for purposes of section 42D of the Restitution Act were supplied and their content explained⁹ and the Court was informed that the outstanding approval could be expected by the end of

⁷ This is detailed further below at paragraph 54.

⁸ These were received in response to paragraph 8 of the directives which provided as follows:

8. The following further directions are issued:

8.1 The State respondents shall file a brief affidavit on or before Friday 22 October 2021 supplying a) the settlement agreement referred to above; b) the section 42D submissions to the Minister and c) setting out – with reference to the underlying official documentation – the time-line and process of conclusion of the above agreement and section 42D submissions.

8.2 The applicant may file any response to the above affidavit on or before 29 October 2021.

8.3 On or before 5 November 2021, the parties shall file a practice directive and any further written submissions they may wish to make in respect of the two issues in dispute and in their practice note shall indicate their views on the further conduct of the matter and specifically whether they contend that the matter can be disposed of without the need for any further oral hearing. Should any material dispute of fact arise, this should be addressed in the practice note and if need be a request made for a further pre-trial conference.

8.4 The Court may issue further directives.

⁹ Thereby curing some of the difficulties that had arisen in respect of the explanatory affidavit.

November 2021. In its affidavit, the applicant set out its contentions why the BBK CPA was entitled to receive the funds.

11. The outstanding approval was however not forthcoming. On 16 March 2022, the Court issued further directives requiring that the approval be supplied or an explanation tendered and certain further information was sought relating to the restitution and development grants.¹⁰ The information and documentation was to be supplied on or before 7 April 2021 and the parties were afforded an opportunity to file a note about the implications thereof on or before 14 April 2021. The State respondents filed a further affidavit on 7 April 2021 supplying, inter alia, the outstanding approval. Unfortunately, neither party availed themselves of the opportunity to provide the note and both parties failed to respond to directive 5.

¹⁰ These read: 'Having considered the documents filed in compliance with the Court's directives of 19 October 2021 (the October 2021 directives), the following further directives are issued:

1. In the event that the First Respondent has taken a decision in terms of section 42D of the Restitution in respect of the recommendations contained in Annexure SBM4 to the State Respondents' affidavit in response to the October 2021 directives dated 22 October 2021 (the State respondents' affidavit), the First Respondent is directed to furnish the Court with a copy of the decision and any Section 42(D) approval.
2. In the event that the First Respondent has not taken any decision, the First Respondent shall provide the Court with an explanation for the delay and an update of the anticipated time-frames for finalising the process.
3. With reference to Annexure SBM2 to the State Respondents' affidavit, and specifically paragraph 13.1 thereof, the State Respondents are directed:
 - a. to furnish the Court with any guidelines or policy documents detailing the purposes for which restitution discretionary grants (RDGs) and settlement planning grants (SPGs) were made at the relevant time (25 August 2006),
 - b. to indicate whether grants of this sort are still being made, and if so, to provide any current guidelines or policy documents governing their intended purpose and remit.
4. With reference to section 42C of the Restitution Act, Annexure SBM3 to the State Respondents' affidavit, and specifically paragraph 1.3, 3 and 5.3 thereof and Clause 11 of the settlement agreement (SBM1), the State Respondents are directed to
 - a. furnish the Court with any guidelines or policy documents governing section 42C financial aid applicable at the relevant time (22 February 2008);
 - b. furnish the Court with such guidelines or policy documents currently applicable.
5. The parties are directed to provide and explain their contentions regarding:
 - (a) the precise description of the properties which are intended to benefit from the Section 42(D) financial aid.
 - (b) whether the use of any or all of the funds comprising the claimed R74 444 884.00 may lawfully be used in respect of Olivenfontein 47JQ; Nooitgedacht 49JQ and Waagfontein 89JQ. ...'

12. I return to the two issues in respect of which appropriate declaratory relief is sought after setting out the factual background and key applicable statutory provisions. In view of the protracted and somewhat convoluted history of the matter it is necessary for me to do so in some detail.
13. As will shortly become evident, a feature of this case that stands out starkly is that the agreement that the applicant seeks to enforce was concluded in the absence of requisite underlying approvals from the relevant State functionaries.
14. Agreements concluded in terms of section 14(3) and section 42D of the Restitution Act frequently arise in disputes that come before this Court. It is disquieting that in this case, the requisite approvals had not been obtained before the agreement was concluded. In the case before me, the parties agreed that the outstanding approval should be obtained before relief is granted in this matter and neither party seeks to resile from the agreement for want of any statutory compliance. In these circumstances, it is fortunately not necessary for me to deal with the legal consequences for the enforceability of the agreement of the failure timeously to obtain the approvals.

Factual background and key statutory provisions in the Restitution Act

15. During December 1998, various land claims were lodged in terms of section 2 of the Restitution Act on behalf of the Bakgatla Ba Kgafela community, which is based in the North West Province. Some of the land claims have been settled in terms of section 14(3) and section 42D of the Restitution Act in terms of the agreement the applicants seek to enforce in this application.¹¹

¹¹ No controversy has arisen in respect of section 14(3) in this case.

16. Section 42D is titled 'Powers of Minister in case of certain agreements' and provides in relevant part:

'(1) If the Minister is satisfied that a claimant is entitled to restitution of a right in land in terms of section 2, and that the claim for such restitution was lodged not later than 31 December 1998, he or she may enter into an agreement with the parties who are interested in the claim providing for one or more of the following:

(a) The award to the claimant of land, a portion of land or any other right in land :
Provided that the claimant shall not be awarded land, a portion of land or a right in land dispossessed from another claimant or the latter's ascendant, unless - (i) such other claimant is or has been granted restitution of a right in land or has waived his or her right to restoration of the right in land in question; or (ii) the Minister is satisfied that satisfactory arrangements have been or will be made to grant such other claimant restitution of a right in land;

(b) the payment of compensation to such claimant;

(c) both an award and payment of compensation to such claimant;

(d) ...

(e) the manner in which the rights awarded are to be held or the compensation is to be paid or held; or

(f) such other terms and conditions as the Minister considers appropriate.

(2) If the claimant contemplated in subsection (1) is a community, the agreement must provide for all the members of the dispossessed community to have access to the land or the compensation in question, on a basis which is fair and non-discriminatory towards any person, including a tenant, and which ensures the accountability of the person who holds the land or compensation on behalf of such community to the members of the community.'

The establishment of the BBK CPA

17. The BBK CPA was established on 3 December 2005 in terms of section 8 of the Communal Property Association Act 28 of 1996 (the CPA Act). A copy of the BBK CPA Constitution has been supplied to the Court.

18. The preamble to the BBK CPA Constitution records that 'it is desirable that the Bakgatla Ba Kgafela community should establish a legal entity through which they may acquire, hold, control and manage property in common on behalf of and for the benefit of all the claimants' and that the land claimants have 'identified and laid a claim to their disposed land ... for the restoration of their land and wishes to acquire such land in a common establishment ...'. clause 2.3 provides: 'The Association shall have the power to acquire, hold and alienate any property, and shall have the capacity to acquire rights and incur obligations.' The term 'property/ies' is defined in clause 3.13 to mean: 'the properties as more fully described in Annexure F hereto.' Annexure F has at no stage been supplied to the Court.

19. Clause 4 is entitled 'Aims and Objectives of the Association' and provides in clause 4.1: 'The aims and main objective of the Association is to acquire, hold and manage the properties described in Annexure E hereto on behalf of and for the benefit of all its members in the 29 villages.' The reference in clause 4 to Annexure E rather than F appears to be an error.¹²

20. Clause 4.2 details the BBK CPA's secondary objectives which include, amongst others 'to acquire in its own name for the benefit and on behalf of its members, property, whether movable or immovable.'¹³ A series of other secondary objectives are listed some of which are development oriented, for example, clause 4.2.2 refers

¹² Annexure E was supplied to the Court but it reflects a list of six village regions and their constituent villages, not the properties in question. In clause 12.2 Annexure E is referred to as a list of the six regions and villages / villages committees.

¹³ Clause 4.2.1.

to 'the provision of appropriate infra-structure including schools, clinics, roads, housing and other social, recreational, economic, cultural, educational and religious facilities and amenities and provide services relating to sewerage, drainage, water, gas and electricity and so forth.' There are other secondary objectives.

21. The members of the BBK CPA are, according to clause 3.12, 'those households listed in Annexure A including their direct descendants.' Annexure A has at no stage been supplied to the Court but it is common cause that there are some 3461 verified households that make up the claimant community, made up of 9990 individuals. Membership is regulated more fully in clause 8 which provides that membership vests in households and not individuals and is limited to households and their direct descendants.¹⁴

22. Clause 9 is entitled 'Powers of the Association and Executive Committee'. It confers on the BBK CPA, through its Executive Committee and subject to the provisions of the Constitution 'all such powers as may be necessary to enable them to manage the affairs and administration of [the CPA]' and 'all rights and powers necessary for that purpose.' Certain specific powers are then conferred including the power 'to receive contributions and donations in money or otherwise on behalf of the CPA.'¹⁵

23. The applicant explained that its formation in 2005 'was birthed out of a resolution that was made by the Bakgatla Ba Kgafela community which comprises of all of

¹⁴ Clause 6.1 and clause 6.3.

¹⁵ Clause 9.1.2.

the households that reside in the 32 villages of the Bakgatla area.’ Clause 25, entitled ‘Adoption of Constitution’ records: ‘This constitution was approved and accepted by members General Council of Bakgatla Ba Kgafela Communal Property Association at a General Meeting held on 3rd December 2005 at Bakgatla Ba Kgafela Tribal Hall and shall come into operation and become binding on all members of the Association upon registration by the Department of Land Affairs.’

The conclusion of the August 2006 settlement agreement

24. Some nine months later and on 30 August 2006, the BBK CPA concluded a settlement agreement in respect of certain claimed land. The settlement agreement was erroneously not supplied to the Court as part of the founding papers, but after the Court identified this difficulty, it was furnished by agreement during the process of case management.¹⁶ It is of course elementary that a party seeking to enforce a written agreement must place it before the Court and it is unfortunate that the Court’s intervention was required in order to identify this error.

25. The claimed land that was the subject of the settlement agreement entailed some 7877.0723 hectares in extent and included 11 (eleven) properties, specifically, Legkraal 45JQ, Doornpoort 57 JQ, Schaapskraal 170 JP, Koedoesfontein 42 JQ, Kruisfontein 40 JQ, Saulspoort 38 JQ, Rooderand 46 JQ, Vogelstruisnek 173 JP, Olivengontein 47JQ, Nooitgedacht 49 JQ, Waagfontein 89 JQ. Part of the claimed land falls within the Pilanesburg Nature Reserve.

¹⁶ A copy is attached to the supplementary affidavit of the applicant dated 28 October 2021 as S1. By agreement between the parties, the Court received a copy during the conference of 13 October 2021.

26. The parties to the agreement are stated to be the BBK CPA, the Minister,¹⁷ the Commission on the Restitution of Land Rights,¹⁸ the Regional Commission,¹⁹ various Departments of the North West government²⁰ and the North West Parks and Tourism Board. In concluding the agreement, the BBK CPA was represented by Daniel Rakoko Motshegare in his capacity as the Chairperson of the BBK CPA 'for and on behalf of the Bakgatla ba Kgafela Community.' In terms of the agreement, the claimed land was to be restored to the land claimants and held by the BBK CPA on behalf of the claimants, but while the BBK CPA would acquire title of the claimed land, the parts of the claimed land that fall within the Pilanesburg Nature Reserve would remain part of the reserve and used solely for the purpose of nature conservation and associated economic activities. In other words, the BBK CPA would acquire title of that land without occupation.

27. Clause 9 of the settlement agreement is entitled 'Legal entity to receive title of claimed land' and provides:

'Bakgatla Ba Kgafela Communal Property Association duly registered in terms of [the CPA Act] shall hold and manage the claimed land subject to the terms and conditions of this Agreement.'

28. Clause 10 of the settlement agreement is entitled 'Compensation for the loss of enjoyment, use and occupation of the claimed land falling within Pilanesburg

¹⁷ At that stage the Minister of Land Affairs represented by Lulama Xingwana.

¹⁸ Represented by the then Commissioner Thozamile Gwanya.

¹⁹ Represented by the then Regional Commissioner for Gauteng and the North West Province, Sarah Itumeleng Seboka.

²⁰ First, the Department of Economic Development and Tourism, second, the Department of Agriculture Conservation and Environment and third, the Department of Public Works of the North West Province. The copy of the agreement supplied to the Court is not signed by any representative of the first or third named Departments.

Nature Reserve' and clause 11 is entitled 'Development Funds'. These clauses provide as follows:

'Clause 10 - Compensation for the loss of enjoyment, use and occupation of the claimed land falling within Pilanesburg Nature Reserve

10.1 The Minister will make a payment, to be determined per verified household, as part compensation for loss of use and enjoyment, as the claimants will not take physical occupation of the claimed land, as the claimed land shall be maintained as a Protected Area and part of the Pilanesburg Nature Reserve. This compensation will in total amount to R29 539 021.00 (twenty-nine million five hundred and thirty-nine and twenty-one rand only).

11. Development funds

11.1 The Minister hereby agrees to the approval of the restitution grant for the verified households subject to relevant submissions for approval. These grants will in total amount to R15 366 840.00 (Fifteen million three hundred and sixty-six thousand eight hundred and forty rand only) and will be paid to the Bakgatla ba Kgafela CPA to be utilised for planning and development purposes in the Pilanesburg Nature Reserve, the funds will be used in accordance with the protected areas legislation. A further development grant in terms of section 42C of the Restitution Act to the value of R29 539 021 (Twenty-nine million five hundred and thirty-nine and twenty-one rand only) will be made available for the abovementioned purpose.

11.2 The Parties agree that any funds as outlined above in this Agreement, may not be alienated, used as collateral security for the payment of any debt owed by the claimant or its members.

11.3 The Commission shall ensure that the grants are used only for the intended purpose and are accounted for as required by this Agreement, other applicable legislation and the constitution of the claimants.'

29. Clause 12 is titled 'Co-Management of Claimed Land falling within Pilanesburg Nature Reserve' and clause 13 is titled 'Development Projects and Management'. Amongst other things, these clauses contemplate the conclusion of a co-management agreement in respect of the claimed land falling within the Pilanesburg Nature Reserve.²¹ Clause 12.3.8 records: 'The parties agree that the project funds from the Commission shall be directed to the specified land owner's projects as per submitted Business Plan.' I mention clauses 12 and 13 because they illustrate some of the ways in which the settlement agreement regulates the use of the claimed land and development funds, whereas, conversely, there is nothing in the settlement agreement dealing pertinently with the use or distribution of the financial compensation referred to in clause 10.

The first section 42D approval

30. The applicant did not supply any documentation reflecting any section 42D approvals. It is not clear whether the documents were or were not in its possession. The documents were ultimately provided by the Regional Commissioner but only on 27 October 2021.²²

31. On 23 October 2006, the Commissioner – then Mr T Gwanya – approved recommendations made in respect of the land claim for purposes of the settlement. He acted pursuant to delegated powers. The approval (the October 2006 approval), entailed, amongst other things:

²¹ A co-management agreement has not been supplied to the Court but is defined in the definitions section as 'an agreement for the management of the claimed land in a Protected Area as contemplated in section 42 of the Protected Areas Act 57 of 2003'.

²² They were intended to be Annexures to the explanatory affidavit but were omitted for reasons not explained.

31.1. The restoration of lost land rights to the Bakgatla-Ba-Kgafela land claimants, specifically 18 portions of 8 of the 11 farms referred to in paragraph 25 above,²³ each of which is situated in the Pilanesburg National Park.

31.2. The payment of restitution discretionary grants (RDGs) to an amount of R10 383 000.00²⁴ and settlement planning grants (SPGs) to an amount of R4 983 840.00²⁵ totalling R15 366 840.00.²⁶

32. Moreover, the manner in which the amounts were calculated is recorded as follows:²⁷

32.1. RDGs - R3000 per household (R3000 X 3461=R10 383 000);

32.2. SPGs - R1440.00 per household (R1440 X 3461 = R4 983 840.00).

33. Viewed in context of all the evidence, this is the amount reflected in clause 11.1 of the settlement agreement.²⁸ In this regard, the section 42D approval confirms that the Department of Agriculture will assist claimants in their application for departmental grants, where applicable.

²³ Paragraphs 3 and 15 of Annexure SBM2.

²⁴ Ten million three hundred and eighty-three thousand rands.

²⁵ Four million nine hundred and eighty-three thousand and eight hundred and forty rands.

²⁶ Fifteen million three hundred and sixty-six thousand and eight hundred and forty rand.

²⁷ Clause 13 of Annexure SBM2 titled 'Financial Implications'.

²⁸ Paragraph 28 above.

34. It was only pursuant to the directives of 16 March 2022 that the Court was supplied with documents relating to the guidelines and procedures relating to the restitution and development grants, including the RDGs and SPGs. I return to these below. Importantly, the approval of this amount in the settlement agreement is expressly rendered subject to the relevant submissions for approval. An application is required for both the SPG and the RDG, although, as appears below, these have now been integrated into a single grant.

The second section 42D approval

35. The October 2006 approval was amended in 2008. This appears from a document supplied by the State respondents in their 27 October 2021 affidavit²⁹ which records the underlying recommendations, their purpose and the relevant approvals. The purpose of the document is recorded to be to request the inclusion of further properties, also portions of the properties referred to in paragraph 25 above, and to request the approval of the Acting Chief Land Claims Commissioner of two further amounts of financial payment as follows:

- 35.1. '... the Bakgatla Ba Kgafela beneficiaries' section 42C development grants to the value of R18 815 587.50'; and
- 35.2. '... the financial compensation to Bakgatla Ba Kgafela Restitution beneficiaries for loss of physical beneficial occupation and use of the properties falling within Pilanesburg Nature Reserve, to the value of R18 815 587.50'

²⁹ As Annexure SBM3.

36. In respect of these further financial payments, the document records that the prior award needed to be rectified ‘to ensure that just and appropriate award is afforded the said beneficiaries.’

37. As regards the financial compensation the document records that the current policy and practice is that *in lieu* of the ongoing loss of physical restoration of the land to which title is acquired, ‘each claimant household will be compensated financially.’ This financial compensation is recorded as being ‘in addition to grants being allocated.’ Under the heading ‘Financial Compensation’,³⁰ the following appears:

‘3.1 The envisaged financial implications for the Department would be towards the disbursement of Section 42C Development Grants and Compensation for loss of physical beneficial occupation and use of the claimed property since the Restitution Discretionary Grants and the Settlement Planning Grants were previously approved with phase one (01) submission.

3.2 The total extent of all properties as cited on the table for Property Description is 5017.49 ha. The total value of the aforesaid properties is calculated as (Total extent in ha) 5017.49 ha X R15 000 (value per ha) = R75 262 350.00.

Section 42C Development Grant (R75 262 350 X 25%)	R18 815 587.50
Total Compensation for loss of physical beneficial occupation and use of land	R18 815 587.50
TOTAL FINANCIAL IMPLICATIONS	R37 631 175.00
Compensation per household (R18 815 587.50 / 3 461 HH)	R5 436.45

³⁰ Paragraph 3.

38. Mr Mahlangu approved the recommendation on 22 February 2008 (the 2008 amendment). The effect of the 2008 amendment was two-fold. First it was to approve the addition of R18 815 587.50 to the restitution and development grant sum, expressly identified as a section 42C development grant. The total amount in development grants approved at this stage (comprising also the SPGs and RDGs previously approved) was accordingly R44 905 861.10. Secondly, it was to approve financial compensation in the same amount. Notably, the approved amounts remain significantly less than what the settlement agreement contemplated where these amounts were each reflected as R29 539 021.

39. The difference is R10 723 433,50 in each case together totalling R21 446 867.00.³¹ Accordingly, as at the time of the 2008 amendment, the settlement agreement reflected a total amount owing which is R21 446 867.00 less than the amount approved by the relevant functionary for purposes of the settlement.

40. The outstanding approval in respect of that amount was only furnished to the Court on 7 April 2022, but had been granted by the Commissioner under delegated authority on 15 November 2021 (the November 2021 approval). The document records that the shortfall of R21 446 867 was to be approved to bring the approved amounts in line with the signed settlement agreement.

41. In summary, as at November 2021, the amounts had finally been approved by the relevant functionary in accordance with the settlement agreement, as follows:

³¹ Twenty-one million four hundred and forty-six thousand eight hundred and sixty-seven rand.

- 41.1. R15 366 840³² comprising RDGs and SPGs.
- 41.2. R29 539 021³³ comprising a section 42C development grant.
- 41.3. R29 539 021³⁴ comprising financial compensation.

The guidelines and procedures for the SPG, RDG and section 42C grants

42. Information regarding the guidelines and procedures for the SPG, RDG and section 42C grants was first made available in the documents supplied by the State respondents on 7 April 2022. Only limited information is to hand in this regard and it was obtained by directive and thus not traversed on the primary affidavits. In the circumstances, and to ensure fairness, I have had only limited regard to it but its content is material to my reasoning and to the further conduct of the matter and accordingly, I refer to certain aspects in full.

The SPGs and RDGs

43. The first document supplied on 7 April 2022 is titled 'Grants and Services of the Land Reform Programme (Version 7)' and is dated November 2000 (the November 2000 memorandum). The November 2000 memorandum explains the purposes, eligibility requirements and application process for both the SPG and the RDG in clause 5 and clause 8 respectively.

³² Fifteen million three hundred and sixty-six thousand eight hundred and forty rands.

³³ Twenty-nine million five hundred and thirty-nine thousand and twenty-one rands.

³⁴ Twenty-nine million five hundred and thirty-nine thousand and twenty-one rands.

44. The objective of the SPG is stated in clause 5.1 and broadly speaking is, in relevant part, to assist poor communities to plan for the acquisition, settlement on, use and development of land and for the mobilisation of the necessary resources to do this, or in circumstances of insecure occupation of land, to clarify and record occupiers rights to land and to support restitution.³⁵ More specifically, clause 5.1.3 provides: 'The grant enables those engaged in land reform initiatives to select and appoint accredited planners and other professionals from private firms and NGOs, with whom they will collaborate on a strategy for land reform. The services which can be covered by the grant include legal and financial-planning assistance, land use planning, infrastructure planning, land valuation, land survey (both the inner and / or the outer boundary survey), assistance with land purchase negotiations including the formation of a legal entity, and the management, administration and disbursement of the remainder of the settlement / land acquisition grant (where applicable) to a legal entity, or to a 2nd or 3rd tier level of government.'
45. Clause 5.1.4 proceeds to set out the two principal planning phases that may be financed through the settlement grant, the first being preliminary in nature the second being more detailed.
46. Clause 8.1.1 details the objective of the RDG to be:
- 'to make a grant available that will assist beneficiaries of a negotiated restitution settlement to immediately manage and secure their restored / compensatory land, and / or to relocate to the land, and / or to settle on the land.'
47. The second document is a 2007 memorandum titled 'Relaxed Application of Grants: Integration of SPG and RDG and Flexible Use of 42C Development Grant' (the 2007 memorandum). The 2007 memorandum first sets out features of the SPG, RDG and the section 42C grant and then proceeds to propose the integration

³⁵ See sub-clauses 5.1.1 and 5.1.2.

of the first two into a single grant known as the Restitution Settlement Grant (RSG). Valued together the grants amount to R4440.00 per verified household made of the values of the SPG and RDG (calculated as R1440 and R3000 per verified household respectively). The application of the integrated grant was to be applied retrospectively. However, a value adjustment in terms of CPI to a higher amount was only to apply prospectively. The recommendations were approved by Mr Gwanya on 27 November 2007, notably after the approval of the SPG and RDG grants in the amount of R15 366 840.00 (fifteen million three hundred and sixty-six thousand and eight hundred and forty rand) in the October 2006 approval.

48. The 2007 memorandum summarises the purposes for which the integrated RSG may be used in paragraph 5.8.1 to be 'to assist claimants to plan for the acquisition, settlement on use and development of land, for the mobilisation of the necessary resources as well as to assist beneficiaries to immediately manage and secure their restored land, e.g. for relocation (which could include transport and settlement).' It proceeds to explain that where applicable, the RSG may be used in two phases, a planning phase and an implementation phase:

5.8.2.1 Planning phase: land use and / or business planning; contributing to the preparation of a settlement, including legal and financial planning, land use planning, infrastructure planning, assistance with land purchase negotiations including the formation of a legal entity. (To ensure that not all the money go towards planning, it is advisable that not more than one third of the total of the grant is used for planning. Should more money be required, that should rather be requested in terms of another submission.)

5.8.2.2 Implementation phase: Relevant uses for relocation and control purposes would include use for farming equipment, workers' wages, electricity, lodge development, basic infrastructure, fencing, immediate maintenance of going concerns.'

49. Notably, the first phase accords with the description of the SPG and the second phase with the description of the RDG³⁶. Moreover, the 2007 memorandum makes it clear that the RSG may be paid to qualifying individuals or to a qualifying group, and that if a group applies for the grant, it must be disposed of according to collective decision-making, albeit that this does not necessarily preclude catering to differences among applicants.³⁷

The section 42C grant

50. Section 42C imposes legal constraints on the use of a 'subsidy or advance' provided in terms thereof. Section 42C of the Restitution Act is titled 'Financial Aid' and provides as follows in relevant part:

(1) The Minister may from money appropriated by Parliament for this purpose and on such conditions as he or she may determine, grant an advance or a subsidy for the development or management of, or to facilitate the settlement of persons on, land which is the subject of an order of the Court in terms of this Act or an agreement in terms of section 14 (3) or 42D or which is expropriated in terms of section 42E, to-

- (a) any claimant to whom restoration or the award of a right in land has been ordered;
- (b) any claimant who has entered into an agreement contemplated in section 14 (3) or 42D;
- (c) any person resettled on such land.

(2) For the purposes of subsection (1) 'development of land' includes the facilitation of the planning of any development of land.

51. Where the statute refers to a 'subsidy or advance', the documents refer to a grant and, for convenience, I follow suit. In using that term, however, I am mindful that

³⁶ As elaborated upon in clause 3.2.4.

³⁷ See clause 5.8.3.

sight must not be lost of the statutory language. As regards the section 42C grant, the 2007 memorandum states, in clause 3.3, that the section 42C grant is calculated at an amount of 25% of the value of the land. The document continues:

- '3.3.2 Approval is in terms of a specific project. This project shall be based on a business plan (including phases of release and implementation, costs and time frames).
- 3.3.3 The nature of the funding should be for leveraging support from other stakeholders.
- 3.3.4 The main purpose of the grant is for
- 3.3.4.1 Improvement or development or restored land incorporating maintenance and management of infrastructure
 - 3.3.4.2 Facilitation of institutional development and capacity building.
 - 3.3.4.3 Contributing towards integrated partnerships with municipalities and other spheres of government.
 - 3.3.4.4 Contributing to strategic partnering in commercial / business operations linked to restored land and related matters.'

52. The relevant recommendation made in the 2007 memorandum, which was approved, is that a more flexible policy be applied to this grant. The need identified was to 'include a wider range of products to unpack the broad criteria indicated and to be as extensive as possible, but not limiting.' A schedule was set out identifying (not limited) uses under each heading above.³⁸

³⁸ The Schedule reads:

'1) Improvement or development of restored land incorporating maintenance and management of infrastructure to include:

- *Equipment that increases the productive value of the land (including inter alia) * implements (for pruning, tillage, sowing and harvesting) * tractors * water pumps and irrigation equipment and materials * generators * livestock equipment * electricity and water connections * beehives.*
- *Permanent improvements to the land (including inter alia) * terraces * internal roads * fences * sheds (including pack sheds, storage sheds, milking sheds etc) * boreholes, irrigation channels and dams * labour costs related to the provision of the above items.*
- *Agricultural inputs (including inter alia) * livestock (including poultry, ostriches, cattle, goats, sheep, pigs, game, bees etc) * livestock feed * chemicals (including fertilisers, pesticides, acaricides, herbicides) * seeds * veterinary medicines and vaccines * compost and other forms of manure * fuel for items under the heading: equipment that increases the productive value of the land (not for taxis*

Events since the institution of proceedings

53. Much of what transpired since the institution of proceedings was set out in the affidavit replying to the State respondents' explanatory affidavit. It is trite that a case must be made out in the founding affidavits³⁹. The content of the replying affidavit goes well beyond a reply and voluminous documentation was attached without adequate explanation.⁴⁰ Moreover, not everything alleged accords fully with the content of the annexures supplied. For example, it was not suitably highlighted in the affidavits that the Commissioner - whilst accepting and seeking to give effect to the terms of the settlement agreement – had, as at 17 February 2021, informed the BBK CPA's attorneys that after considering the application and reviewing the files, the Commission had established that there is a discrepancy in the claimed amount and the amount reflected in their commitment register.

etc) * electricity and water accounts that are directly related to the agricultural production cycle (electricity and water accounts related to the running costs of legal entities are not included here.)

- *Purchases or payment that are unacceptable (including inter alia)* * running costs of a legal entity, * payment for advisory services (these payments in any case can be made from other Department funds) * payment of security guards hired to protect land that has been transferred but not occupied.

2) Facilitation of institutional development and capacity building for beneficiaries (including inter alia)

- * Setting up an office for the landholding entity and the business entity
- * Formal relevant training for leadership
- * Mentorship programmes
- * Skills development / transfer plans and / or projects
- * Project management training and mentoring
- * Business management training and mentoring
- * Internship programmes.

3) Contributing towards integrated partnerships with municipalities and other spheres of government (including inter alia):

- * Internal services for roads, water, electricity and as defined in the business plans
- * On-site basic infrastructure
- * Defined operational cost as per business plan

4) Contribution to strategic partnering (including inter alia)

- * Payment of claimants' share of the loan
- * Capacity building for claimants for strategic involvement in partnership
- * Advisory and other relevant specialised services.'

³⁹ Director of Hospital Services v Mistry 1979(1) SA 626(A) at 635H – 636F.

⁴⁰ For the correct approach, see Swissborough Diamond Mines (Pty) Ltd and others v Government of the Republic of South Africa and others 1999 (2) SA 279 (T) at 324F-325C and Minister of Land Affairs and Agriculture and others v D & F Wevell Trust and others 2008 (2) SA 184 (SCA) at para 43.

54. Nevertheless, it can be accepted for purposes of these proceedings that one of the outcomes of the engagement between officials of various State respondents and the BBK CPA's attorneys after institution of proceedings was the convening of a special meeting of the General Council of the BBK CPA on 23 April 2021. At this meeting a plan styled an 'action and financial plan' was purportedly approved. The action and financial plan entailed requesting the release of the full amount of the claimed funds to the BBK CPA to be managed with the assistance of a fund manager. The following is then recorded:

'3. That the formation of the village committees, which consists of the members of the General Council, are the full representation of all the beneficiaries and verified members of the association within in (sic) the 32 villages of the BBK Community in terms of section 4 and section 11.1 of the BBK Constitution. Furthermore, that a process of the verification of the 3461 individual households was conducted and concluded and set out in the settlement agreement dated 23 October 2006. Consequently, that the verification of the households is therefore, effectively implied through the existence of the General Council in terms of section 25 of the BBK Constitution, which was also verified at the General Council meeting which took place on 23 April 2021.

4. That the BBKCPA is mandated by the households in the 32 villages through the general council to utilise the funds for the benefit of the community at the discretion of the CPA.

5. That the BBKCPA has appointed experts to assist the association with its business and financial plans.

6. That the intention is to use the payment mostly for investment purposes so that the BBK CPA can generate a sustainable income to facilitate the establishment of social upliftment programmes and infrastructure etc.'

55. A framework for the immediate, mid-term and long term development objectives and plans was set out as follows:

	Item	Brief Summary	Estimated amount
	Short Term		

1.	Acquisition of game drive vehicles	This includes the purchase of tracking systems for the vehicles. These vehicles will be used to generate sustainable revenue streams in the Pilanesberg National Park from activities such as game safaris and drives. NB Subject to comprehensive due diligence.	R13 417 027.81
2.	Social Intervention	This is to assist the community with ad hoc food distribution, Covid 19 relief funds and any other needs of distressed community members.	R500 000.00
	Medium – Term		
3.	Fund Management	This fund shall be set aside with medium investment risk exposure. This means an investment portfolio of a mixture of a low-risk fixed income as well as equity exposure.	R14 500 000.00
4.	Operating expenses	This is mainly to cover the operational costs of the CPA which are inclusive of the general operating expenses of BBKCPA over a period of 12 months, payments to creditors, legal, accounting, tax, auditing and other professional expenses incurred and that will be required as to the association continues with its pursuit to acquire all the BBKCPA properties and the related title deeds.	R22 527 854,39
	Long term		
5.	Equity	Acquisition of a 25% equity stake in the hospitality industry within the Pilanesberg National Park NB Subject to comprehensive due diligence	R24 000 000.00
	TOTAL		R74 444 882.20

56. The reference to operational expenses in paragraph 9.2(b) above is a reference to item 4 in the table above.

The questions for determination

57. I now return to the two issues requiring the Court's determination by way of appropriate declaratory relief foreshadowed in paragraph 9 above. This requires

interpretation of clauses 10 and 11 of the settlement agreement and section 42C and 42D of the Restitution Act.

58. The Constitutional Court has pronounced on the approach to be followed when interpreting the Restitution Act in *Goedgelegen Tropical Fruits*,⁴¹ and I do not repeat the full content of the relevant paragraphs. Suffice to emphasise that the Restitution Act is 'remedial legislation umbilically linked to the Constitution'⁴² and to highlight the role in the interpretative process of text, context and purpose having regard to section 25(7) of the Constitution.⁴³

59. The law relating to the interpretation of documents was expressed in *Endumeni Municipality* as follows:

'Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the

⁴¹ *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* [2007] ZACC 12; 2007 (10) BCLR 1027 (CC); 2007 (6) SA 199 (CC) at paras 51 to 55.

⁴² *Goedgelegen Tropical Fruits* supra n 35 at para 53.

⁴³ Section 25(7) provides: 'A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.'

parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.⁴⁴ (Footnotes omitted.)

The first issue – financial compensation

60. The first question requiring resolution by appropriate declaratory relief is whether the financial compensation of R29 539 021.10 is payable to the applicant to be used for any lawful purpose of the BBK CPA as the applicant contends or the 3461 verified households who make up the claimant community (either directly or via the applicant) as the State respondents contend. Mr Mathebula, for the State respondents, contended further that if the compensation is to be paid to the BBK CPA, it must be then either be distributed to individual households or their consent must be obtained to use the funds for the lawful purposes of the BBK CPA or any specific collective purpose. The settlement agreement is not a model of clarity,⁴⁵ which is unfortunate given the remedial purposes of the Restitution Act and its consequential importance to those intended to benefit from it. Matters are not assisted by the length of time that has passed since the settlement agreement was concluded.

⁴⁴ Natal Joint Municipal Pension Fund v Endumeni Municipality 2012(4) SA 593 (SCA) at para 18 cited with approval by the Constitutional Court in Airports Company South Africa v Big Five Duty Free (Pty) Limited and Others [2018] ZACC 33 at para 29. See too Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk [2013] ZASCA 176; [2014] 1 All SA 517 (SCA); 2014 (2) SA 494 (SCA).

⁴⁵ Even a cursory comparison with the facts of other cases that have resulted in reported judgments illustrates the point. See for example Concerned Land Claimants Organisation of Port Elizabeth v Port Elizabeth Land and Community Restoration Association and Others [2006] ZACC 14; 2007 (2) SA 531 (CC); 2007 (2) BCLR 111 (CC) at para 25 and Mangangeni Emmaus Westmead Returners Community Trust & others v Minister of Rural Development and Land Reform & others [2012] JOL 29096 (SCA).

61. I have concluded that on a proper construction of the settlement agreement, the financial compensation is payable to the individual households via the BBK CPA, which holds it on their behalf, and accordingly if it is to be used for the lawful purposes of the BBK CPA, or any specific collective purpose, then their consent must be duly obtained. That consent may, however, be obtained by duly following the BBK CPA processes for obtaining the beneficiaries consent.

62. The starting point is the language used. Clause 10 is quoted above. It requires the Minister to make 'a payment' in a globular amount. The agreement is concluded with the BBK CPA and was concluded by Mr Motshegare (then Chairperson) 'for and on behalf of the Bakgatla ba Kgafela Community.' This strongly suggests that the payment is to be made to the BBK CPA itself. However, the payment is 'to be determined per verified household'. The word 'per' can be used in different ways,⁴⁶ but the syntax, and specifically the fact that the words 'verified household' appear immediately afterwards, suggests that it means 'for each'. Following this approach, the compensation is determined by dividing the globular amount by the number of households, with the BBK CPA then holding that amount on behalf of each household.

63. That approach accords with the broader context of the settlement agreement. Where awards are destined for the BBK CPA, the agreement says so expressly. Thus clause 9 expressly records that title in the claimed land will vest in the BBK CPA. Clause 11, which deals with the restitution and development grants, records that they will be paid to the BBK CPA to be used for planning and development

⁴⁶ The New Shorter Oxford Dictionary (Clarendon Press, 1993 ed, vol 2, p 2154) defines 'per', *inter alia*, as follows: 1. Through, by means of; 2. In the direction of; 3. By means of, by the instrumentality of, in accordance with; 4) For each, for every.

purposes. This reinforces the conclusion that the compensation is determined for each household to benefit.

64. In my view the approach also accords with the purpose of the compensation as restitution which is, at least in part, ‘to provide redress to those individuals and communities who were dispossessed of their land rights by the government because of the government’s racially discriminatory policies in respect of those very land rights.’⁴⁷ It difficult to see in the context of this case and the provisions of the settlement agreement how the objectives of section 42D(2), cited above,⁴⁸ can be achieved unless the settlement agreement is interpreted in this way.⁴⁹ In arriving at that conclusion I am mindful that the settlement agreement is, save for clause 10, silent on the financial compensation and am of the view that section 42D(2) must require that all community members have meaningful access to the compensation.

65. In *Endumeni*, the SCA expressly endorsed a consideration of the material known to those responsible for the settlement agreement. In this case that material – at least of which the Court is apprised – is limited and consists of primarily the CPA Constitution.⁵⁰

66. The BBK CPA is material for two reasons. First, while there is nothing in the CPA Constitution that deals expressly with financial compensation awarded under the Restitution Act, there is no impediment to the CPA receiving funds of this sort

⁴⁷ *Alexkor Ltd and Another v Richtersveld Community and Others* [2003] ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) at para 98.

⁴⁸ At para 16.

⁴⁹ Cf *Baphuting Bo Seleka Community v Borakologadi Communal Property Association and Others* [2017] ZALCC 7 (21 June 2017) at para 25.

⁵⁰ The November 2000 memorandum would also have been available to at least some of the parties.

whether for distribution or use for its primary or secondary objectives. Clause 4.2 allows the BBK CPA to acquire property (movable or immovable) in its own name for the benefit and on behalf of its members. In my view, it can accordingly receive property under a *stipulatio alteri* for the households. Secondly, it was known at the time the settlement agreement was concluded how the CPA would take collective decisions. Importantly, the ultimate authority of the CPA resides in a General Council which derives its mandate from the households in its 32 villages. It is made up of representatives of committees from each of the 32 villages.⁵¹ This means that when the settlement agreement was concluded, it was known that ultimate authority resides with a decision-making structure that represents the land claimants and is constituted to enable the participation of each household, through the village committees and the General Council. If lawfully and fairly conducted, this would entail a process requiring, amongst other things, active engagement, based on adequate information and fair notice, not only of the General Council but of the village committees themselves where the views of households would have to be lawfully and fairly ascertained.

67. The financial compensation is dealt with in the 2008 amendment. That document was not to hand to those apprised of it at the time the settlement agreement was concluded in 2006. Yet on the facts of this case, it remains useful as a guide to its interpretation because it reveals the applicable government policy for determining compensation and in turn, how the initially approved compensation amount was to be determined, this being the sum of R18 815 587.50. This also accords with the interpretation I have given clause 10. The first relevant portion of the 2008

⁵¹ Clause 11.1.

amendment is paragraph 2.5 where the current policy / practice in 'conservation claims' is explained. Specifically, it is noted that in most of these cases, claimants agree to restoration in title but not physical restoration. In lieu of the loss, 'each claimant household will be compensated financially in addition to grants being allocated.' In paragraph 2.6, the following appears:

'2.6 The value of the claimed properties has been determined through a comparative approach based on the fact that grazing land for game farming within Pilanesburg Nature Reserve is currently valued at R15 000 per ha. The total number of hectors (sic) of the properties cited above will be multiplied by the value per hector (sic) to get the total current market value of the said properties. ...'⁵²

68. The second relevant portion, paragraph 3.2 of the 2008 amendment, is fully quoted in paragraph 37 above. It appears from this paragraph that the initially approved amount is 25% of the value given to the property itself. At the end of the table reflecting the financial implications, what then appears is what each household will then receive, specifically R5 436.45, which is arrived at by dividing the globular figure by the number of households. Now that the globular approved figure is R29 539 021.10, as reflected in the settlement agreement itself, the amount per household would come to R8 534,82.

69. Once it is accepted that the financial compensation is meant for the verified households, albeit paid via the BBK CPA, it follows that it can only be used for the general lawful purposes of the BBK CPA with their consent. The question that then arises is whether it is competent for the General Council of the BBK CPA to decide, via its ordinary processes, to use the financial compensation for such purposes or

⁵² See paragraph 37 above.

whether the consent of each household must be obtained to do so. Both the BBK CPA Constitution and the settlement agreement are silent in this regard. In my view, following the approach in *Endumeni*, it is competent for the General Council of the BBK CPA to decide to use the financial compensation for its general lawful purposes or a specific collective purpose provided the use benefits all households meaningfully. First, the absence of any specific process for dealing with financial compensation in either the BBK CPA Constitution or the settlement agreement suggests that the usual processes should be followed when a decision of this sort must be taken. Second, as mentioned, it was known when the settlement agreement was concluded that ultimate authority resides with a decision-making structure that represents the land claimants and is constituted to enable the participation of each household, through the village committees and the General Council. Third, this is a sensible meaning to give to the agreement concluded on behalf of the community, and avoids potentially chaotic results should some households seek to use the compensation for collective purposes and others not.

70. However, I must emphasise that this does not mean that the resolution taken by the General Council on 23 April 2021 to use the household's financial compensation for collective purposes, stated or otherwise, is a lawful one either procedurally or substantively. That is not properly before me.⁵³ In any event, the Court is not in a position to make that decision, not least because it is not known whether the households were duly and adequately informed of the proposed

⁵³ *Fischer and Another v Ramahlele and Others* [2014] ZASCA 88; 2014 (4) SA 614 (SCA); [2014] 3 All SA 395 (SCA) para 13, affirmed by the Constitutional Court in *Public Protector v South African Reserve Bank* [2019] ZACC 29; 2019 (6) SA 253 (CC) para 234.

decision and no information has been provided as to how households were engaged at village committee level.

The second question

71. The second question is whether the Minister may lawfully refuse to make payment of the restitution and development grant in three circumstances, which I deal with in turn. In this regard, the State respondents' intention is to perform in terms of the agreement, not to withhold payment, which it wishes to make. However, it wishes to ensure that the funds will be used for lawful purposes in circumstances where they are not satisfied that the action and financial plan that the General Council approved on 23 April 2021 complies with the applicable legal requirements. In my view, they are both obliged and entitled to perform their statutory duties and exercise their contractual rights in a manner that ensures that these funds are used for their intended statutory and contractual purposes.⁵⁴

72. The first concern is that it is intended that the financial compensation is to be used for the general purposes of the CPA and not distributed to the verified households. The second concern is that the applicant intends to use a portion of the funds to pay for operational expenses of the BBK CPA as reflected in item 4. The third concern is that this includes payment of professional fees including, specifically, legal fees incurred (on contingency) to secure the implementation of the settlement agreement, professional fees to prepare the development plan and forensic investigators.

⁵⁴ Clause 11(3)d of the settlement agreement.

73. Three preliminary issues need to be highlighted.

74. First, the restitution and development grants are released following the approval of a submitted application as set out in the guidelines and procedures relating to the grants. The settlement agreement expressly contemplates such an application process. While the status of the application process has not been fully detailed in the affidavits before the Court, it appears from what has been supplied that that process is not yet wholly completed, but is intended to be completed after delivery of this judgment in light of any declaratory relief granted on the disputed issues. But this has important consequences for the scope and nature of any declaratory relief that can appropriately be granted. Specifically, the relevant state functionaries enjoy a degree of discretion when approving funding applications and the administrative process for finalising the release of the funds is yet to be completed. It is not for this Court to substitute that decision. Accordingly, the declaratory relief I grant is designed to seek to resolve the disputes between the parties but not fetter the discretion that vests in the relevant state functionaries. Ultimately it is for the relevant state functionaries to decide what grants should be approved for what purpose having regard, amongst other things, to the overall needs of the BBK CPA in context of their land claim, its history and restitutionary objectives.

75. Second, the exercise of this Court's power to grant declaratory relief is discretionary.⁵⁵ In circumstances where the issues for determination by the Court

⁵⁵ Section 22(1)(cA). *Blaauwberg Municipality v Bekker and others* [1998] 1 All SA 88 (LCC) at para 16.

were narrowed via a court-directed case management process, and certain information obtained by the exercise of inquisitorial power, caution must be exercised. As appears below, I have concluded that only limited declaratory relief should be granted in respect of the second issue due to the pleadings⁵⁶, the absence of adequate information and argument on certain issues. In addition, the application process for the restitution and development grants remains inchoate. In this regard, the parties have approached the case management process on the basis that they have supplied the Court with the information and submissions that they intend to. To the extent necessary, however, I have made provision in my order for the parties to approach the Court on the same papers supplemented where necessary for further relief.

76. Third, in my view, the State's duties to pay must be approached on the basis that the total amount payable is made up of three amounts: RDGs and SPGs (now the composite RSG), the section 42C grant and the financial compensation, each subject to legal requirements. In turn, if the requirements in respect of one amount are met, that amount can be released even if the requirements in respect of another amount have not been met.

77. This addresses the first concern as the restitution and development grants, as approved, may be released independently of the financial compensation. Whether or not this is desirable is a separate question for the BBK CPA. However, it is obvious that the maximum amount that is subject to a live controversy is the R22 527 854,39 designated for operational expenses. This is less than the amount due as financial compensation.

⁵⁶ See Fischer above fn 53.

78. The second concern relates to the use of the restitution and development grants for these operational expenses. In my view, section 42C of the Restitution Act does not impose any impediment to the use of a grant made under that section for the general operational expenses of a communal property association provided that the funds are used for 'the development or management of, or to facilitate the settlement of persons on, land' that is the subject of a section 14(3) or 42D agreement. The term 'management' in my view would include the operational expenses of a communal property association to the extent that they are directed at the management of restored land.

79. There is, however, insufficient information supplied to the Court to determine whether the specific operational expenses are so directed. It is thus unfortunate that the applicant elected to provide the Court with only limited information regarding its intentions, the Court was not supplied with Annexure F to the CPA Constitution and the parties failed to comply with the Court's directive in paragraph 5 of the 10 March 2022 directives. Nevertheless, what is clear is that such funds must be directed at the management of land restored pursuant to the settlement agreement and not other land and it must be directed at the management of the land.

80. However, while section 42C does not present an impediment to using funds for management purposes, it is apparent from the current guidelines and procedures that running costs of a legal entity and payment for advisory services are not

regarded as acceptable payments.⁵⁷ This Court has not been informed whether that approach is rigidly adhered to or not, and for what reasons, and in any event the application process is inchoate. In all the circumstances, it would not be appropriate to grant declaratory relief in respect thereof.

81. To the extent that the BBK CPA intends to resort to the RSG for payment of operational expenses, this Court is similarly not in a position to grant appropriate declaratory relief.

82. The third concern relates to the use of the restitution and development grants for purposes of certain professional fees being legal fees incurred on contingency to secure the implementation of the settlement agreement, professional fees to prepare the development plan and forensic investigators.

83. In my view, section 42C poses no legal impediment to the use and approval of a section 42C advance or subsidy for purposes of preparing a development plan. That is expressly contemplated by the section, specifically section 42C(2) cited above.⁵⁸ I am not however persuaded that a section 42C advance or subsidy can lawfully be approved or used to pay legal fees that may be owed to enforce the settlement agreement. While certain legal fees may comfortably fall within the purview of a section 42C grant or subsidy, this expenditure does not serve the 'development or management of, or ... the settlement of persons, on [restored land]'. While notionally, forensic fees might fall within the scope of 'management'

⁵⁷ See item 1 of the Schedule quoted in fn 38 para 52 above.

⁵⁸ See paragraph 50 above.

of restored land, there is insufficient information before the Court to determine whether the forensic fees incurred in this case fall within that category.

84. As regards the RSG grant, the Court has not been adequately apprised of the statutory basis for the grant or indeed if it is also approved pursuant to section 42C or another law. Accordingly, this Court is not in a position to grant appropriate declaratory relief in respect thereof.

Interest and costs

85. The applicant sought relief in the form of interest from the date of demand for payment. In light of my conclusions above, that case has not been made out.

86. In my view, each party should carry its own costs to date. Although the applicant has stridently criticised the State respondents for their conduct both prior to and during the litigation process, the criticism is in my view overstated. The settlement agreement was concluded many years ago and the delay in its enforcement is disquieting. However, on the information supplied, internal divisions within the BBK CPA itself and related litigation have contributed to the delays. I have expressed my disquiet about the agreement being concluded in circumstances where the underlying approvals had not been obtained. But when regard is had to the correspondence both prior to the litigation and the process that ensued when the parties sought to settle the litigation, it strikes me that the State respondents have genuinely sought to resolve matters by seeking the outstanding approval and furthering the restitution and development grants that required to be processed by application. Moreover, it was the State respondents who emphasised the need for a meeting of a General Council to be convened. Whatever its status, no such

meeting had been convened before the proceedings were instituted. As indicated above, but for the case management process, the applicant would not have been entitled to the relief initially sought and the State respondents have raised valid concerns. On the other hand, neither party's conduct either during the litigation and the case management process is without criticism.

Order

87. I make the following order:

- 87.1. It is declared that R29 539 021.10 is owing and payable by the Minister to the applicant as financial compensation in terms of section 42D of the Restitution Act pursuant to the 2006 settlement agreement which funds are to be held on behalf of and for distribution to the 3461 households comprising the membership of the applicant.
- 87.2. The BBK CPA may not use the financial compensation for the general or any specific purpose of the CPA unless the 3461 households consent thereto, which consent may be obtained through the BBK CPA's General Council.
- 87.3. Unless the BBK CPA requests otherwise, the financial compensation must be paid to the BBK CPA within 30 (thirty) days of this order, failing which interest shall be paid at the prescribed rate from that date to date of payment.

88. In respect of payment of subsidies or advances to be made to the BBK CPA in terms of section 42C of the Restitution Act it is declared that:

88.1. No payment may be authorised or used for purposes of paying legal fees in terms of a contingency fee agreement concluded by the applicant for purposes of enforcing the settlement agreement.

88.2. Payment in terms of section 42C of the Restitution Act may be authorised or used for purposes of paying the costs of the development plan.

88.3. Payment in terms of section 42C of the Restitution may only be authorised or used to pay for the forensic investigation to the extent that the investigation was conducted for purpose of managing the land restored in terms of the 2006 settlement agreement.

89. The parties are granted leave to approach the Court on the same papers supplemented where necessary for any further relief.

90. There is no order for costs.



JUDGE S COWEN
Land Claims Court

Date of conclusion of court-directed case management process: 14 April 2022

Date of judgment: 8 July 2022

APPEARANCES:

Applicant: Mr Ramaila instructed by Avela Nontso Attorneys Inc

State respondents: Mr Mathebula, State Attorney, Pretoria