REPUBLIC OF SOUTH AFRICA

IN THE LAND CLAIMS COURT OF SOUTH AFRICA
HELD AT PAULPIETERSBURG AND RANDBURG

Case Number: **LCC 75/2009**

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

14 January 2025 _____
DATE SIGNATURE

In the matter of:

WELVERDIEND COMMUNITY Plaintiff

and

MINISTER OF RURAL DEVELOPMENT AND LAND REFORM First Defendant

TANNENBERG TRUST Second Defendant

ESTATE LATE MANDLA ALMOS MBATHA Third Defendant

REGIONAL LAND CLAIMS COMMISSIONER,

KWAZULU-NATAL Fourth Defendant

concerning:

Land described by the Welverdiend Community ("Claimant Community"). At the time of dispossession, as comprising areas: Mahulumbe (Welverdiend No. 2193) situated in the eDumbe Municipality, KwaZulu-Natal.

JUDGMENT

YACOOB J:

Introduction

[1] This matter has a long history before this court, and the nature of the claim has, over time, changed its shape. The plaintiff community ('the community') initially sought the restoration of land in terms of the Restitution of Land Rights Act, 22 of 1994 ('the Restitution Act'), of which it claimed that it had been dispossessed. The restoration was opposed by the current owners of the land (the second and third defendants).

[2] After the first hearing of the matter, in March 2020, and an inspection *in loco*, the matter was set down again for hearing in March 2022. At that point, the community elected to relinquish its claim for restoration, and to seek only monetary compensation. This meant that the second and third defendants were no longer part of the proceedings. It also meant that, although the trial was originally to be heard with an assessor, an assessor was no longer necessary.

[3] The matter was postponed for the remaining parties, that is, the community on the one hand, and the first and fourth defendants on the other (I shall, for simplicity's sake, simply refer to the defendants, as both the first and fourth defendants are part of the state, have the responsibility of dealing with restitution claims and shared legal representatives in this matter), to submit a stated case on which the matter may be decided, and for the defendantsto undertake a verification process, to determine which who exactly was part of the community and who was entitled to compensation. There was some back and forth between the defendantsand the community on this process, and a final agreed verification was completed and submitted late in 2023. Further legal submissions were filed between September 2023 and April 2024.

[4] There is now no dispute between the defendantsand the community on whether the community is entitled to compensation, or on the identity of those entitled to compensation. The only dispute now between the community and the commission on the merits is whether the members of the community are entitled, in addition to compensation in accordance with the defendant's Financial Compensation Policy, to further compensation, or *solatium*, for the trauma and humiliation suffered by the members of the community. The community seeks an award in *solatium* of R5 million per household.

[5] In its initial written submissions to this Court, in March 2022, the defendantsraised the point that the claim for *solatium* was not pleaded by the community. It was never part of the issues dealt with by the parties and was never properly canvassed. The defendantscontends that the claim for *solatium*, which suddenly made its appearance in the stated case submitted in 2022, is no more than an afterthought. The first time an amount for *solatium* is quantified is in the community's heads of argument, and there is no real attempt to substantiate the amount claimed.

[6] Despite the various delays and developments since that date, and the opportunities given to the community to make further submissions, particularly with regard to the question of *solatium*, the community made no effort to deal with the point that the claim was never pleaded. Nor was any attempt made to formally amend the pleadings.

[7] Nevertheless, it is clear to me that the claim for *solatium* appeared as a result of the community's relinquishment of the claim for restoration of the land, and as a balancing measure. The defendants have had the opportunity to deal with the claim and I am therefore entitled and obliged consider it properly.

[8] The facts in this matter are not in dispute. Members of the community were made to unceremoniously leave their homes and the land on which they lived and subsisted. They were threatened with imprisonment if they did not comply, and their livestock and ploughing equipment were impounded to enforce compliance. It is common cause, and is in fact indisputable, that they suffered emotional and

physical trauma, and were not treated in a manner that would be acceptable in a society based on the values of dignity, equality and freedom.

[9] The claimants rely on the judgment of the Land Claims Court in *Baphiring Community v Uys*,[1] in which the court reaffirmed that fair compensation would, in certain circumstances, include "solace for emotional distress".[2] The principle of including an amount for *solatium* in the consideration of fair compensation was considered in detail in *Hermanus v Department of Land Affairs*.[3] This was again confirmed by the Supreme Court of Appeal in *Haakdoornbult Boerdery CC v Mphela* ('*Mphela'*).[4] The basis for the inclusion is the factors listed in s 33 of the Restitution Act, which, as pointed out by the Court in the *Hermanus* judgment, include factors not listed in s 25(3) of the Constitution.[5]

[10] The SCA in *Mphela* also sets out the importance of ensuring that, although a generous approach must be taken and there is not a strict mathematical calculation of compensation, the result of the award is not over-compensation.[6]

[11] I requested the parties to make submissions on whether the Financial Compensation Policy, on which the defendants rely to determine the amount it is now common cause each family should be awarded as a minimum, includes in its calculation of the amount a consideration of the fact that, in most instances of dispossession for which restitution may be claimed in this Court, there is almost inevitably trauma and humiliation which would justify some kind of claim for *solatium*.

[12] The response from the defendants was simply to refer to and proffer interpretation of the existing policy. Examination of the policy reveals that it deals primarily with compensation with reference to historical valuation and the factors listed in section 25(3) of the Constitution, although it makes passing reference to section 33(eB) of the Restitution Act, which requires "the hardship caused" by the dispossession to be taken into account. The historical valuation method

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[1] 2007 (5) SA 585 (LCC)
[2] At para [15].
[3] 2001 (1) SA 1047 (LCC) at paras 15-27.
[4] [2008] 7 BCLR 704 (SCA) at [48].
[5] Constitution of the Republic of South Africa, 1996.
[6] At para [60]

espoused by the policy requires a determination of market value, followed by an adjustment by taking into account section 25(3) of the Constitution. It does not require adjustment taking into account factors listed in s 33 of the Restitution Act.

[13] The upshot is that the Financial Compensation Policy deals with financial compensation for loss of a right in land of one kind or another, calculated with specific reference to the financial value of the loss. It does not comprehensively consider "equitable redress" as contemplated in section 25(7) of the Constitution, or the Restitution Act, in particular in the factors to be considered by the Court in s 33.

[14] The unavoidable conclusion is that the Policy did not, and does not, include in its considerations the "hardship caused" by a dispossession. It would therefore be open to a claimant accepting an award in terms of the Policy to claim, and if the claim is found to be established, to be awarded, an amount for *solatium*.

[15] At the same time, the very existence of the whole scheme of restitution is based on an acceptance and acknowledgment that dispossession as a result of racially based laws and practices necessarily caused hardship, humiliation and trauma, especially to those people who did not have registered rights in land and whose rights were simply not acknowledged as worthy of legal or moral consideration. This is evident in the fact that the Restitution Act was enacted to facilitate equitable redress to people who suffered dispossession as a result of racially based laws and practices, and in the factors a court must consider in terms of s 33 of the Act, which include "the desirability of remedying past violations of human rights",[7] "the requirements of equity and justice",[8] and any other factor the Court considers relevant.[9]

[16] In my view, the obligation of the Court to look at these factors demonstrates that in some cases, the levels of trauma and humiliation suffered by the affected people would be beyond what might have been contemplated as "ordinary" levels of suffering which could be catered for by simple mathematically calculated awards. It must be acknowledged too, that the idea that certain levels of trauma

[7] Section 33(b).
[8] Section 33(c).
[9] Section 33(f).

and humiliation must be considered to be "normal" is a demonstration of the unacceptable nature of what it was commonplace to expect people to tolerate before the advent of the constitutional democracy.

[17] It ought by now to be trite that an award for *solatium* is intended not to be something from which a claimant can profit. It is intended as an acknowledgment of a wrong, and a nominal token of apology. The Commission referred the court to a judgment of the Constitutional Court, *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd*.[10] In that judgment, Moseneke DCJ emphasised the character of a claim for equitable redress, although in the context of determining how causation should be determined:

> "The claim is against the state. It has a reparative and restitutionary character. It is neither punitive in the criminal law sense nor compensatory in the civil law sense. Rather, it advances a major public purpose and uses public resources in a manifestly equitable way to deal with egregious and identifiable forms of historic hurt."[11]

[18] The defendants relied also on the *Hermanus* case (above), to submit that the award must balance the interests both of the claimant and the community from which the award will be financed (i.e. the fiscus), and that the reparation has symbolic significance but is not intended to be complete compensation for emotional suffering.[12]

[19] On balance, in the circumstances of this case, my view is that the emotional suffering that it is common cause was and continues to be experienced by the claimants is sufficient to justify some additional award as *solatium*, as an acknowledgment of that suffering. But that award must be only a nominal amount, to show that the suffering was and is not invisible, and not an amount intended as compensation for suffering.

[20] Certainly, the amount claimed, and not substantiated, by the claimants in their written argument, of R5 million per household, is excessive. That is an amount intended to make a substantial difference in the lives of the people who receive

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[10] 2007 (6) SA 199 (CC); 2007(10) BCLR 2027 (CC) (wrongly referred to in the written submissions as *Baphiring Community v Uys and Others*).
[11] At para [68].
[12] *Hermanus v Department of Land Affairs*, above, at para [33].

it, and would have been an excessive amount even if it was an award in a delictual claim. It is also more than ten times the amount of the award each household is entitled to in terms of the Policy, for the main compensation award. There is no basis on which this is appropriate.

[21] The cases referred to by the claimants in support of the claim are all delictual claims, by individuals. They are not community claims, and are not made in the context where there is already a valid and undisputed claim for an amount of financial compensation. They do not find application in the context of this matter.

[22] The claimants also make a claim for "special damages in respect of loss of livestock and ploughing equipment associated with *solatium*", of R4 364 148, but that claim is also not pleaded. The fact that there is evidence about those damages in the expert reports goes towards the financial valuation of the main compensatory claim, and not the *solatium* claim. In my view there is no basis to include that head of damages in the consideration of *solatium*.

[23] The amount awarded for solatium in the *Hermanus* case was R6 000, and this was in 2000. The value of that award today is approximately R20 000. Taking into account that an award is not just intended to be a mechanical calculation, and that there was only a single claimant in *Hermanus*, I find that an appropriate amount per household for an award of *solatium*, as a nominal amount acknowledging the hurts and indignities suffered, would be R15 000 per household. As there are 54 households, the total amount of that award would be R810 000.

[24] It remains to consider costs. A great deal of the delays in this case were caused by disputes and confusion about the costs of the claimants. At first the litigation was funded by the defendant. Then the defendants concluded an agreement with Legal Aid South Africa that it would handle the representation of claimants on behalf of the defendant. I was informed that as a consequence of this agreement the defendant's budget for legal representatives for claimants was apparently also handed over to Legal Aid South Africa. In order to benefit from representation funded by Legal Aid South Africa, the claimants would have had to change legal representatives mid-litigation, because the claimants' attorneys

were not accredited service providers with Legal Aid South Africa. The claimants then elected to enter into a contingency fee agreement with their representatives.

[25] The defendants objected to the contingency fee agreement on the basis that, according to them, it amounted to double-dipping. According to the defendant, Legal Aid South Africa would provide the requisite legal representation and there was no basis on which the contingency fee agreement could be countenanced.

[26] After much to-ing and fro-ing, after it became clear that the claimants' chosen representative was not accredited with Legal Aid South Africa, and that the claimants, not unreasonably, wished to continue with their chosen representatives, I ruled that the claimants had the right to choose to conclude a contingency fee agreement and continue with their existing legal team. The defendants conceded that there was no evidence of double dipping, but that the impression had arisen out of a misunderstanding of the situation.

[27] As a result of the confusion, the experts employed by the claimants after Legal Aid South Africa became the defendant's agent in arranging legal representation, have been paid for by the claimants' attorneys, and those costs must be included in the costs order.

[28] The contingency fee agreement was submitted to court and is consistent with the Contingency Fees Act,[13] save that the amount that may be paid to counsel in terms of the agreement is not subject to the limit of a maximum of 25% of the value of the claim. This is clearly an oversight, as the amount paid to counsel cannot be unlimited. In addition, it seems to me that to allow separate limits for each legal practitioner would unnecessarily erode the value of the award received by the claimants. For example, if there had been three representatives, and each was limited to a maximum of 25% of the value of the claim, this could easily result in 75% of the claim award being allocated to legal costs, with 54 households then sharing only 25% of the claim. This is neither just nor equitable, and in my view is in fact inconsistent with a proper interpretation of the Contingency Fees Act.

[13] Act 66, 1997

[29] Counsel's fees must be calculated as part of the total maximum of 25% of the award which may be allocated to legal fees not covered by the costs award.

[30] It is appropriate in the circumstances that the claimants not be out of pocket for more than necessary, and therefore that the costs be taxed on an attorney and client scale.

[31] For the reasons set out above, I make the following order:

1. The following compensation is to be paid by the Minister of Rural Development and Land Reform to the plaintiff for:

1.1.	monetary compensation in respect of restitution of land rights	R17 043 369.00
1.2.	recompense for trauma, pain and suffering for all 53 households	R810 000.00
	TOTAL	R17 853 369.00

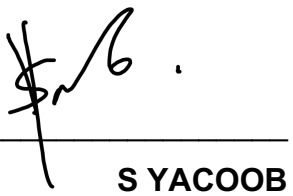
2. The total amount payable to the plaintiff in terms of paragraph 1 of this Order, be paid into the trust account of the plaintiff's attorneys of record, the details of which are as follows:

Account holder:	P S L NKAMANE ATTORNEYS
Bank:	STANDARD BANK
Account number:	051139456
Branch:	KINGSMEAD
Ref:	WELVERDIEND COMMUNITY // MINISTER FOR RURAL DEVELOPMENT & LAND REFORM, CASE NO. LCC 75/09

3. The First Defendant is to pay the taxed costs of the plaintiff including for the employment of the attorneys, Senior Counsel and the experts as from 7

February 2020 up to and including 25 March 2024, on an attorney and client scale.

4. The fees payable to the plaintiff's attorneys and counsel by the plaintiff in respect of the period of 7 February 2020 to 25 March 2024, shall be in accordance with the Contingency Fee Agreement signed on 25 March 2022 and 4 July 2022, a copy of which is annexed to this Order, marked **"WC1"**, with the proviso that the total amount that is paid towards legal fees as a whole shall not exceed 25% of the total amount awarded.



S YACOOB

ACTING JUDGE OF THE LAND CLAIMS COURT

For the Plaintiffs:	G Shakoane SC
Instructed by:	Maseko Mbatha Attorneys
For the First and Fourth Defendants	RBG Choudree SC and TSI Mthembu SC
Instructed by:	The State Attorney, Durban