IN THE LAND CLAIMS COURT OF SOUTH AFRICA

Held at **PIETERSBURG** on 20-28 July 1999 and **CASE NUMBER**: LCC26/98
at **RANDBURG** on 29 July and on 20 and 21 September 1999
before **Dodson** and **Moloto JJ** and **Plewman (assessor)**.
Handed down on 10 December 1999.

In the matter of:

KRANSPOORT COMMUNITY Claimant

Concerning

THE FARM KRANSPOORT 48 LS

JUDGMENT

DODSON J:

Introduction

[1] In this case, the "Kranspoort Community" claims restoration of a farm originally known as Kranspoort No1849 in terms of section 25(7) of the Constitution[1] read with section 2 of the

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1 Constitution of the Republic of South Africa Act 108 of 1996. Section 25(7) reads:

> "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."

Restitution of Land Rights Act.[2] I will refer to the latter Act as "the Restitution Act". References to "the farm" and "Kranspoort" are references to the farm Kranspoort as described in Deed of Grant 600 of 1906, before any subdivision, unless the context indicates otherwise. The farm lies at the base of the Soutpansberg mountain range. The current owner of the farm is "die Nederduitse Gereformeerde Kerk van Transvaal".[3] I will refer to it and the Cape-based "Nederduits Gereformeerde Kerk in Suid Afrika"[4] as "the Church", unless I specifically need to make the distinction.[5] The Church opposes the claim. So do Messrs Goosen and Venter, who have each purchased one of the two portions which now make up the farm, but who have not yet received transfer. Goosen, Venter and the Church are represented by the same legal team. The grounds on which Goosen and Venter oppose the claim and the stances which they adopt in the legal proceedings are identical to those of the Church. The Department of Land Affairs also participates in the case as an interested party. In order to understand the claim, it is necessary to provide a brief history going back to the last century.[6]

Factual background[7]

[2] On 13 November 1857, the Church decided at its Synod in Cape Town to extend its missionary work beyond the northern boundaries of the Cape Colony. A search began for suitable candidates for appointment as missionaries. An emissary of the Church visited Edinburgh and secured the services of a Scot, Alexander MacKidd. He made his way to the Cape and after that

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2 Act 22 of 1994. Section 2, in so far as it impacts on this claim, is summarised in paragraph [21].

3 The Dutch Reformed Church of Transvaal.

4 The Dutch Reformed Church in South Africa.

5 References in this judgment to "the Church" in relation to events before 1 January 1920 are references to the Cape-based Dutch Reformed Church in South Africa. References to "the Church" from 1 January 1920 onwards are references to what is now known as the Dutch Reformed Church of Transvaal. See paragraph [12]. Likewise, references to "the Mission Committee of the Church" before 1 January 1920 are references to "die Buitelandse Sending (besuiden die Sambesie) Subkommissie van die Nederduits Gereformeerde Kerk in Suid Afrika" and after that date to the equivalent committee in the Dutch Reformed Church of Transvaal. This is unless the context indicates otherwise.

6 No-one argued that the Department was not a legal entity capable of litigating and I will accordingly assume that this is the case.

7 The history as set out in paragraphs [2] to [20] is based on that part of the evidence referred to in paragraph [24] which is undisputed.

to the Transvaal (then known as the South African Republic). On arrival in the Transvaal, his attention was drawn to a law of the Republic which required that there must first be an invitation from a tribe to perform missionary work before any such activity could commence. MacKidd based himself in Rustenburg while efforts were made to solicit such an invitation.

[3] Initially he met with no success. Later his prayers were answered when, in December 1862, a letter was received from one Michael Buys (who described himself as "Kaptein der Basoetoes")[8] and fourteen other persons. It invited MacKidd to come to the Soutpansberg, settle amongst them and preach the word of God. On 20 December 1862, the letter was presented to the Executive Council of the Republic, sitting in Rustenburg, and some sort of preliminary permission was granted for the missionary work to proceed. He and his wife set off for Soutpansberg on 25 April 1863.

[4] The Soutpansberg area had been inhabited by African tribes long before the arrival of the first Voortrekkers, Loius Trichardt and Hans van Rensburg, in the 1830's. These included, principally, the BaVenda, the Shangaans and the BaSotho. This was the setting when the MacKidds arrived in Soutpansberg in May 1863. On their arrival, they stayed with a certain Lottering family. The Lotterings "gave"[9] the MacKidds a farm, Goedgedacht, on which to establish a mission station. MacKidd was concerned about the adequacy of the water supply at Goedgedacht. He therefore bought an adjacent farm, known as Kranspoort, from the Lotterings out of his own pocket. Kranspoort had a better water supply. The MacKidds proceeded to the kraal of Michael Buys on 22 May 1863. MacKidd then set about regularising the Church's legal position. On 2 November

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8 Michael Buys was one of the sons of Coenraad de Buys. It would appear that Coenraad de Buys was the first white settler to reach the area. He had various wives from amongst the indigenous population. Malunga *A Century of Dutch Reformed Church Missionary Enterprise in the Soutpansberg Area - The Story of Kranspoort* (unpublished thesis submitted in fulfilment of the requirements for the degree of Master of Arts in the Department of History in the Faculty of Arts, University of the North, 31 January 1986) at 2; Maree *Lig in Soutpansberg: Die Sendingwerk van die Nederduitse Gereformeerde Kerk in Noord-Transvaal* (Sinodale Sendingkommissies van die Noord- en Suid-Transvaalse Streeksinodes van die Nederduitse Gereformeerde Kerk, Pretoria 1962) at 42 to 45.

9 This did not mean that they obtained title. See paragraph [9].

1863 he eventually received formal and final permission in terms of section 8 of the constitution[10] of the South African Republic to carry on his missionary work.

[5] On 24 January 1864, the MacKidds moved their missionary activities from the kraal of Michael Buys to the farm Goedgedacht which they had been "given". The activities at the new mission station involved the running of both a church and a school. Although Michael Buys was a "coloured" person, there were, according to the records, indigenous people, who were members of his kraal, living at Goedgedacht.

[6] On 6 February 1865 a young religious instructor, Stephanus JG Hofmeyr, arrived at Goedgedacht to assist MacKidd. His arrival was timely, because MacKidd passed away on 30 April 1865, a year after his wife had suffered a similar fate. In his will, MacKidd bequeathed both the farms Goedgedacht and Kranspoort in their entirety to the Mission Committee of the Church -

> "to be used . . . in all time coming . . . as a Mission Station for the spreading of the glorious Gospel of Jesus Christ among the poor Heathen".[11]

[7] Hofmeyr took over from MacKidd as missionary in 1865. Later that year, tension developed between the white settlers in the area and the Buys group on the one hand and the BaVenda on the other. This resulted in the mission station being abandoned and ultimately ransacked. The mission station was temporarily re-established on a farm called Noem-Noem Draai in an area known as Maletseland. After a short time there, however, Hofmeyr returned to the Cape to attend to his ailing health. He also wished to become ordained and to find himself a wife. All three goals were accomplished and he returned to the Soutpansberg, arriving at Noem-Noem Draai in October 1867. He persuaded the Church to buy this property and renamed it Bethesda.

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10 The relevant part of section 8 read:

> "Het volk laat de uitbreiding van het Evangelium toe onder de heidenen, onder bepaalde voorzorgen tegen gebrek of misleiding."

Loosely translated, this means:

> "The people permit the spreading of the gospel among the heathen, subject to particular precautions against fault and deception."

11 Maree above n 8 at 59.

[8] In 1871, the mission station went back to Goedgedacht. Tension developed at the mission station between the extended Buys family and Hofmeyr because of the latter's unwillingness to recognise the Buys family, who were of mixed race, as superior to the indigenous people living at the mission. This resulted in a substantial part of the Buys family leaving the mission station and establishing themselves elsewhere. It seems that the mission continued to function successfully despite the departure of some members of the Buys family. The appearance of the mission station in 1885 has been described as follows:

> "Die stasie was min of meer reëlmatig met strate aangelê. Die huise was soos die wat 'n mens op sendingstasies in die Kaapkolonie ook gevind het. Die grond was baie vrugbaar en daar was genoeg water en volop vrugte. Elke bewoner het een of meer erwe gehad wat met mielies beplant was. . . . By gebrek aan 'n skoolgebou is die kerk vir die doel gebruik . . .".[12]

[9] Despite the mission station having become established, the title to Goedgedacht and Kranspoort remained insecure, notwithstanding the gift of the former, the purchase of the latter and the bequeathing of the farms to the Mission Committee of the Church. These transactions were not reflected in the Deeds Registry. The government of the Republic was also not in favour of allowing missionary societies based outside the Republic to own land. On the advice of one of the commissions which looked into land ownership in the area in the 1880's, Hofmeyr caused Kranspoort to be surveyed with a view to transferring it into his own name and thereafter to the Mission Committee of the Church.

[10] In 1890 the mission station was moved once again, this time to the farm Kranspoort because of its better situation. In 1898, Hofmeyr was joined by his son-in-law, JW Daneel, also a priest and missionary. The "Anglo-Boer" War broke out the following year and the Hofmeyr and Daneel families were summoned to Pietersburg by the British military authorities for having had General Christiaan Beyers stay with them at their home at Kranspoort. They remained in Pietersberg under a form of house arrest until the end of the war. After the war they returned to Kranspoort. During their absence, the station was run by African evangelists who had been trained at the mission station. However conditions had deteriorated during the war and a considerable amount of reconstruction work was needed. During the period of reconstruction, additional settlements were established on the farm known as Patmos and Muse. These were, initially at least, settled by non-

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12 Maree above n 8 at 86-7.

Christians.[13] On 23 July 1905, Hofmeyr died and Daneel took over as the resident missionary at the mission station.

[11] It was only in 1906 that the farm Kranspoort was eventually the subject of a deed of grant which caused it to be registered in the name of someone other than the State. In this way the farm Kranspoort was registered in the name of Hofmeyr and, shortly thereafter, the joint estate of Hofmeyr and his wife. In terms of their will, most of the north-western part of the farm was bequeathed to the Hofmeyr family. This despite the fact that MacKidd had bequeathed the entire farm to the Mission Committee of the Church for mission work. The rest of the farm, largely the south-eastern half, on which the mission station was based, was bequeathed to the Mission Committee of the Church, subject to the condition of title (amongst others) that it be used for mission work in perpetuity. A subdivision was eventually formally surveyed and, in 1910, transfer was registered, so that the farm was from that time divided into two farms, the Remainder belonging to Christoffel Hofmeyr (a son of Stephanus Hofmeyr, who purchased it out of the joint estate) and Portion 1 belonging to the Church. I will refer to the portions created by the subdivision as "the Remainder" and "Portion 1" respectively. Upon transfer, certain servitudes came into being. There was a servitude of aquaduct in favour of Portion 1 in respect of the furrow which led water from the Kutetsha River[14] over the Remainder to the mission station. There was a servitude of grazing over Portion 1 for 100 livestock in favour of the Remainder. The Remainder stayed in the Hofmeyr family until 1987.

[12] By 1906, there were 406 church-goers at Kranspoort.[15] From 1 January 1920, what is now known as the "Nederduitse Gereformeerde Kerk van Transvaal" took over responsibility for Kranspoort and other mission stations in the area from the "Nederduits Gereformeerde Kerk in Suid Afrika".[16] Daneel's term as missionary ended in 1935. A missionary by the name of WMA van Coller took over. His term of office continued until 24 November 1945. During his time, a new school was erected which still stands. The school was called the Stephanus Hofmeyr school.

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13 See paragraph [13].

14 The documentary evidence uses a wide variety of spellings for this river. The one used here is that reflected on the 1:50 000 map. Other versions are: Khotetsa, Khatetsa, Khudetsa and Khoedhetes.

15 Maree above n 8 at 161. No figure is given for non-Christians living at Patmos and Muse.

16 Maree above n 8 at 217.

A new manse was also built which still stands. The missionary who took over at Kranspoort on 27 October 1946 was LC van der Merwe. By his time there were over 800 people living at Kranspoort. It was during his term of office at Kranspoort that the events which gave rise to this land claim took place.

[13] It is common cause that life at Kranspoort was regulated broadly in the following manner. The Christian community was based in the main settlement alongside the church and the school. The settlement was divided up into plots with streets. People in the settlement generally had one or more structures on the plots. The witnesses described the homes generally as being made of brick and being quite substantial. Most had a number of fruit trees growing on the plots as well as vegetable gardens. A furrow, the remains of which are still to be seen, led water from the Kutetsha River, over the Remainder and through the settlement. It provided water for the residents. Some of the fruit trees are still to be seen, particularly the mango trees. The manse formed part of the mission station. There was an orchard alongside it. The southern part of the farm, below the Louis Trichardt - Vivo road, was divided up into a number of areas which were generally used for cultivation and grazing and the establishment of kraals for livestock.

[14] The settlement known as Patmos was on the western side of the farm. The other settlement, known as Muse or Oorkant, was situated on the north-eastern side of the farm on the eastern side of the Kutetsha River. The structures on these settlements seem to have been more traditional forms of housing. Initially, these settlements were, in terms of the rules regulating life there, occupied by persons who had not yet been converted to the Christian faith. However, by the time of the events giving rise to this claim, there were also some Christians living there. On the Remainder, there was another orchard immediately north of the one alongside the manse. It was used by the Hofmeyr family. The Hofmeyr family also had ploughing fields on the Remainder roughly along the western side of the Kutetsha River. It is common cause that the Hofmeyr family had exclusive use of this orchard and these ploughing fields. The extent to which the residents on the mission station had use of the rest of the Remainder (ie excluding the orchard and the ploughing fields) was the subject of much debate in the proceedings. This is dealt with below.

[15] Government at the mission was divided broadly along secular and religious lines. Church affairs were the exclusive preserve of the missionary and the church council. The church council

was made up of the missionary, the resident evangelist and other members chosen from amongst the church-going residents. Civic affairs were governed by a "kgotla"[17] or village council made up of representatives of the residents. The village council met under a large tree alongside the church. The extent of the jurisdiction of the two committees was a matter of some dispute, but, for reasons which will become apparent, this is not material.

[16] The missionary, Van der Merwe, introduced a stricter regime at the mission station after his arrival. He sought to enforce the payment of annual rent by residents. He also introduced controls on visitors to the mission station, amongst other things. Whether or not this was justified was disputed. It is common cause that the result was that a great deal of resentment built up between what was ultimately the majority of the residents, on the one hand, and the missionary and those residents loyal to him on the other. The former group were known as the BaSefasonke.[18] The latter group were labelled the BaPharoah, because of their allegiance to Van der Merwe, who was likened to the biblical oppressor of the Israelites.

[17] The tensions between the groups burst into open opposition in 1953 when there was a dispute with the missionary and the church council over the burial by a Christian living in the main mission settlement, Joseph Matseba, of his non-Christian mother-in-law at Kranspoort. There were some attempts to resolve these tensions, but they were not successful. The problems arising from this conflict continued throughout 1954. The Church made enquiries with the authorities as to how they might get rid of some of the people at Kranspoort.[19] These enquiries resulted in an arrangement whereby the authorities would give permits in terms of the Group Areas Act of 1950[20]

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17 Usually, the term "kgotla" is, apparently, a reference to the place where a tribe or its authority structure meets to conduct official business or the occasion of such a meeting.

18 Apparently "sefasonke" means "we die together".

19 There were in fact two approaches to government. The first was a request made in 1952 by Van der Merwe to the then Minister of Native Affairs, Dr HF Verwoerd, to expel "undesirable people" from the mission, which met with no success. See Malunga above n 8 at 167. The second was a meeting between the mission secretary of the Mission Committee of the Church, JHM Stofberg and an official of the Department of Native Affairs, JS de Wet on 8 March 1954. This meeting is referred to in a subsequent letter from the Secretary for Native Affairs to Stofberg which contains the government's detailed advice to the Church about its legal position regarding the proposed eviction of "natives" from Kranspoort and Bethesda. A copy of the letter appears in the referral. The date of the letter itself is not visible on the copy. (See paragraph [24] (i) for an explanation of the term "referral".)

20 Act 41 of 1950.

to 75 families at Kranspoort. The illegality of the presence of the remainder in terms of the Group Areas Act would then be used as a basis for giving all of the remaining families notice to vacate the farm. On 13 June 1955, the residents for whom permits were not obtained were given notice to vacate the farm by 13 September 1955.[21] Some families left the farm in response to the notice. Others decided to ignore the notices and stay on. They were subjected to repeated arrests and criminal prosecutions during 1956, which ultimately led to their vacation of the farm. They were not compensated for any losses suffered as a result of the removals. It is common cause that these removals were effected in terms of the Group Areas Act of 1950.

[18] The permit regime under which the remaining 75 families lived did not endure. By the end of 1964 they had all been removed, save for an evangelist, the teachers at the school and two families who remained as workers on the farm. Some compensation was paid to 26 of the 75 families. The detail of these removals is dealt with below. The school continued to function until 1997 as a farm school for the children of farm workers in the surrounding areas. The church continued to function on a similar basis, but not as a mission station. The former residents of Kranspoort were scattered to many different places after their removal. Some went to surrounding farms. Many went to an area called Maepane. Many settled in urban townships, particularly Nancefield in Messina, New Look in Pietersburg, Mamelodi in Pretoria and Sophiatown and Newclare in Johannesburg.

[19] It is also necessary to trace the more recent history of the property from a cadastral perspective. In 1931 Portion 1 was transferred from the "Buitelandse Sending (besuiden die Sambesie) Subkommissie van die Nederduits Gereformeerde Kerk in Suid Afrika" to "Die Nederduitse Hervormde of Gereformeerde Kerk van Suid-Afrika".[23] The restrictive conditions of title relating to mission work were carried forward in this deed of transfer. These conditions[24] were deleted by order of the Transvaal Provincial Division of the Supreme Court on 17 April

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21 The notices or "trekpasses" were given to the representatives of the various families by Van der Merwe at a meeting which was held under the supervision and guidance of officials of the Department of Native Affairs. This appears in a minute dated 20 July 1955 from the "Streekwerkverskaffingskommissaris" to the "Hoofnaturellekommissaris, Pietersburg" which appears in the rral.

23 The latter church underwent a name change to the "Nederduitse Gereformeerde Kerk van Transvaal".

24 Along with a condition obliging the owner of Portion 1 to maintain the dam and furrow on the Remainder which provided its water supply.

1985.[25] In 1987, the Church purchased the Remainder from the Hofmeyr family and thus became, for the first time, the registered owner of the whole of the original farm as it was when purchased and bequeathed by MacKidd. The Remainder is, however, still subject to a reservation of a one third share of the mineral rights in favour of (the late) Hendrik Hofmeyr, one of the sons of Stephanus Hofmeyr. The balance of the mineral rights is held by the Church. This reservation of mineral rights was never dealt with in the winding up of the estate of the late Hendrik Hofmeyr.

[20] The Church has brought about a subdivision of Portion 1 and a consolidation of one of these subdivisions with the Remainder. The result is that the farm is now divided into two portions separated by the Louis Trichardt - Vivo road, and no longer by the boundaries of the mission station and its associated settlements. The portion on the north-western side of the road is Portion 3 of the farm Kranspoort No 48 LS. The portion on the south-eastern side of the road is Portion 2 (a portion of Portion 1) of the farm Kranspoort No 48 LS. Portion 3 was sold by the Church to Goosen on 14 March 1997 and Portion 2 was sold by the Church to Venter on 21 March 1997, but, as I have said, transfer of the portions has not yet been registered in their names.

Issues to be decided

[21] The legal requirements for a successful claim for relief in terms of the Restitution Act are contained in section 2 of the Act. For purposes of the present claim, they require that the claimant must prove the following:

(i) it is a community

(ii) dispossessed

(iii) of a right in land

(iv) after 19 June 1913

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25 There is a patent numerical error in the reference in the order of that court to the 1931 deed of transfer which, on the face of it, renders the deletion of conditions applicable to a property other than Portion 1 of the farm Kranspoort. However the deletion of the conditions has been effected by the Registrar of Deeds in the correct title deed and I am satisfied that it is effective.

(v) as a result of

(vi) racially discriminatory laws or practices;

(vii) a claim for restitution was lodged before 31 December 1998; and

(viii) just and equitable compensation or other consideration was not received in respect of the original dispossession.

[22] The persons who allegedly make up the Kranspoort Community also claimed, in the alternative to the community claim, as individuals who were themselves dispossessed of rights in land or were the direct descendants or other relations of such persons. In so far as relief is concerned, the claim is for restoration to the claimant community of its alleged rights in both Portion 1 and the Remainder and the upgrading of those rights to full ownership in terms of section 35(4)[26] of the Restitution Act. In the event that the Court comes to the view that the claimant is entitled to relief, but in a form other than restoration of rights in land as claimed, there will be an additional issue as to which alternative form of relief is appropriate. The ambit of the dispute is thus potentially very broad. However, in the course of proceedings and with the consent of the parties, the Court made an order in terms of rule 57 of the Land Claims Court Rules,[27] the effect of which was to separate and leave for determination in later proceedings (if necessary) -

(i) the question of the appropriate form of alternative relief for the community in the event that the Court decided against restoration; and

(ii) the claims of the individuals made in the alternative.

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26 Section 35(4) is quoted in paragraph [103].

27 Rule 57 provides for specific issues of law or fact which may arise in a matter to be decided separately from other issues relating to that matter where this is convenient. The Land Claims Court Rules are published in Government Gazette 17804, 21 February 1997, as amended by GN 345, Government Gazette 18728, 13 March 1998 and GN 20049, Government Gazette 594, 7 May 1999.

[23] The ambit of the dispute was also narrowed by agreement in respect of certain issues. Apart from those issues canvassed in the introductory part of this judgment, there is no dispute in relation to items (ii), (iv) and (vii) referred to in paragraph [21]. It was also conceded that the 1955/6 and 1964 removals were "in terms of" racially discriminatory laws. This left the following disputed issues for determination in this judgment:

(i) the existence of the "Kranspoort Community" at the material times;

(ii) whether or not the community had a right in land in respect of, firstly, Portion 1 and, secondly, the Remainder;

(iii) whether the 1955/6 removals were as a result of racially discriminatory laws or practices, in the sense of such laws or practices having been their "determinative cause";[28]

(iv) whether or not just and equitable compensation was received in respect of the 1964 removals (it was conceded that just and equitable compensation was not received in respect of the 1955/6 removals);

(v) whether or not it is an appropriate exercise of the discretion contemplated by section 35 of the Restitution Act to restore rights in land;

(vi) whether there should be restoration of rights in Portion 1 only, or in both Portion 1 and the Remainder, to the claimant;

(vii) if the answer in (v) is in favour of restoration of any property, whether or not the rights originally held by the Community should be upgraded in terms of section 35(4).

Evidence

[24] The information on the basis of which the decision must be made includes:

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28 *Minister of Land Affairs and Another v Slamdien and Others* [1999] 1 All SA 608 (LCC) at 629b.

(i) the documents referred to the Court by the Regional Land Claims Commissioner in terms of section 14(2) of the Restitution Act, including her report.[29] I will refer to these documents as "the referral".

(ii) three research-based documents. The first is the work by WL Maree *Lig in Soutpansberg: Die Sendingwerk van die Nederduitse Gereformeerde Kerk in Noord-Transvaal*.[30] I will refer to it as "Maree's work". The second is a thesis by WF Malunga entitled "*A Century of Dutch Reformed Church Missionary Enterprise in the Soutpansberg Area - The Story of Kranspoort*".[31] I will refer to it as "Malunga's thesis". The thesis was based primarily on documents in the archives of the Church, Maree's work and interviews with former residents of Kranspoort. Unfortunately none of the former residents who were his main sources of information were able to testify, most, if not all, having passed away. The third is an article by FS Malan, a professor who gave oral evidence, entitled "*Die lewe en werk van evangelis Walther Ramokone Segooa van Kranspoort*".[32] It is based primarily on interviews conducted by him with the evangelist referred to in the title, who was the resident evangelist at Kranspoort at the time of the events which gave rise to this claim.

(iii) a substantial number of contemporaneous documents relating to Kranspoort over the years, including letters, minutes of meetings and the like uplifted from the archives of the Church.

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29 Section 14(2) reads:

> "(2) Any claim referred to the Court as a result of a situation contemplated in subsection (1) (a), (b) or (d) shall be accompanied by a document-
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> (a) setting out the results of the Commission's investigation into the merits of the claim;
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> (b) reporting on the failure of any party to accede to mediation;
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> (c) containing a list of the parties who have an interest in the claim;
>
> (d) setting out the Commission's recommendation as to the most appropriate manner in which the claim can be resolved."

30 Maree above n 8.

31 Malunga above n 8.

32 The article forms one of the chapters in Stofberg Teologiese Skool, Turfloop *Enkele Swart Pioniers in die N.G. Kerk in Afrika* (University Press, Turfloop 1978) 63 - 95.

(iv) a report by I Gaigher, professor in Zoology at the University of Venda, on the environmental significance of the Soutpansberg area based on his studies of the fauna and flora of the region. I will refer to this as "the Gaigher report".

(v) aerial photographs of Kranspoort taken in 1957 and 1965.

(vi) the evidence of the various witnesses who testified.

(vii) a "statement of facts not in dispute" agreed to by the parties pursuant to a pre-trial conference.

[25] The agreed status of the documentary evidence referred to in (ii), (iii) and (iv) of paragraph [24] is that the documents are what they purport to be and further that, although they might be hearsay, their contents are admissible in terms of section 30(1) and (2) of the Restitution Act. However, in terms of section 30(3), the Court must give this evidence such weight as it deems appropriate in all the circumstances.[33]

[26] Three witnesses gave evidence for the claimant. All are former residents of Kranspoort. Mr Masete Eliakem Serumula was born at Kranspoort in 1939 and left there at the time of the

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33 The relevant parts of section 30 read as follows:

> "**30 Admissibility of evidence**
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> (1) The Court may admit any evidence, including oral evidence, which it considers relevant and cogent to the matter being heard by it, whether or not such evidence would be admissible in any other court of law.
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> (2) Without derogating from the generality of the aforegoing subsection, it shall be competent for any party before the Court to adduce-
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> (a) hearsay evidence regarding the circumstances surrounding the dispossession of the land right or rights in question and the rules governing the allocation and occupation of land within the claimant community concerned at the time of such dispossession; and
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> (b) expert evidence regarding the historical and anthropological facts relevant to any particular claim.
>
> (3) The Court shall give such weight to any evidence adduced in terms of subsections (1) and (2) as it deems appropriate."

1955/6 removals. He is the chairperson of the Kranspoort Community Committee. Charles Chamberlain Tau was born at Kranspoort in 1924 and grew up there. He lived there until approximately 1945, when he qualified as a teacher, although he was away during some of this time for study purposes. After that he visited Kranspoort from time to time because he had family there. His mother was one of those removed in 1964. Mothomone Lettie Mabuela was born at Kranspoort in 1937. She grew up there. Like many other residents at Kranspoort, she went on to qualify as a teacher at Bethesda, where the Church had established a teachers training college as part of the mission station there. On completion of her training in 1956, she became a teacher at the Stephanus Hofmeyr school at Kranspoort. Her family was evicted in 1964, but she stayed on as a teacher.

[27] Two witnesses gave evidence for the Church and the two purchasers of Kranspoort. Professor Francois Stephanus Malan, the author of the article referred to in paragraph [24](ii), was the missionary at Kranspoort from 1970 until 1972. He was thus unable to testify directly to the events from 1955/6 until 1964. However, his knowledge was based on the interviews with the evangelist Segooa,[34] Maree's work and other reading and minutes of meetings of the church council at Kranspoort. He testified generally as to the accuracy of the Malunga's thesis.[35] The other witness was Violet Johanna van der Merwe, the widow of the missionary Van der Merwe. She is now 92 years old.

[28] The evidence of the witnesses is analysed, to the extent necessary, in relation to the specific points in dispute which are dealt with below. Generally, given the passage of time and the fact that none of the main role players of the 1955 to 1964 period gave evidence, the documentary evidence, particularly contemporaneous documents and research based on them, proved the most useful and reliable evidentiary source.

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34 See paragraph [24](ii).

35 He assisted Malunga in his research.

Approach to interpretation

[29] There are a number of provisions in the Restitution Act which must be interpreted for the first time by this Court in this matter. These must, on the basis of previous decisions of this Court, be interpreted purposively.[36] This requires me to -

> "(i) in general terms, ascertain the meaning of the provision to be interpreted by an analysis of its purpose and, in doing so,
>
> (ii) have regard to the context of the provision in the sense of its historical origins;
>
> (iii) have regard to its context in the sense of the statute as a whole, the subject matter and broad objects of the statute and the values which underlie it;
>
> (iv) have regard to its immediate context in the sense of the particular part of the statute in which the provision appears or those provisions with which it is interrelated;
>
> (v) have regard to the precise wording of the provision; and
>
> (vi) where a constitutional right is concerned, as is the case here, adopt a generous rather than a legalistic perspective aimed at securing for individuals the full benefit of the protection which the right confers."[37]

[30] I am also mindful of section 39(2) of the Constitution which requires me -

> "[w]hen interpreting any legislation, and when developing the common law . . . [to] promote the spirit, purport and objects of the Bill of Rights."

Existence of the Kranspoort Community

[31] The term "community" is defined in section 1 of the Restitution Act as follows:

> "'community' means any group of persons whose rights in land are derived from shared rules determining access to land held in common by such group, and includes part of any such group;".

In terms of section 2(1)(d),

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36 *Slamdien* above n 28 at 615b to 617d. *Dulabh and Another v Department of Land Affairs* 1997 (4) SA 1108 (LCC 1126B-1128B); [1997] 3 All SA 635 (LCC) at 650d-652a respectively. See also *Former Highlands Residents concerning area formerly known as the Highlands, Pretoria, in the case between Sonny and others v Department of Land Affairs* LCC116/98, 26 November 1999 at para [10]-[12].

37 *Slamdien* above n 28 at 616f to 617a.

> "[a] person shall be entitled to restitution of a right in land if . . . it is a community or part of a community dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices". [38]

The use of the present tense suggests that there must be a community (or part of a community) which exists at the time when the claim is submitted and decided. At the same time it must be a community or a part of a community which, at some point in the past (after 19 June 1913), existed and was subjected to a racial dispossession of land rights.

[32] Initially, the Church disputed that there was at any time a group of persons constituting a Kranspoort community as claimed. The result was that considerable evidence was led about this issue, particularly in relation to the period from the inception of the mission station until the 1955/6 removals. However, when the matter was argued, the Church conceded, on the basis of the evidence which was led during the trial, that a Kranspoort Community did exist up until the removals in 1955/6. In my view this concession was correctly made. I need not dwell on this aspect any further.

[33] The Church did dispute that there was a community at any time after the 1955/6 removals. In relation to the period from 1955 to 1964, the Church referred to the evidence of Mrs Mabuela to the effect that the village council no longer existed after 1955. This contention is flawed. Firstly, the persons who stayed on after the 1955/6 removals were a part of the pre-1955/6 community, and accordingly complied with that part of the definition of community which includes "part of any such group". Secondly, the evidence suggests that the remaining persons continued to access the land for residential and agricultural purposes in an orderly and regulated fashion. This points to the continued existence of "shared rules determining access to land held in

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38 Section 2(1)(d) was introduced into the Restitution Act by section 2 of the Land Restitution and Reform Laws Amendment Act 18 of 1999, which came into force on 23 April 1999. The claim in this matter was lodged before then. However, in terms of section 14 of Act 18 of 1999,

> "[a]ll proceedings which were pending before a court upon the date of promulgation of this Act, must be disposed of in accordance with section 2 of the principal Act as substituted by section 2 of this Act, unless the interests of justice require otherwise."

This case was pending on 23 April 1999. The interests of justice do not require that the amendment be ignored. Note that a community was entitled to claim before the amendment. On the nature of this amendment see *Former Highlands Residents concerning area formerly known as the Highlands, Pretoria* LCC116/98, 17 September 1999, internet website http://www.law.wits.ac.za/lcc/1999/highlandssum.html.

common", even if the mission station was now regulated by the church council only. A community, albeit a much reduced one, accordingly continued to exist during the period from the 1955/6 removals until 1964.

[34] That brings me to the current existence of a community. As I have said, it is clear that there must be a community in existence at the time of the claim. Moreover, it must be the same community or part of the same community which was deprived of rights in the relevant land. However, this does not mean that the identity of the claimant community, in terms of its constituent members, should be identical to the one which was originally dispossessed. This would be an anomaly, something which a statute is assumed to avoid.[39] Communities cannot be frozen in time. Changes in the constituent families and the admission of new members and departure of others must mean that the face of a community changes over time. It would also be anomalous to suggest that a community which had been subjected to a forced removal should be required to show that, at the time of the claim, the members have rights in land held in common by that group. That requirement can only apply in respect of the situation which existed before the dispossession. In the circumstances, in deciding what meaning is to be given to the concept of a community at the time of the claim, the qualification "unless the context indicates otherwise" at the beginning of section 1 comes into play and reliance cannot be placed on the definition of community in the Restitution Act. Dictionary definitions are also of little assistance. The meaning must be derived from its context. This seems to me to require that there must be, at the time of the claim -

(i) a sufficiently cohesive group of persons to show that there is still a community or a part of a community, taking into account the impact which the original removal of the community would have had;

(ii) some element of commonality with the community as it was at the time of the dispossession to show that it is the same community or a part of the same community that is claiming.

[35] The Church contends that, if regard is had to all of the evidence, it is impossible to identify a particular group of persons which, at the time of the claim, constitute the Kranspoort Community. This, says the Church, is a bar to a successful claim. What then is the evidence before the Court?

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39 Devenish *Interpretation of Statutes* (Juta, Cape Town 1992) at 177 - 8.

The starting point is the information contained in Malunga's thesis, which the Church itself suggested was the most reliable record of events. Malunga's information as to what took place between the removals and the present day must be taken seriously as it was during that time that he conducted the interviews with former residents on which his thesis was based. He states that until 1968 animosity persisted between the BaSefasonke and the BaPharoah in areas where members of both groups ended up. From 1968, however, there was a process of reconciliation between the groups. Associations were formed to cater for the former residents of Kranspoort during baptismal, wedding, birthday and graduation parties. One of the largest of these associations was the Kranspoort Burial Society which was founded in Mamelodi in 1968 and later included affiliated branches in various urban and rural areas. It's motto was "Unite and be strong".[40] Generally, the former residents have remained staunch Christians. Pursuant to a decision taken by the Pretoria Branch of the Burial Society in 1983, a reunion of former residents was held at Kranspoort over the Easter weekend in 1984. It was attended by some 200 former residents, together with additional family members and by Malunga himself. There were church services, the unveiling of a tombstone,[41] speeches and reminiscing about the days before the removals. According to Mr Serumula, these reunions were then repeated on an annual basis over the Easter weekend until an occasion in recent years when the former residents were informed that there was a new owner and they would not be allowed to hold their ceremony. He estimated the year to be 1996.[42]

[36] Although the details are sketchy, Mr Serumula testified that there were a series of "community meetings" leading up to the lodging and hearing of the claim.[43] The mechanism whereby such meetings were convened was not explained, although Mr Tau testified in respect of one of these meetings that he had been contacted by Mr Serumula and invited to attend. At one of these meetings, the date of which was not made clear, individuals filled in claim forms and sent the message out to others who had not attended the meeting to do so. According to a document in the referral, another meeting took place at Kranspoort on 31 May 1997 at which a "Kranspoort

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40 "Swaranang le Tiye".

41 It is common cause that some former residents have been buried in the cemetery at Kranspoort subsequent to the removals.

42 The sale agreements were entered into in 1997. See paragraph [20].

43 He is corroborated in this respect by Mr Tau.

Community Committee" was elected by secret ballot and authorized "to manage the land claim for the restitution of the farm Kranspoort . . . on behalf of the claimants". A note at the bottom of the written record of the resolutions records that a list of claimants who took part in the election of the Committee and the "community resolution" is attached. The attached list contains 78 names. I will refer to it as the "resolution list".

[37] It appears from the evidence of Mr Serumula and a document in the referral[44] that another such meeting was held over 2 days in March 1998 at which a list described as the "Kranspoort Claimant List" was drawn up. According to Serumula and the document in the referral, the meeting was held "to verify claimants". The meeting had before it various lists. The first was a list of all those who had individually submitted land claims pursuant to the previous meeting. Then there were two lists of the people removed in 1955/6 and 1964 obtained from the National Archives and the archives of the Church. I will refer to these as the "archival lists". The verification method was described in a document in the referral as follows:

> "We used the archival lists and read out the names of the person who were (sic) removed, the year that the person was removed and the person who is claiming. The community verified each person. . . People who were not on the archival lists were verified by taking the list of people who submitted claims, reading out their names and the capacity in which the person is claiming. The community verified each person."

[38] I will refer to the list which resulted from this process as the "main list". An extract from the first page looks like this:

Person who lost the right	**year removed**	**Claimant**	**Relationship**	**Descendants**	**Physical address**	**telephone number**
Baloi Jonas	1955	Baloi Jonas	SELF		. . .	
Buys Sameul (sic)	1955	Buys Martha Julia	Daughter		. . .	

[39] The first 2 entries/rows are provided by way of example. There are in fact 125 such entries/rows. According to Mr Serumula, each family elected one family member to represent it

44 The contents of which were not disputed in so far as what took place at the meeting was concerned.

as claimant for the purposes of the claim. As a result, while there is generally only one name per entry in the claimant column, there are sometimes several other descendants in the fifth column. The fourth column is meant to represent the relationship of the persons in the claimant column to the person who was originally removed from Kranspoort. Mr Serumula testified that this list contained the names of all the members of the community, presumably referring to the names in the "Claimant" and "Descendants" columns, many of the people in the first column having passed away. It was on this basis, he said, that the community was identifiable. It appeared from his testimony that he knew a large proportion of the people on the list personally.

[40] In cross-examination and argument, counsel for the Church challenged the accuracy of the main list. He was able to show that there were errors in respect of some of the entries. He also pointed out that in a number of instances, relatives were listed as claimants who were not direct descendants of the person who had originally been removed. Some claimants, including Mr Serumula, were listed as deriving their right to claim from an ascendant, whereas they themselves had been removed.

[41] It is necessary to scrutinise some of the errors in the list more closely in order to evaluate the extent to which they undermine the claimant's case.

(i) It emerged in Mr Serumula's evidence, that Samuel Buys[45] is the husband and not the father of the person listed as the claimant (ie Martha Julia Buys) and further that her husband had never lived at Kranspoort or been removed from it. It was in fact the parents of the claimant who were removed. Despite this error, what emerges is that the claimant has a clear connection with Kranspoort, as well as a probable claim in her own right as a descendant of parents who were removed (assuming the other elements of a successful land claim can be proved).

(ii) Alfred Pheko Laka is listed twice on the basis of his being the nephew of Gideon Laka. The duplication is clearly not material. However, a person cannot, as an individual claim restitution in terms of section 2 of the Restitution Act on the basis that he or she is a

45 See paragraph [38].

collateral relative of a person who was dispossessed of rights in land.[46] Nonetheless, there is no reason why a collateral relative should not be accepted into a community which was dispossessed of rights in land. Nowhere is it suggested in the Restitution Act that only direct descendants of the group of persons who constituted the community at the time of the dispossession can be members of a claimant community. The direct descendancy requirement applies only to persons who claim as individuals on the basis of the dispossession of an ascendant.[47] If communities were to be limited in this way, it would give rise to problems. The spouses of descendants could never be accepted into the community. It would also be in conflict with the dynamic nature of an entity such as a community. Thus the inclusion in the main list of persons purporting to be community members by reason of their being a collateral relative of a member of the community at the time of the removals does not affect the reliability of the list for purposes of identifying the community, even though such persons would fail to make out the alternative claim for restitution as individuals.

(iii) Laka Elizabeth Mmule is listed as a claimant twice, once as the daughter of Jacoba Nare and once as the granddaughter of Ernestina Nare. In fact, Jacoba Nare is still alive, and ought to have been included in the claimant list. Ernestina Nare is in fact the sister and not the grandmother of Laka Elizabeth Mmule. Once again, the errors are not such as to show fundamental defects in the main list. Elizabeth has a clear connection with Kranspoort, whether or not she has a claim in her own right.[48] Jacoba has been omitted from the claimant list, but included in the first column. This is not a material error.

(iv) Albert Marakene Machete is listed as a claimant on the basis of his being the son-in-law of Petrus Matseba. Again, a son-in-law is not a descendant entitled to claim restitution as an individual. However, under the same entry, three persons are listed as descendants, one of whom is Serina Machete. She is the daughter of Petrus Matseba and, subject to proof

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46 *Ex parte Mayibuye: In re Sub 121, Farm Trekboer* [1998] 4 All SA 604 (LCC) at 612g.

47 This appears from s 2(1) of the Restitution Act which lists the different categories of potential claimants. Direct descendants are dealt with in paragraph (c) and a community is dealt with in paragraph (d).

48 Such a claim could not be based on her being a descendant of Jacoba Nare if she is still alive. See section 2(1)(c) of the Restitution Act.

of the other elements of a land claim, would be entitled to claim as an individual. More importantly, for purposes of identifying whether or not there is a community, she has a clear link with Kranspoort and so does her husband as a result of his association with her.

(v) Walter Ramakone Segooa is listed as a claimant claiming as the son of Mamangana Elisha Segooa, whereas the latter is the son of the former. Moreover, Walter Segooa was never removed from Kranspoort, having been given permission to stay on after the 1964 removals as the resident evangelist. This too would appear to preclude Mamangana Elisha Segooa from an individual claim. Nonetheless, he has a clear connection with Kranspoort and there is no reason why he should not subsequently have been allowed to join the community.

What these instances show is that while the main list certainly appears to have errors, including ones other than those referred to here, on closer scrutiny they do not materially affect the case which is sought to be made out to the effect that there is an existing Kranspoort community.

[42] The Church also attacked the accuracy of the main list on the basis of its inconsistency with other lists. The list incorporated in the notice published in the Government Gazette[49] in terms of section 11(1) of the Restitution Act contains far more names than those listed as claimants in the main list. However, if one peruses the names in that list, they are simply a combination of the names in the two archival lists of persons removed in 1955/6 and 1964. It is common cause that the Kranspoort community, if it does exist today, does not consist of exactly the same persons who were removed in 1955/6 and 1964. The use of the archival lists by the Regional Land Claims Commissioner responsible for publishing the notice was for the sake of convenience, because the verification process had not yet taken place. The main list cannot therefore be criticised because it does not coincide with the archival lists in the notice.

[43] The main list was also attacked on the basis that it differed substantially from the resolution list. The resolution list contained only 78 names. This is perhaps understandable. The meeting took place almost a year before the main list was prepared. The increase in numbers in the main list probably reflects an increase in awareness about the claim process. The meeting to which the

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49 GN 1102, Government Gazette 18167, 1 August 1997.

resolution list relates was also held at Kranspoort which is some distance away for many of those former residents and their families who now live in urban areas around Pretoria and Johannesburg. The main list also includes the names of people who were not present at the verification meeting, but lodged claim forms. The resolution list was also criticised because it included a number of names which do not appear on the main list. On my analysis, there are 36 names which are common to both lists. However, if one analyses the remaining 42 names, probable connections with Kranspoort and its former residents become apparent. In a number of instances, the surnames of persons on the resolution list are shared with persons on the main list[50] or on the archival lists[51] or both.[52] In the main list, the descendants of persons listed as claimants are often omitted. The resolution list in certain instances includes descendants of persons listed as claimants without descendants in the main list.[53] There are also some instances where the same person may be listed in both the main list and the resolution list, but with slightly different spellings of their names.[54] The only names on the resolution list which do not appear to be connected with one of the other lists in some way are SJ Mashilo, NM Madibana, LL Raphaswana, MM Tshweni and MP Manthata. Even in relation to these, Mr Serumula testified that he knew Raphaswana and that he was one of the "children of Kranspoort". "Tshweni" may simply be an alternative spelling of "Chuene". There is an MM Chuene in the main list and there are a number of Chuenes in the archival lists. It is so that any person who attended the meeting where the resolution list was prepared, but did not lodge a claim, would not be able to do so now in his or her individual

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50 See, for example, SM Mushi and DA Mushi on the resolution list and JM Mushi on the main list; NW Mbatha on the resolution list and MC Mbatha on both the main list and the resolution list; KK Mantole on the resolution list and ME Mantole on the main list.

51 See, for example, M and BB Sefole.

52 See, for example, MA and RJ Lebepe, the Sefaras, MC and ME Sebola, GM Motau , ME and MK Nare, MW Kekana.

53 This would, for example, explain why S Sebati, MJ Sebati, MM Modiba and PW Matsapola are not referred to in the main list, whilst their mother, ME Sebati is.

54 For example ME Safara in the main list and ME Sefara in the resolution list. Mr Serumula was cross-examined in connection with the Sefaras and the Setimos on the basis that none of those mentioned in the resolution list appeared on the main list. Mr Serumula explained that he knew the family and that the Setimos were the grandchildren of the Sefaras. This is corroborated by the fact that all the Sefaras and the Sitimos give the same address in the resolution list.

capacity, the final date for lodging of claims having passed,[55] but that does not preclude membership of the community.

[44] What emerges from all of the evidence, is that despite the diaspora which followed the removals in 1955/6 and 1964, a substantial number of former residents of Kranspoort and persons associated with them have continued to engage in activities based on their connection with Kranspoort. Before the claim, these activities related to the burial and similar societies and the annual reunions. In relation to the submission of the claims in terms of the Restitution Act, there has also been co-ordinated activity. All these forms of co-ordinated activity point to cohesiveness amongst the participants. It is inevitable, given the spread of the claimants now, that the co-ordination of those activities is difficult and it would be impossible for the identical group of persons to emerge on each occasion that a meeting was held for one of these purposes. Where a record has been kept of the names of the persons participating in these activities, scrutiny of those records reveals a commonality with the community as it was at the time of the removals, in that the community now includes persons who were among the former residents at the time of the removals, their descendants and other persons associated with them.

[45] It is so that it is not possible to say with precision, on the evidence before me, who each and every member of the community now is. In my view, provided the elements of commonality and cohesiveness are present, it does not matter that this precision is lacking. The problems in identifying the individuals in a community were recognised by this Court in *In re Macleantown Residents' Association*[56] when it said:

> "The Regional Land Claims Commissioner raised the question whether it is necessary to specify a list of individual claimants and he obtained legal opinion thereon. The opinion correctly points out that if the claim is by a community, the land will be transferred to the community (to be held in a manner as the court order may direct), and a list of members of the community will not be necessary. . .. On the other hand, if the claim is made by individuals, a list of the individual claimants must be submitted."

The legal opinion referred to is then quoted verbatim in the footnotes to the judgment and reads as follows:

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55 Section 2(1)(e) of the Restitution Act.

56 1996 (4) SA 1272 (LCC) at 1278D - J; [1996] 3 All SA 259 (LCC) at 265b-c.

> "It is not a requirement of the Restitution Act that where a claim is lodged by a community a definitive list of the members of such community or the beneficiaries in that claim be obtained. In actual fact in terms of section 10 the representative of a community is entitled to institute a claim on behalf of a community.
>
> The claimant in a case like the abovestated one will be the community in question (note that claimant includes a community in terms of section 1(ii) of the Restitution Act). When land is restored after the claim has gone through all the stages as required by the Restitution Act and the Rules, it is restored to the claimant. It must be borne in mind that the claimant in a case where a claim is by a community is not the individual members of that community but the community as a whole.
>
> In most cases it will be extremely difficult to draw up a list of individual members or beneficiaries of a community and that cannot be what was intended. It is therefore concluded that it is not a legal requirement that the Commission obtain a definitive list of claimants."(my emphasis)

[46] This statement must be read in the context in which it was made. The Court was dealing with an unopposed and purportedly settled matter which had been referred to the Court to be made an order of Court. Where a matter is opposed on the basis that the existence of a community is placed in dispute, a broad enquiry into who the persons making up the community are, is legitimate. This will assist in determining whether or not there is an element of commonality with the community which existed at the time of the dispossession. But this does not mean that each and every member of the group making up the community needs to be identified in order to find, on a balance of probabilities, that a community exists. To this extent, the dictum in the *Macleantown* case holds true for a situation such as the present one.[57]

[47] Some indication of what is meant by the term "community" in the Restitution Act can be derived from the Communal Property Associations Act[58] which is complementary to the Restitution Act in that it specifically provides (amongst other things) for the creation of a communal property association where there has been an order of restitution to a community in terms of the latter Act.[59] A communal property association qualifies for registration in terms of the Communal Property

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57 On this basis, the decisions in the *Macleantown* case and *Bataung Ba-Ga Selale in re Farm Zephanjeskraal 251-IQ Rustenburg, NW Province* (LCC 85/98, 2 September 1999 internet website http://www.law.wits.ac.za/lcc/1999/ lcc.bataung.html) can be reconciled. In the latter case, the Court ordered the claimant to provide information about the individual members of the community in the context where the existence of the community had specifically been placed in dispute and it was not suggested by the claimant that they were not able to obtain this information. The decision was largely based on rule 10(4)(c) of the Land Claims Court Rules which allows a party, by delivery of a notice, to request a list of names and addresses of the members of a community and other entities.

58 Act 28 of 1996.

59 Section 2(1)(a).

Associations Act if, amongst other things, its constitution deals with the matters referred to in the schedule to the Act. The schedule includes as one of the matters to be addressed in the constitution of such an association:

> "Qualifications for membership of the association, including a list of the names and, where readily available, identity numbers of the intended members of the association: Provided that where it is not reasonably possible to provide the names of all the intended members concerned, the constitution shall contain-
>
> (i) principles for the identification of other persons entitled to be members of the association; and
>
> (ii) a procedure for resolving disputes regarding the right of other persons to be members of the association."[60] (my emphasis)

This points to legislative recognition of the difficulties which a claimant community faces in these circumstances.

[48] The main reason for difficulties in identifying the members of the community with precision is the fact that there was a removal and consequential diaspora in the first place. It would be a grave injustice if the Restitution Act is to be interpreted so that the tragic consequences of a removal become a reason why a community restitution claim aimed at remedying the removal should fail.[61] This is particularly so in the circumstances of this case, where compensatory land was generally not offered to the persons who were removed. This would have accentuated the extent of the diaspora. I am accordingly satisfied that there is a sufficiently cohesive group to constitute a community. That community has been shown to have substantial commonality with the community as it was at the time of the removals. The claimant has thus proved the existence of a community.

A right in land

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60 Clause 5 of the schedule.

61 The situation is akin to that referred to in *Zulu and Others v Van Rensburg and Others* 1996 (4) SA 1236 (LCC) at 1257H; [1996] 2 All SA 615 (LCC) at 635g.

[49] The next issue which must be decided is whether the claimant community enjoyed a right in land in respect of, firstly, Portion 1 and secondly, the Remainder. The community's stay at Kranspoort took place against a backdrop of the enactment of successive racially discriminatory land laws which would have affected the extent to which the community and its members could have acquired any rights in Kranspoort. These included Law 11 of 1887 of the Volksraad of the South African Republic. This limited to five the number of "native" households permitted to reside on a farm outside demarcated locations. This law was replaced by a similarly worded "Squatters Law" 21 of 1895 which came into operation on 1 January 1896. It would appear from Maree's work that there were at all relevant times more than five "native" households at Kranspoort. The next significant legislative event was the Natives Land Act.[62] Outside the "native" areas referred to in the schedule to that Act,[63] "natives" were prohibited from entering into any

> "agreement or transaction for the purchase, hire, or other acquisition from a person other than a native, of any such land or of any right thereto, interest therein, or servitude thereover" [64]

It was expressly provided that the Act was supplementary to and did not repeal various existing racially discriminatory land laws, including the "Squatters Law".[65] The Natives Land Act was supplemented by the Native Trust and Land Act.[66] The effect of the latter was, amongst other things, to increase the area of land in which "natives" were not subject to the prohibition on entering into transactions for the acquisition of land quoted above, but Kranspoort was not included in that extended area. Chapter IV created a new regime which sought to regulate more closely the occupation of land by "natives" outside the "native" areas. Once an area was proclaimed as an area to which chapter IV applied, it was illegal for a "native" to reside in such an area unless he or she was the owner of the land or a servant of the owner or specifically registered in terms of that Chapter as a labour tenant or squatter or otherwise exempted from the

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62 Act 27 of 1913.

63 It is common cause that Kranspoort was outside the areas referred to in the schedule to the Natives Land Act.

64 Section 1(1).

65 Section 6.

66 Act 18 of 1936. With the passage of time, this Act underwent various name changes. I will refer to it by its original name.

provisions of the Chapter.[67] This chapter was made applicable to Kranspoort with effect, at the latest, from 1 September 1956.[68] There is no evidence that the residents at Kranspoort were ever registered as squatters in terms of the Native Trust and Land Act. Once chapter IV became applicable in any area, the Squatters Law of 1895 was repealed in that area.[69]

[50] The next significant piece of legislation was the Group Areas Act of 1950.[70] That provided various mechanisms aimed at securing racial exclusivity in particular areas. Initially, the Transvaal, including Kranspoort, was an area in which racial occupation was frozen according to the race group occupying the area on 30 March 1951.[71] However, on 31 October 1952, the area became part of the "controlled area".[72] That meant that it became illegal for persons of a race different from the owner to occupy that land without a permit.[73] The Church as owner of Kranspoort was considered to be a white person in terms of the definitions contained in the Group Areas Act.[74]

[51] The racially discriminatory laws to which I have referred included various provisions for exemptions, in some instances specific to mission stations, which might have prevented their application to Kranspoort. For example, section 8(1)(h) of the Natives Land Act provided as follows:

> "Nothing in this Act contained shall be construed as . . . applying to land held at the commencement of this Act by any society carrying on, with the approval of the Governor-General, educational or missionary work amongst natives".

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67 Section 26(1).

68 GN 177 of 1956, Government Gazette 5374, 31 August 1956.

69 Section 50(4) of the Native Trust and Land Act read with Part II of the Third Schedule to that Act. See in this respect *R v Maluma* 1949 (3) SA 856 (T).

70 Act 41 of 1950.

71 Section 12 read with Proclamation 74 of 1951, Government Gazette 4570 , 30 March 1951.

72 Proclamation 256 of 1952, Government Gazette 4951, 31 October 1952.

73 Section 10 read with section 1. Once it fell into the controlled area, the Natives Land Act no longer applied in that area: section 38(6) of Act 41 of 1950. However chapter IV of the Native Trust and Land Act would have continued to apply.

74 Section 1.

However, no evidence was led which suggested that there was at any time up until 1955,[75] a successful approach to government which resulted in the application of one of those exemptions to Kranspoort.[76] A letter from the Secretary for Native Affairs to the Mission Secretary of the Church sent in 1954[77] states that a record could be found showing that the required approval was obtained for the Church's mission at Bethesda, nearby, in terms of section 8(1)(h) of the Natives Land Act, but not for Kranspoort. It seems unlikely that the Church would not have arranged such approval in respect of both missions or that in the entire period from 1890 to 1955 there would not have been any successful attempt at legalising the occupation of the mission community, but that unlikelihood is not sufficient for me to find that, on a balance of probabilities the necessary exemption was obtained. The matter must therefore be decided on the basis that the community's occupation of Kranspoort was never legally recognised and was always prohibited by one racially discriminatory law or another.

[52] A "right in land" is defined in the Restitution Act as follows:

> "any right in land whether registered or unregistered, and may include the interest of a labour tenant and sharecropper, a customary law interest, the interest of a beneficiary under a trust arrangement and beneficial occupation for a continuous period of not less than 10 years prior to the dispossession in question;"

With reference to that definition, the apparent illegality of the community's occupation of the farm would preclude a finding that the community had a "registered or unregistered" right in land in the sense that this term might be understood at common law. The community was also not made up of "share cropper[s]" or "labour tenant[s]". No attempt was made to make out a case that the community had a "customary law interest" in the land. The argument that the community was a "beneficiary under a trust arrangement" was only faintly pressed and it is not necessary for me to decide it. It was however strongly argued in respect of both the Remainder and Portion 1 that the

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75 The 75 families who were not evicted in 1955/6 were given permits to remain at Kranspoort on 26 January 1955 in terms of the Group Areas Act 41 of 1950.

76 The permission referred to in paragraph [4] was not given in terms of one of these exemptions and preceded the 1887 and 1895 laws. In fact Maree's work at 135 suggests that in 1899 the government told Hofmeyr that it was opposed to the concept of mission stations and drew his attention to the existence of the "Squatters Law".

77 See above n 19.

community and its members had "beneficial occupation for a period of not less than 10 years prior to the dispossession in question".

[53] The term "beneficial occupation" as referred to in the definition of "right in land" has not yet received more than the passing attention of this Court.[78] Both the terms "occupation" and "beneficial occupation" are widely used both in common law and in various contracts and statutes.[79] It is of some assistance to start by looking at the concept of occupation. In this regard there is an important reminder in the words of Solomon ACJ in the case of *Madrassa Anjuman Islamia v Johannesburg Municipal Council*:[80]

> "the word 'occupy' itself is capable of bearing more than one meaning, so that where it occurs in any statute we must judge from the context and from the object of the Act what the sense is in which it is there used." [81]

[54] In Claassens' *Dictionary of Legal Words and Phrases*, the term "occupation" is defined as

> "Being in possession; the state of being occupied."[82]

In Mozely and Whitely's *Law Dictionary*, it is defined as:

> "the use, tenure, or possession of land"

Both these definitions equate the concept of occupation, at least in one sense, with possession in relation to land. In my view the facts of this case illustrate well the need for the inclusion in the

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78 Nchabeleng v Phasha 1998 (3) SA 578 (LCC) at 592B, [1997] 4 All SA 158 (LCC)at 169d.

79 In the context of lease agreements, the term is used to describe the free and undisturbed use (commodus usus) of the leased asset which is and must be available to a lessee in terms of a lease. See, for example, *Sishen Hotel (Edms) Bpk v Suid-Afrikaanse Yster En Staal Industriële Korporasie Bpk* 1987 (2) SA 932 (A). The term is also used in the context of building contracts, beneficial occupation generally being given when a certificate of practical completion is given. *Oerlikon South Africa (Pty) Ltd v Johannesburg City Council* 1970 (3) SA 579 (A).

80 1919 AD 439 at 448.

81 The same point is made in Stroud's *Judicial Dictionary of Words and Phrases* 4th ed Vol A-C (Street and Maxwell, London 1971) at para 22.

82 2nd ed Vol 3 (Butterworths, Durban 1997) at O-8

definition of right in land of the concept of possession distinct from any underlying rights which may entitle the holder of such rights to possession. The fundamental aim of the successive racially discriminatory land laws was to prevent certain race groups from obtaining underlying rights in land which had been zoned for a particular race group. The racial zones which were legislated were substantially in conflict with the factual distribution of the various race groups. As this case shows, racially discriminatory land laws existed long before the 19 June 1913 cut-off date for land claims[83] and these prevented members of disadvantaged groups from obtaining rights in land. If "beneficial occupation" is to be interpreted as requiring the existence of an underlying right justifying such occupation, this may mean that a community who could show that they were forcefully removed as a result of a racially discriminatory law or practice, would be non-suited specifically because discriminatory laws prevented them from ever obtaining such rights in land.[84] Yet it is these very laws whose aftermath the Restitution Act seeks to remedy. Occupation must thus be taken to mean possession as distinct from any recognised underlying right. Our common law is not unfamiliar with the concept of conferring a remedy based purely on possession without there being a need to enquire into the presence or absence of underlying rights.[85]

[55] Possession at common law contemplates a subjective component (animus) and an objective component (detentio or corpus).[86] There does not appear to be a difficulty with importing the same requirements into the concept of occupation as used in the Restitution Act, provided the tests take into account the wording, purpose and object of the Restitution Act and the likely circumstances in which persons claiming under the Restitution Act would have occupied.[87] In the present context, the subjective component of possession would require the intention that such occupation should be beneficial and that it should be of a long term nature, regard being had to the 10 year requirement. On the other hand it would be contrary to the spirit of the Restitution Act to require

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83 Section 2(1)(e) of the Restitution Act.

84 Of course there is a debate around whether or not possession in itself constitutes a real right. See Kleyn and Boraine *Silberberg and Schoeman's The Law of Property* 3rd ed (Butterworths, Durban 1987) at 111 - 3. In this case it is not necessary for the decision of the matter to enter into that debate.

85 The primary example is the mandament van spolie.

86 Kleyn and Boraine above n 84 at 114ff and the authorities referred to at fn 19.

87 *S v Brick* 1973 (2) SA 571 (A) at 579H; *S v R* 1971 (3) SA 798 (T) at 803E; Kleyn and Boraine above n 84 at 118.

that the possessor should have believed that there existed an underlying right upon which such possession could be based. An informed occupier or possessor may well have known that racially discriminatory laws precluded lawful occupation. In so far as the physical component of possession is concerned, this too would have to have been for a period of at least 10 years prior to the dispossession and would be qualified by the word "beneficial".

[56] What meaning is to be given to the word "beneficial"? The *New Shorter Oxford English Dictionary* defines it as follows:

> "1 Of benefit, advantageous, . . . Lucrative, bringing pecuniary profit . . .
>
> 4 *Law.* Of, pertaining to, or having the use or benefit of property etc."[88]

Stroud's Judicial Dictionary of Words and Phrases says -

> "The test of 'beneficial occupation' as regards liability to pay rates is not whether a profit is made, but whether the actual occupation is of value . . ."[89]

[57] In the case of *Ex parte Van Deventer*[90] the court was concerned with the Removal or Modification of Restrictions on Immovable Property Act of 1916[91] which allowed for the removal of such restrictions where the shares held by a beneficiary in the relevant immovable property "are so small that they cannot be beneficially occupied or enjoyed." In this context, the court gave the following meaning to "beneficial":

> "'Beneficial', 'beneficially' and 'beneficiary' are all formed from the word 'benefit'. 'Beneficial occupation' would mean occupation which would produce a benefit."[92]

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88 Brown (ed) *The New Shorter Oxford English Dictionary on Historical Principles* Vol 1 (Clarendon Press, Oxford 1993) at 214.

89 Above n 81 at para 14. The Court was assisted in dealing with this aspect of the judgment by the extensive research reflected in the heads of argument prepared by Mr Havenga on behalf of the Department of Land Affairs.

90 1950 (2) SA 90 (N).

91 Act 2 of 1916.

92 Above n 90 at 92B.

The distinction between "occupation" and "beneficial occupation" in the context of a lease is apparent from the facts in the case of *Arnold v Viljoen*.[93] Arnold leased a building to Viljoen for the latter to run as a residential hotel. Viljoen was given full access to the premises, but these were not fit for the conduct of the envisaged business, because of the defective roof and electrical system and Arnold's failure to effect alterations required by the health authorities for the issue of the relevant permit. The court regarded Viljoen as being in occupation, but not beneficial occupation for the purposes of determining his liability for the payment of rent.[94]

[58] Although these authorities relate to different areas of the law, they do provide some guidance as to what meaning is sought to be conveyed. Clearly there must have been some particular value or benefit which the claimant derived from the occupation, together with the intention to derive such value or benefit. More than this it is not necessary or desirable to say. The meaning will have to be developed on a case by case basis as different factual circumstances come before the Court for consideration.

[59] Applying this analysis of "beneficial occupation" to the facts of this case, there is very little that needs to be said as regards the community's occupation of Portion 1. The facts are essentially common cause and the Church did not seriously pursue its original contention in the pleadings that Portion 1 was not beneficially occupied. In relation to the physical element, the community was present at Kranspoort from 1890 until 1955. Save for the manse and garden and orchard attached to it (which were used by the missionary), and the church (which was used by the missionary and the community), the community had exclusive use of Portion 1, with management of that use being carried out exclusively, or primarily by the village council, on which the Church was not formally represented.[95] Some parts, such as the clinic, the school and the land used for agricultural purposes, were used communally. The individual erven allocated to families to establish their homes and gardens were used exclusively by those families. Included in the area used exclusively by the community were the settlements of Patmos and Muse. There is no doubt that the claimant community's occupation was beneficial in many different respects. There was residential

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93 1954 (3) SA 322 (C).

94 *Arnold* above n 93 at 330B.

95 There was uncertainty as to whether or not the missionary had some sort of appellate function in respect of matters which could not be resolved in the village council, but this is not material.

accommodation, land on which to keep livestock and to grow crops, fruit and vegetables, religious and educational services were provided and health care was received at the clinic.

[60] In so far as the mental element or animus is concerned, the following extract from a report prepared by an official in the Department of "Bantu Labour" in November 1959 after a visit to Kranspoort and other mission stations is instructive:

> "Tydens my besoek aan die . . . sendingstasies het ek opgemerk dat die hutte of huise waarin die Bantoe woon oor die algemeen nie van dieselfde swak en tydelike tipes is as die wat in onregmatige plakkerskampe aangetref word nie, maar wel dat dit stewige strukture is wat deur die eienaars met die oog om dit sy permanente woning te maak opgerig is; m.a.w. dat toe dit opgerig is, die eienaar onder die volle indruk was dat aangesien hy die grond wettiglik okkupeer hy rederlikerwys kon verwag dat hy toegelaat sal word om dit te bly okkupeer. Daar is sommige huise wat op blanke boustyl gebou is en seker meer as £500 werd is . . . [H]ierdie Bantoe [is] nie onregmatige en mala fide plakkers . . . nie maar . . . hulle [het] daar vir geslagte met die stilswyende goedkeuring van verskeie Regerings gewoon . . .".[96]

Whilst the underlying racism offends, this extract accurately reflects the subjective component of the community's occupation of Portion 1. Indeed, it seems from the oral evidence that a substantial part of the community may have believed that the community actually owned the land. I am accordingly satisfied that the claimant community had a right in land in respect of Portion 1 in the form of beneficial occupation for the ten year period required by the definition.

[61] In so far as use of the Remainder is concerned, there was a factual dispute. Mr Tau and Mr Serumula attempted to convey the impression that their use of the Remainder was on a basis which was similar to their exclusive use of (most of) Portion 1. The Church disputed this. The dispute was manifested in extensive examination and cross-examination over (amongst other things) the existence or otherwise of a fence between the Remainder and Portion 1. In my view it is not necessary to go into the dispute over the fence in any detail. There is evidence of the existence of a fence when the Hofmeyrs' 1902 will was signed, although it is not clear that it traversed the entire boundary. There is evidence of the absence of a fence in 1966 (only two years after the second removals) when Professor Hofmeyr, grandson of Stephanus Hofmeyr and owner at that time of the Remainder, corresponded with the Church about the erection of a fence over the boundary. A patently higher density of vegetation on the Hofmeyr side of the boundary in the 1957 aerial photographs suggests that the Remainder was not farmed as intensively as Portion 1. The

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96 The report is one of the documents in the referral.

probabilities are that there was a fence at some times and at other times there was not, perhaps as a result of it having fallen into disrepair.

[62] On weighing all the evidence, the picture which emerges as far as the physical element of the alleged possession of the Remainder is concerned is that the community had use of the Remainder for certain purposes. However this use was not an exclusive use. In respect of the orchard and the ploughing fields visible in the aerial photographs on the Remainder, it was common cause that the Hofmeyr family had exclusive use. In respect of that part of the Remainder which falls outside the fields and the orchard, the community enjoyed various forms of non-residential and non-exclusive use. Some forms of use were seasonal. These included grazing during the period when the fields on Portion 1 were being used for cultivation of crops,[97] the gathering of fruit and berries and the gathering of grass for thatching and making brooms. Hunting and the gathering of leaves for a certain type of tea could have been seasonal or throughout the year, one cannot say on the evidence. Mining clay for pots, collecting fire wood and cutting wood for making yokes and axe handles would have taken place throughout the year. So would the activities associated with the registered water servitude which existed in favour of Portion 1 over the Remainder. This included the actual use of the water and the cleaning of the furrow which led water from the Kutetsha River over the Remainder and through the mission station. That these forms of use took place over a long period of time is apparent from the fact that both Mr Serumula and Mrs Mabuela spoke of their parents or grandparents using the Remainder for some of the purposes which I have referred to. None of these activities would have been inconsistent with the existence of a fence between the two properties. As far as the grazing is concerned, even if there was a fence, there must have been at least one gate in the fence, as access to the Remainder was gained via Portion 1. In fact Mrs van der Merwe testified to the existence of a gate in the vicinity of the manse through which such access was gained.

[63] The mental element of the alleged possession of the Remainder was probably influenced by the history in relation to that portion. When the community arrived there, there was no distinction

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97 The evidence as to whether the use of the Remainder for grazing was seasonal or not was not entirely clear. Certain statements of the witnesses who testified for the claimant, particularly Mrs Mabuela, point to a seasonal use when the fields on the southern part of the farm were being used for cultivation. This would explain why the cover of vegetation on the Remainder in the aerial photographs for 1957 looks better. On the probabilities, I find that the grazing on the Remainder was seasonal.

between the subdivisions. Hofmeyr was the resident missionary, so there was no need for the Hofmeyr family to be accommodated elsewhere. The community at that stage would have had the same attitude to their use of what became the Remainder as they would have had in relation to the rest of the farm. It is highly improbable that the community would have been aware of the detail of the transactions which gave rise to the subdivision of the farm in 1910. Their understanding of the underlying transactions probably only extended to what they observed by way of the Hofmeyrs' physical assertion of control over the Remainder. This view is supported by the clear understanding which emerged in the evidence of the claimant's witnesses of the exclusive use of the ploughing fields and the orchard by the Hofmeyrs. At the same time, it is likely that the Hofmeyr family would have tolerated continued use of the Remainder by the community to the extent that this did not affect them negatively because of the family's historical association with the mission. Documents in the referral showed some continuing concern on the part of the Hofmeyr family for the mission's affairs along with a pride in the family's historical connection with the mission. Their access to their land was via Portion 1 and this too would have necessitated a degree of reciprocal tolerance. The community's sense of legitimate access to the Remainder was probably enhanced by the fact that, at least in the years leading up to the removals, no-one from the Hofmeyr family was resident on the farm. This, in my view, goes some way towards explaining the attitude of entitlement on the part of the witnesses called by the community to the forms of use concerned. The probabilities are that the community regarded these forms of use as an entitlement associated with their membership of the mission community on Portion 1.

[64] Counsel for the Church argued that these forms of use were so slight that they could not constitute beneficial occupation. For there to be such occupation, the community's intention had to be to occupy or possess to the exclusion of any other party. He relied for authority on the case of *Nienaber v Stuckey*.[98] That case concerned an application for a mandament van spolie. The applicant in that case sought relief in terms of the mandament on the basis that he was entitled to plough and cultivate land on the farm of the respondent and had been precluded from doing so by the locking of a gate. The respondent opposed the application specifically on the basis that the applicant did not have exclusive possession of the land and that he (the respondent) retained full use of the land to the extent that this was compatible with the applicant's ploughing and cultivation (which was seasonal). The Appellate Division rejected this argument and found that the

98 1946 AD 1049.

applicant's non-exclusive possession was still a basis for the grant of an order restoring such possession. Greenberg JA held as follows:

> ". . . there appears to be good reason for holding that exclusiveness of possession is not an essential element [for the grant of relief under the mandament]. In *Nino Bonino v de Lange* (1906 TS 120) INNES CJ says (at p 122)) that 'spoliation is any illicit deprivation of another of the right of possession which he has whether in regard to movable or immovable property or even in regard to a legal right'. Wassenaer (Practyk Judicieel Chap 14 Art 1) says that the remedy following on spoliation is competent to anyone who has been deprived of 'eenige goederen of gerechtigheden' which seems to include incorporeal rights. (See also Voet 43.16.7; Lee's *Introduction to Roman-Dutch Law* 3rd ed p167). The fact that these authorities state generally, and without any limitation or exception, that the possession of incorporeal rights is protected against spoliation means that the holders of such servitutal rights as rights of way, where clearly the person who holds the servitude does not have exclusive possession of the land, are entitled to the relief against dispossession by spoliation. See also de Blecourt *Kort Begrip van het Oud-Vaderlandsch Burgerlyk Recht* (5th ed p 189) where he says that, in respect of the same piece of land, there may be different rights, vested in different persons, all entitled to the protection of spoliation proceedings. Moreover, apart from authority, I can see no reason why the relief should not be available merely because the person who has been despoiled does not hold exclusive possession."[99]

The case is therefore strong authority for the recognition of forms of possession or occupation which do not involve exclusive use.

[65] In the case of *Bon Quelle (Edms) Bpk v Munisipaliteit van Otavi*[100] the Otavi Municipality had applied for a spoliation order in respect of water led from a spring on Bon Quelle's farm. The municipality was not able to prove in those proceedings that it had an underlying right in the form of a servitude, but was able to show that it had led water from the farm peacefully and without disturbance for decades until the supply was cut. The Appellate Division held that this was enough to found the grant of the possessory remedy. Hefer JA's reasoning, backed up by extensive reference to Roman and Roman-Dutch authorities, was as follows:

> "Die vraag is nou hoe 'n geval soos die onderhawige waar die respondent nie die serwituut waarop hy aanspraak maak, bewys het nie maar tog jarelank die bevoegdhede van 'n serwituuthouer uitgeoefen het, benader moet word. As basiese uitgangspunt moet, myns insiens, aanvaar word dat 'n reg, hoewel onliggaamlik, nogtans vatbaar is vir besit - wat natuurlik as *quasi*-besit verstaan moet word. *Quasi possessio* is 'n begrip wat reeds in die Romeinse reg bekend was; . . . en is ingeburger in die Suid-Afrikaanse reg . . . 'n Onliggaamlike saak soos 'n serwituut is natuurlik nie vatbaar vir fisiese 'besit' in dieselfde sin as wat daardie uitdrukking gebruik word met betrekking tot liggaamlike sake nie, maar wel vir *quasi-possessio* wat bestaan uit die daadwerklike gebruik van die serwituut. (Waar ek later in hierdie uitspraak die uitdrukking 'besit van 'n reg' gebruik, bedoel ek dit in hierdie sin.) In die samehang van die

99 At 1055 - 6.

100 1989 (1) SA 508 (A).

> mandament van spolie neem, soos later sal blyk, die daadwerklike gebruik van 'n beweerde serwituut die plek van die besit van 'n liggaamlike saak.
>
> . . .
>
> Uit wat ek reeds gesê het, blyk dit dat die begrip van die besit van 'n reg in die vorm van *quasi possessio* vir eeue reeds aanvaar word en ook deur hierdie Hof aanvaar is. Hieroor kan daar nie verder diskoers gevoer word nie. Dit is juis die *quasi possessio* van regte wat die hoeksteen vorm van beslissings soos *Nienaber v Stuckey* . . .."[101] (my emphasis)

Although the decision is based on the concept of possession of a right, Hefer JA makes it clear that the concept of quasi-possession essentially amounts to the practical manifestations of the exercise of the servitudinal right (see the portions emphasised).

[66] I should add that in the context of letting and hiring, our law (unlike English law) does not require that there be exclusive occupation of the leased asset for there to be an agreement of lease.[102] This was pointed out in the judgment of Roper J in *South African Railways And Harbours v Springs Town Council* as follows:

> "Voet (19.2.1) describes the contract of letting and hiring simply as a consensual contract for the exchange of use or work for hire. Van Leeuwen (RDL 4.21.1) defines it as a contract whereby the use of a thing, or the benefit of any service or act, is promised for a certain price (cf Grotius 3.19.1; Pothier Louage para 1). None of these authorities say that the enjoyment or use to be afforded to the lessee must be the full enjoyment and use of the property or that possession must be exclusive. Not only corporeal but incorporeal property (i.e. rights) may be hired and let (Voet 19.2.3.; Pothier Louage para 9) and the conception of letting and hiring is wide enough to cover a number of subjects which are not categorised in English law under the heading of landlord and tenant. It does not appear to me that the notion of exclusive possession or exclusive control or exclusive enjoyment is essential to the idea of a letting and hiring in Roman-Dutch Law. It is absent in the case of some of the contracts for services, e.g. deposit for hire, and carriage, and may well be absent in the case of a grazing lease, or a lease of trading or shooting rights."[103]

[67] Now the forms of use which the community exercised over the Remainder of Kranspoort were, in the case of the community's activities relating to the water servitude, identical to those in the *Bon Quelle* case and in the case of the other uses, akin to the practical manifestations of the exercise of servitudinal or similar non-exclusive rights in land. Taking into account the analysis

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101 Above n 100 at 514C-I and 515C.

102 Cooper *Landlord and Tenant* 2 ed (Juta, Cape Town 1994) at 38.

103 1949 (2) SA 34 (T) at 52-3.

of the physical[104] and subjective[105] components, I am satisfied that these uses amounted to quasi-possession. They would have justified the award of a spoliation order were they interfered with. The question is whether such quasi-possession or non-exclusive use is included in the concept of beneficial occupation as referred to in the Restitution Act. In my view the following considerations lead to the conclusion that quasi-possession or non-exclusive occupation must be included in the concept of beneficial occupation, provided it is beneficial and is exercised for at least ten years prior to the dispossession:

(i) This represents a coherent treatment of the different forms of land use which dispossessed persons exercised.

(ii) There is a principle of statutory interpretation that requires statute law to be interpreted in harmony with the common law.[106] The common law equates the concepts of possession and quasi-possession for purposes of the award of possessory remedies. It also recognises non-exclusive, beneficial occupation as a basis for a lease. An interpretation of the Restitution Act which also treats these forms of possession as logically equivalent would be in accordance with this principle.

(iii) To hold otherwise may lead to injustice. Even a claimant who had dominant but not exclusive beneficial occupation of land and was deprived of it as a result of a racially discriminatory law or practice, would have no claim.

(iv) Such an interpretation is in accordance with the approach to interpretation to which I referred in paragraphs [29] and [30].

[68] There are however two respects in which the above analysis must be qualified. The first is that there must be something particular to the claimant about the exercise of the quasi-possession and the enjoyment of the benefits which are derived from that quasi-possession. Thus the regular

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104 See paragraph [62].

105 See paragraph [63].

106 *S v Collop* 1981(1) SA 150 (A) at 164A-B; *In re Beukes and Bekker* [1998]1 All SA 34 (LCC) at 42b; *Mayibuye* above n 46at 614g and the authorities listed in n 28 of that judgment.

use of a public road, for example, could not be considered to qualify as beneficial occupation. If the definition of right in land is not interpreted in this way, it may extend the reach of restitution way beyond what the legislation envisages. Secondly, once it is shown that there were rights of this nature in land, it must be evaluated separately whether, on a proper exercise of the discretion conferred on the Court by section 35 of the Restitution Act, restoration of those rights is the appropriate remedy.[107]

[69] There can be no doubt that the claimant community's quasi-possession arising out of the various uses of the Remainder was beneficial and was particular to it. I am accordingly satisfied that the claimant community had beneficial occupation, to the extent explained, of the Remainder for at least ten years before the removals. It accordingly had rights in land in respect of the Remainder.

Were the dispossessions as a result of a racially discriminatory law or practice?

[70] In order to succeed, the claimant community must show that it was dispossessed as a result of racially discriminatory laws or practices. Pursuant to a series of pre-trial conferences held between the parties, a document setting out facts which were not in dispute between the parties was filed. In regard to this question, the document reads:

> "4.1 During 1955/6 all residents at Kranspoort, but 75 families, were evicted from Kranspoort in terms of the Group Areas Act of 1950.
>
> 4.2 The 75 families who had remained at Kranspoort were moved from Kranspoort during 1964 in terms of the Development Trust and Land Act, No 18 of 1937."

[71] I should mention at this point that the evidence showed quite clearly that the 75 families who remained were not all removed in 1964, but were removed over a period of time culminating in the final removals in 1964 of 31 remaining families. I deal with this in paragraph [75](iii). What is important to point out here is that the Church did not dispute that the removal of the 75 families was as a result of a racially discriminatory law. Nor was there any basis for disputing this. What the Church contested was whether the 1955/6 removals were as a result of a racially discriminatory law or practice. The Church accepted that the removals were in terms of the Group

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107 See paragraph [85].

Areas Act, but argued that the determinative cause or the cause which should be legally recognised was the refusal of the Ba Sefasonke to co-operate with the Church and their disregard for the rules regulating life at the Mission. The Church contended that the employment of the Group Areas Act was "nothing more than an instrument to effect an inevitable eviction". The Church relied on the case of *Minister of Land Affairs and Another v Slamdien and Others*[108] which was followed in *Boltman v Kotze Community Trust*.[109] In the *Slamdien* case, this Court held that the enquiry regarding whether or not the dispossession was as a result of a racially discriminatory law or practice was an enquiry into causation. The approach to the enquiry was described by the Court as follows:

> "[37] . . . It has been recognised in relation to other branches of law that there are common themes in all legal enquiries into causation. In *Napier v Collett and another* Grosskopf JA provided the following analysis:
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> > 'Despite the differences between various branches of the law, the basic problem of causation is the same throughout. The theoretical consequences of an act stretch into infinity. Some means must be found to limit legal responsibility for such consequences in a reasonable, practical and just manner . . .'
>
> [38] The problem to which Grosskopf JA refers can also be stated from the perspective of a particular result (in this case, the dispossession). Such a result would usually have several antecedent events or conditions, without which the result would never have come about. The difficulty is to identify which of these must be regarded, for purposes of a legal enquiry, not just as a necessary condition for a result, but the actual cause of it. In other fields of law, this problem has been resolved by separating the causation enquiry into two stages. The first involves an enquiry into what has been termed 'factual causation'. Generally, this involves the application of the 'conditio sine qua non' or 'but for' test. In other words, but for the act or omission identified as a potential cause, would the result have followed. If this test identifies the act or omission as a necessary condition for the result to have occurred, there is a second enquiry into 'legal causation'. It is at this stage of the enquiry that the Court must isolate that event or condition which was sufficiently determinative of the result to be treated not just as a necessary condition, but as a legally recognised cause of the particular result. In order to achieve this, the courts (at least in the fields of criminal law and delict) adopt a flexible approach which draws on one or more of the recognised tests and on the dictates of reasonableness, policy, common sense and the facts of the particular case.
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> [39] Where the causal enquiry is required by the words of a statute, the process must, in the first place, be guided by the application of the principles of interpretation. It may well be clear, simply on an application of the principles of interpretation, what the solution to a statutorily based causal enquiry is. Where the solution is not clear, provided that there is nothing which expressly or impliedly excludes it, the two stage enquiry can be employed in an appropriate way to resolve the matter. Given the confirmed status of the two stage enquiry as part of our common law, this is in accordance with the presumption of statutory interpretation to the effect that an enactment is in harmony with, and amends in as limited a way as possible, the common law and the existing statute law. When it comes to the second leg of the enquiry

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108 *Slamdien* above n 28.

109 [1999] JOL 5230 (LCC); internet website http://www.law.wits.ac.za/lcc/1999/boltmansum.html.

> (legal causation), the flexible approach which has been applied in criminal and delictual law would be circumscribed by the rules of statutory interpretation."[110]

Based on this case, the Church argued that the Group Areas Act did not survive the application of the "sine qua non" ("but for") test. The BaSefasonke would, in the absence of the Group Areas Act, have been evicted by way of civil action in terms of the common law.

[72] What emerges from the above extract is that, before entering into the traditional two stage enquiry, one must first see whether the solution to the causal enquiry cannot be arrived at on a simple application of the terms of the statute. What this means is that if, having regard to all the circumstances, the dispossession is patently one in respect of which the statute intended to provide a remedy, the enquiry need go no further. If regard is had to the circumstances of the 1955/6 removals, they bear all the hallmarks of the type of dispossession which the Restitution Act seeks to remedy. The records in the referral reveal that the process of carrying out the 1955/6 removals was guided throughout by the Department of Native Affairs, an instrument of State one of whose primary functions was to implement the policy and laws relating the racial zoning of the country. As appears from the analysis in paragraphs [49] to [51], the community's position had already been undermined by a series of racially discriminatory land laws long before any dispute arose between the BaPharoah and the BaSefasonke. Even on the Church's characterisation of the use of the Group Areas Act as a "mere instrument" to effect the eviction, it remains a very relevant factor in deciding whether or not this is the type of action which the Restitution Act sought to remedy. The direct use of this "instrument" distinguishes the present case substantially from the facts of the *Slamdien* case. There the instrument selected to effect the dispossession was a race neutral prerogative power, with the Group Areas Act providing only a very remote part of the background to the case.[111]

[73] The racially discriminatory manner in which the removals were carried out is also relevant in this regard. All the official correspondence preceding and following the removals referred to the persons affected with the racist label of "native". There was in fact no resort to civil process to secure the removals, something which in my view would never have been contemplated by the Church or the State in respect of a large group of white persons which it wished to evict. When

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110 *Slamdien* above n 28 at 628f to 629e.

111 *Slamdien* above n 28 at 629e to 630f.

the removals were carried out, many people were arrested. Children were separated from their parents. They stayed on at the mission without parents until the end of the school term. In the case of the witness Serumula who was then a boy aged 16 or 17, at the end of the school term he had to harness the family's mules alone and take his younger siblings, nephews and nieces by cart a distance of at least 60 to 70 kilometres by night to join his uncle in Witlig. They left at night because they were under threat of arrest if they were still at Kranspoort at midnight. Again, I simply cannot see white children whose evictions might have been sought for any reason being treated in this way. The attitude displayed by the "hoofnaturellekommissaris, noordelike gebiede" in a memorandum to the Secretary for Native Affairs dated 5 March 1956 reveals the attitude behind the official actions relating to the removals. It related to the period when some families had ignored the "trekpasses" and were being subjected to successive prosecutions and reads:

> "As daar lank genoeg aangehou word met die hofsake sal die versetters wel moeg word. Ek voel egter dat dit nie die regte prosedure is nie. Die oues van dae kan die keuse gegee word om na landelike dorpe te gaan, maar die ander moet uitgesit word, met geweld, indien nodig." (my emphasis)

[74] All of these circumstances to me point to the type of forced removal which falls squarely into what was contemplated by the concept of a "dispossession as a result of racially discriminatory laws or practices" and which the Restitution Act was intended to remedy. On this basis the causal enquiry is resolved in favour of the claimant on the first test referred to in the *Slamdien* case.

[75] Even if I am wrong in this regard, it is my view that the application of the traditional two stage enquiry does not resolve the matter in favour of the Church either. I will assume for purposes of my decision that the BaSefasonke did refuse to co-operate with the Church and disobeyed the rules regulating life at the Mission. The application of the first stage of the test to this potential cause (ie the conduct of the BaSefasonke) requires one notionally to remove it from the sequence of events and decide whether the removals would still have taken place. In my view the following facts justify a conclusion that, on a balance of probabilities, the removals would still have taken place:

(i) The official documentation in the referral reveals that the Church sought and secured the intervention of the Department of Native Affairs in bringing about the 1955/6 removals. When they approached the Department, they included as part of the problem in respect of

which they sought advice and the intervention of the Department, the mission station at Bethesda. In fact the very same scheme was hatched by the Secretary for Native Affairs for both missions, using the Group Areas Act and the issuing of permits to bring about the retention of a limited number of families at the mission and the de-legitimation of the occupation of the remainder who were then to be removed.[112] Most of the subsequent correspondence between the Department and the Church in connection with the 1955/6 removals deals simultaneously with removals at both Bethesda and Kranspoort. Yet neither Maree's work, which also deals with the history of Bethesda,[113] nor the correspondence contains any reference to any disturbance of the type which took place at Kranspoort having taken place at Bethesda. Nor was Professor Malan aware of any such disturbance at Bethesda.

(ii) The 157 families who were removed from Kranspoort included many who were in fact supporters of the BaPharoah, who had sided with the missionary during the conflict. This was confirmed in the evidence of Malan and in Malunga's thesis as to whose accuracy Malan testified on behalf of the Church. This undermines the theory that it was the rebellious stance of the the BaSefasonke which led to their eviction.

(iii) Although on the Church's version the 1955/6 removals got rid of the trouble makers, the process of removal did not stop. Contrary to the statement of facts not in dispute between the parties, the official records in the referral show that over the ensuing years, trekpasses continued to be issued to families,[114] culminating in the removal of the last 31 families in 1964. It thus appears that a process of removal started in 1955/6 and continued until 1964

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112 75 Group Areas Act permits were obtained for Kranspoort and 100 for Bethesda. This appears from a letter dated 25 April 1955 addressed by the Mission Secretary to the Secretary for Native Affairs.

113 At 193 to 202. The unrest at Kranspoort is referred to at 211 of Maree's work.

114 The November 1959 report referred to in paragraph [60] states as follows in the part dealing with Kranspoort:

> "Die genootskap het toe 'n groepsgebiede-permit gekry vir die orige 75 gesinne. Sedertdien is ook aan 'n verdere 43 trekpasse gegee sodat daar vandag net 32 families oor is."

By the time of the 1964 removals the number was down to 31.

and it made no difference whether or not the victims had co-operated with the Church and complied with the rules.

[76] Even if I am wrong in this respect and the actions of the BaSefasonke are to be taken as a causa sine qua non or factual cause of the removals, I am still not satisfied that this was the determinative cause. In other words, the second stage of the enquiry is not satisfied. What the documents in the referral reveal is that once the Church secured the involvement of the Department of Native Affairs, they essentially took complete control of the process of planning and effecting the removals. The dominant imperative from that point became the enforcement of the country's racial zoning laws and policies and whatever the reasons for the Church's approach were in the first place became irrelevant. This is reflected in the fact that the removal process did not stop in 1956. The intervention of the Department of Native Affairs in this very active and prolonged manner in my view relegated the disturbances at Kranspoort to mere background, with the determinative cause of the removals being the racially discriminatory laws which the Department wished to enforce and the racially discriminatory practices which were involved in the execution of the removals.[115] In the language of the traditional tests for legal causation, the Department's intervention represented a new intervening cause ("novus actus interveniens").[116] A view along these lines is expressed in Malunga's thesis where he says the following:

> "The unrest which erupted at Kranspoort Mission Station between the BaPharaoh and BaSefasonke in 1953 coincided with the attempts by the Government of the Union of South Africa to implement its policy of social and residential separation. This was to be carried out by the Group Areas Act of 1950. Unfortunately for the Synodical Mission Committee the Mission Station was within a declared White area and as a result was to be closed down. Thus the partial collapse of the Dutch Reformed Church missionary enterprise at Kranspoort was not brought about only by the unrest between the BaPharaoh and BaSefasonke. The Group Areas Act of 1950 and the Promotion of Bantu Self-Governing Act of 1959 also made the closing down of Kranspoort Mission Station inevitable."[117] (my emphasis)

I am accordingly satisfied that the claimant community was dispossessed as a result of racially discriminatory laws and practices.

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115 See paragraph [73].

116 On the concept of novus actus interveniens, see Neethling, Potgieter and Visser *Law of Delict* 2nd ed (Butterworths, Durban 1994) at 187 to 189 and the authorities referred to there.

117 Malunga above n 8 at 89.

Was just and equitable compensation received by the 75 families who remained?

[77] In terms of section 2(2) of the Restitution Act,

> "(2) No person shall be entitled to restitution of a right in land if-
>
> (a) just and equitable compensation as contemplated in section 25 (3) of the Constitution; or
>
> (b) any other consideration which is just and equitable,
>
> calculated at the time of any dispossession of such right, was received in respect of such dispossession."

The Church contends that such compensation was received in respect of the 75 families who stayed on after the 1955/6 removals. An issue which was disputed in this case and has not yet been settled by this Court is who bears the onus of showing that just and equitable compensation was not received. I will assume in favour of the Church and the Department (without deciding the point) that this onus rests on the claimant.

[78] As appears from paragraph [75](iii), the 75 families were not all removed at once. The final removal in 1964 involved only 31 families who were left by then. The official records in the referral show that compensation for improvements on Kranspoort was paid to only 26 of these 31 families.[118] The compensation was paid only for improvements, including buildings, fences and trees. No compensation was paid for the loss of their beneficial occupation of the farm. The documents relating to this removal also show that, when told by the officials of the Department of Native Affairs that they had to leave, these 31 families all decided to move to land falling under the jurisdiction of a certain Chief Khutama. This Chief was only willing to accept these persons onto his land on condition that they would not be entitled to any land for grazing or cultivation.[119] At Kranspoort they had substantial access to land for cultivation and grazing. The compensation

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118 A detailed breakdown is contained in a document dated 14 April 1964.

119 This appears from, amongst others, a letter dated 31 July 1964 from the "Bantoesakekommissaris, Louis Trichardt" to the "Hoofbantoesakedommissaris, Pietersburg". A letter from Van der Merwe, the missionary, to the Mission Secretary of the Church dated 27 October 1964 reads:

> "Die volk wat getrek het, kon hulle beeste nie almal verkoop kry nie, en daar is nêrens gras of 'n heenkome daarmee nie. Hulle mag dit ook nie mee neem nie . . .".

paid did not include compensation for this loss. On this basis alone, it has been shown that they did not receive just and equitable compensation.

[79] In so far as the rest of the 75 families are concerned, the evidence is that they were issued with trekpasses between 1956 and 1959 (save for one family removed between 1959 and 1964). There are no records in the referral to suggest that they received any compensation. Given that their removal was also based on trekpasses, the probabilities are that they were treated in the same way as the 1955/6 evictees and received no compensation whatsoever. Indeed the idea of compensation seems to have come about as a result of the November 1959 report which motivated very strongly for the payment of compensation for improvements to the 32 families who then remained at Kranspoort.[120]

[80] Over and above this, the evidence led at the trial and Malunga's thesis show that, generally, the persons removed were left far worse off than they had been when living at Kranspoort. The claimant has accordingly shown that neither just and equitable compensation,[121] nor any other just and equitable consideration[122] was received by the 75 families who remained after the 1955/6 removals.

[81] The claimant community has thus shown that it complies with the requirements for a valid land claim in terms of section 2 of the Restitution Act.

What is the appropriate remedy?

[82] The discretion which is vested in the Court in terms of section 35 of the Restitution Act to grant appropriate relief in respect of a valid land claim was described in *Pillay v Taylor-Burke Projects (Pty) Ltd and others*[123] as follows:

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120 Paragraph [60]. Note that at some point between 1959, when this report was prepared, and the time when the final removals of 31 families took place, another family must have left or been removed.

121 Section 2(2)(a) of the Restitution Act.

122 Section 2(2)(b) of the Restitution Act.

123 LCC 119/99, 19 October 1999, internet website http://www.law.wits.ac.za/lcc/1999/pillaysum.html at paragraphs [16]-[17].

> ". . . once a claim has been shown to comply with the section 2 requirements, there are a wide variety of potential forms of relief. In deciding on which form of relief is appropriate, the Court is accorded a wide discretion. In *Makuleke Community Claim pertaining to Pafuri area of Kruger National Park* this Court said the following about section 35(1):
>
> > 'The power of the Court to order restitution in one form or another is derived primarily from section 35(1) of the Restitution Act. . . . The use of the word 'may' suggests that the Court has a discretion as to whether or not it should make such an order and what the content of that order should be. The discretion, although not unfettered, is a wide one. This is also apparent from the ensuing subsections in section 35 and from section 33 which lists the factors which the Court must consider in 'considering its decision in any particular matter'.'
>
> In *Blaauwberg Municipality v Bekker and Others*, Gildenhuys J held as follows:
>
> > 'it must be remembered that there is no substantive right to any particular form of restitution, be it restoration, alternative land, compensation or some other form of relief. The interim Constitution and the Restitution of Land Rights Act only provide a right to 'claim' or 'enforce' restitution, in other words, a right to engage in a process. A substantive right to a particular form of restitution only comes into existence when the Court makes a restitution order.'
>
> Although the legal regime in respect of restitution claims has changed, this dictum is still accurate because it emphasises that a claimant has no specific right to a particular form of relief, even in respect of the property originally dispossessed."

[83] The claimant in this case seeks an order restoring its rights in the farms which now constitute the original farm Kranspoort, along with an order in terms of section 35(4) of the Restitution Act adjusting those rights to full ownership. The Church opposes the form of relief sought, saying that even if a claim is proved, restoration is not the appropriate remedy. As appears from the above extract from the judgment in the *Pillay* case, the Court must have regard to the factors in section 33 of the Restitution Act in making its decision. It is with reference to these factors that I will analyse what form of relief is appropriate.[124]

[84] The factor referred to in section 33(a) is

> "the desirability of providing for restitution of rights in land to any person or community dispossessed as a result of past racially discriminatory laws or practices".

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124 My specific allusion to the factors here must not be taken to mean that I have not considered them elsewhere in my decision-making in relation to this matter, where appropriate.

"Restitution of a right in land" is however defined to include both restoration and the other forms of relief which are available.[125] This factor seems to be neutral in relation to the particular form of relief which is appropriate.

[85] Section 33(b) refers to "the desirability of remedying past violations of human rights". There is no doubt that the sequence of events which resulted in the removal of the claimant community involves serious violations of human rights. If the community has indicated that it prefers restoration in order to remedy those violations, they are supported in this regard by the authorities and they are otherwise able to show that the grant of restoration is an appropriate exercise of the Court's discretion, this factor weighs in favour of restoration. This factor is relevant also to the question of whether there should be restoration in respect of the Remainder. There may be situations where the remedying of past violations of human rights can be achieved without restoring rights based on quasi-possession, particularly where such rights were very limited in nature. Thus section 35(1)(a) provides for the restoration either of all or of only a portion of the land in respect of which a claim is lodged. However, this is not such a case. I do not agree with the Church's characterisation of the claimants use of the remainder as slight. Taking into account all the circumstances, including the extended period over which the rights in question were exercised, if rights in land in respect of the Remainder are not restored,[126] whilst rights in land in respect of Portion 1 are, the community would be left in circumstances substantially less favourable than those they were in before the dispossession and this would constitute an inadequate remedying of those past violations.

[86] The observations made in relation to section 33(b) apply equally to the next factor, which is "the requirements of equity and justice".[127] The positions of all the parties affected by the claim must be taken into account in relation to this factor. The Church argued that the community never had rights of ownership and it could never be just and equitable to take the land away from the Church, as owners, and hand it to a community that had already been the object of the Church's kindness. I do not agree with this argument. The Church is protected by its constitutional right to

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125 Section 1 of the Restitution Act.

126 I confine myself here purely to the question of restoration of the rights originally enjoyed. The claim for an adjustment of those rights in dealt with in paragraphs [103] to [104].

127 Section 33(c).

compensation in respect of any rights in land which are expropriated in order to effect restoration. The Church has already entered into agreements of sale in respect of both the farms making up the original Kranspoort. The only effect which a restoration order will have is that the compensation will come from the process of expropriation and not from the sales (assuming transfer is not registered in the mean time). Moreover, the taking of existing rights in order to effect restoration is specifically envisaged by the Restitution Act.[128] The fact that the Church had better title to the land than the community is tempered by the fact that they held the land specifically for the purposes of running a mission station for the spiritual and material well-being of the community, not for its own benefit. An order which restores the land to the community comes far closer to realising the original purpose of the bequest of the land to the Church than allowing the Church to retain the land purely for the purposes of selling it to private individuals with no connection to the mission history of the Church. The Church also argued that racism played no role in the 1955/6 removals and that this also placed justice and equity on the side of the Church. I disagree with this for the reasons already given in paragraphs [72] to [73].

[87] The next factor is that referred to in section 33(cA):

> "if restoration of a right in land is claimed, the feasibility of such restoration;".

It is this factor that gave rise to the most debate. The Church referred to the evidence of the claimant's witnesses as to their intentions regarding the resettlement of the farm and the viability of that resettlement. The evidence suggested that the community intended re-establishing themselves at Kranspoort and living off the land on the basis of the agricultural activities which they conducted on the land before. The documents suggest that before the 1955/6 removals there were some 800 people living at Kranspoort. Potentially, a similar large number could return.[129] They would have to survive off only 1542,8568 hectares or less if only Portion 1 was restored. The existing infrastructure at Kranspoort could not cope with the resettlement of several hundred

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128 See section 35(1)(a) of the Restitution Act where it authorises the restoration of land "and, where necessary, the prior acquisition or expropriation of the land . . ." .

129 Mr Serumula testified that the claimants listed in the main list and their relatives would be allowed to return.

people. There has been no proper planning for the community's return to the land. For these reasons, the Church argued that the restoration of the farm was not feasible.

[88] In order to assess the impact of this argument it is necessary to establish the meaning of "feasibility" in paragraph (cA). The concept of feasibility is not defined in the Restitution Act. It does have a legislative history. Section 123(1) of the Interim Constitution[130] provided that restoration of a right in land could only be granted, in the case of State land, if the State certified that restoration of the land was feasible and in the case of private land, if the State certified that the acquisition of the right in land was feasible. Before the Restitution Act was amended to provide for the changes brought about by the promulgation of the final Constitution, this constitutional requirement of a certificate of feasibility was given effect to by section 15. It required that, before a land claim for restoration be referred to the Court, the Chief Land Claims Commissioner obtain a certificate of feasibility from the Minister of Land Affairs. Section 15(6) read -

> "In considering whether restoration or acquisition by the State is feasible . . . the Minister shall, in addition to any other factor, take into account -
>
> (a) whether the zoning of the land in question has since the dispossession been altered and whether the land has been transformed to such an extent that it is not practicable to restore the right in question;
>
> (b) any relevant urban development plan;
>
> (c) any other matter which makes the restoration or acquisition of the right in question unfeasible; and
>
> (d) any physical or inherent defect in the land which may cause it to be hazardous for human habitation."

[89] The final Constitution[131] did not contain the same level of detail in the provision dealing with restitution (ie section 25(7)) as did the Interim Constitution. In particular, section 25(7) makes no reference to feasibility, but does make the right subject to the limitations contained in an Act of Parliament. The Restitution Act was amended in 1997 to take into account the constitutional

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130 Constitution of the Republic of South Africa Act 200 of 1993. Sections 121 to 123, read with section 8(3)(b) of the Interim Constitution were the first provisions to confer a right to restitution arising out of racially based dispossessions of rights in land.

131 Above n 1.

changes.[132] These included amendments to the provisions dealing with feasibility. Section 15 was deleted and paragraph (cA) was inserted in section 33, it now being the only provision referring to feasibility. In the *Slamdien* case, this Court held that the changes brought about by the final Constitition did not seek to change the basis for restitution fundamentally and were largely the result of a different drafting style.[133] That approach must have informed the consequential amendments brought about by the Land Restitution and Reform Laws Amendment Act of 1997, including the repeal of section 15. Moreover, once the requirement for the Minister to issue a certificate of feasibility fell away, there was no longer a need to spell out in detail the nature of the discretion to be exercised in relation to feasibility.[134] For these reasons, I am of the view that some guidance as to what was meant by the concept of feasibility can still be derived from the repealed section 15(6), even though that provision was not re-enacted elsewhere in the Restitution Act. Section 15 is discussed at some length by Roux in *Juta's New Land Law*.[135] With reference to the factors in section 15(6), he comes to the conclusion that -

> "[i]n essence, whenever land has been substantially transformed or developed, the Minister will have good reason to refuse a feasibility certificate".[136]

Also in relation to the now-repealed section 15, the author Murphy expressed the view that "[f]easibility addresses the question of whether restoration . . . is practically achievable."[137]

[90] In so far as dictionary definitions are concerned, the *New Shorter Oxford English Dictionary* defines "feasibility" as "The quality or state of being feasible" and "feasible" as

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132 Land Restitution and Reform Laws Amendment Act 63 of 1997.

133 *Slamdien* above n 28 at 622d - e.

134 This was necessary before, because an expansive interpretation of feasibility by the Minister may have undermined the Court's ultimate authority to grant or refuse restoration. Once the discretion regarding feasibility was also housed in the Court, this need fell away.

135 Budlender et al *Juta's New Land Law* (Juta, Cape Town 1998)at 3A-45 to 48.

136 Budlender above n 135 at 3A-47.

137 Murphy "The restitution of land after apartheid: The constitutional and legislative framework" in Rwelamira and Werle (ed) *Confronting Past Injustices: approaches to amnesty, punishment, reparation and restitution in South Africa and Germany* (Butterworths, Durban 1996) at 131.

"Practical, possible; manageable, convenient, serviceable; . . .". It also defines a "feasibility report or study" as a study or report "on or into the practicability of a proposed plan."[138]

A Concise Dictionary of Business defines "feasibility study" as -

> "A study of the financial factors involved in producing a new product, setting up a new process, etc. The study will analyse the technical feasibility with detailed costings of set-up expenses, running expenses, and raw-material costs, together with expected income. The capital required and the interest charges will also be analysed to enable an opinion to be given as to the commercial viability of product, process, etc."[139]

The dictionary definitions thus convey a spectrum of meaning ranging from, simply, "possible" to, when used in the context of a feasibility study, "commercially viable".

[91] It is also important to bear in mind the immediate context of the words in the sense that the enquiry relates to the feasibility of restoration. The feasibility of the community's plans for resettlement or community development after restoration are not expressly included in the formulation of paragraph (cA). The focus is on the process of actual restoration of the rights. At the same time, the various criteria referred to in the repealed section 15(6) do seem to imply some enquiry into the intended use of the claimant in so far as it called for reference to be made to changes in the zoning for the area and any relevant development plan. These are land use planning measures. Clearly the intention is that restoration would not be considered feasible where the claimant's intended use was out of kilter with more recent development of the land itself or in the surrounding area.

[92] The test which emerges from this analysis is that the Court should ask: is the restoration of the rights in land in question to the claimant possible and practical, regard being had to -

(i) the nature of the land and the surrounding environment at the time of the dispossession;

(ii) the nature of the claimant's use at the time of the dispossession;

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138 Brown above n 88 at 926.

139 Isaacs et al (ed) *A Concise Dictionary of Business* (Oxford University Press, Oxford 1990) at 143.

(iii) the changes which have taken place on the land itself and in the surrounding area since the dispossession;

(iv) any physical or inherent defects in the land;

(v) official land use planning measures relating to the area;

(vi) the general nature of the claimant's intended use of the land concerned.

However this does not mean that an enquiry into the social and economic viability of the claimant's intended use is required. To require this would give rise to problems. Courts are not well-equipped to assess such social and economic viability. The effect of requiring such an enquiry may also be greatly to narrow the prospects of restoration awards being made generally and this would be contrary to the overall purpose of the legislation which has as one of its major focuses the actual restoration of rights in land.

[93] Returning to the Church's argument, there is no doubt that the community has done very little in the way of realistic planning of its return to, and viable resettlement on, the land which might be restored to them.[140] However, on the basis of the above analysis, this is not relevant to the feasibility of restoration. What is relevant is that there is no evidence of any zoning or other legal impediment to restoration, nor of any transformation of the land or the surrounding environment, nor of any physical or inherent defect in the land which makes the intended agricultural and residential use of the land hazardous or impractical. In the circumstances I am satisfied that the restoration of rights in land in respect of both Portion 1 and the Remainder is feasible. This is not to say that the Court is not perturbed at the current lack of proper planning in relation to any possible resettlement of the land. This a matter to which I will return below.

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140 This is not surprising. The community was faced with the burden of proving its land claim in the face of strong opposition which had placed in dispute almost every element which must be proved to establish a valid land claim. A substantial investment in planning the resettlement and development of the land would have made no sense where the community did not know if they would succeed in securing restoration and, if so, whether it would be restoration of Portion 1 only or of the entire original farm. Moreover, it would appear that State subsidies are not available for such planning until an order of restoration has been made. See section 42C(1) of the Restitution Act.

[94] Section 33(d) requires the Court to have regard to "the desirability of avoiding major social disruption". There are no circumstances present in this matter which suggest that a restoration order will cause major social disruption. Section 33(e) requires me to consider any existing affirmative action measures already in place in respect of the land concerned. There is no evidence that there are any such measures. Section 33(eA) requires me to consider -

> "the amount of compensation or any other consideration received in respect of the dispossession, and the circumstances prevailing at the time of the dispossession".

I have already dealt with the compensation paid to a small number of the former residents. The fact that there was no provision for any compensatory land[141] is a strong consideration in favour of an order of restoration. In so far as the circumstances prevailing at the time of the dispossession are concerned, these have been dealt with above, particularly at paragraphs [49] to [76]. These support an order of restoration.

[95] Section 33(eB) requires me to consider a number of issues:

(i) the history of the acquisition and use of the land;

(ii) the history of the dispossession;

(iii) the hardship caused by the dispossession; and

(iv) the current use of the land.

The history contemplated by items (i) to (iii) is set out in detail above, particularly at paragraphs [2] to [20]. Generally, the history of the land and the long-standing association of the claimant community with it, favours an order restoring it to them, particularly when one considers the severe hardship suffered by the former residents as a result of the removals.

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141 I do not consider the arrangement for the last 31 families to reside on Chief Khutama's land on most unfavourable terms to be an award of compensatory land.

[96] With reference to item (iv), this suggests that in deciding whether or not restoration is the appropriate form of relief, the Court must have regard to the current use of the land, the value of that use both to the current users of the land and in terms of the public interest and then evaluate the impact of a restoration order.

[97] Applying this to Kranspoort, very little evidence was led as to the current use of the land. An inspection of the land suggested that it had not been intensively farmed for some time. Documents which formed part of the Church's bundle[142] suggest that in respect of what is now Portion 3 (the north-western part of the farm), Mr Goosen has taken possession of it and has entered into an agreement with the Department of Environmental Affairs and Tourism in terms of which that part of the farm is included in the South African Natural Heritage Programme. However the documents do not make it clear what the precise legal significance of this is. It seems that the agreement contemplates undertakings from Goosen as to the proper management of the area from an environmental perspective in return for unspecified benefits from that Department. In so far as any alienation of the land is concerned, the agreement simply requires Goosen to notify the Department 60 days beforehand. The questionnaire which has been filled in in regard to this programme (and which forms part of the Church's bundle of documents) is helpful in that it suggests that, at least in 1997, that part of the farm was used for conservation, youth camps (there are newer buildings on the farm to accommodate these), hiking trails and to graze 30 head of cattle. Professor Malan's evidence as well as the observations made at the site inspection indicate that this is probably still the current use. If this is the wrong impression, it was up to the Church to present more detailed evidence in regard to the current use of the land.

[98] Of particular relevance in relation to this criterion is the Church's reliance on the Gaigher report.[143] According to Gaigher, the area is particularly important from an environmental point of view because it is unique in many respects and features a number of threatened plant and animal species. He also speaks of the vulnerability of the environment in the Soutpansberg to harmful activities by humans. There is also reference in the report to the cultural history of the area, with artefacts having been found evidencing Early, Middle and Late Stone Age activity. There are also

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142 I may have regard to these documents even though they were not formally proved on the basis of the agreement between the parties referred to in paragraph [25].

143 See paragraph [24](iv).

Iron Age sites, and there is rock art.[144] The report refers to the formation of the Western Soutpansberg Conservancy. He also says that a process is under way to have the Soutpansberg area recognised as a World Heritage Site and as a Biosphere Reserve in the relevant programme of UNESCO.[145] The focus of the report is to argue for a clear policy and priniciples regarding the management of the conservancy in order to preserve its heritage.

[99] On the basis of Gaigher's report, it was put to Mr Serumula that the return of the community would lead to a breach of the principles identified in his report for the proper management of the area as a conservancy and would deplete the natural resources. Mr Serumula's response was to say that the community would be sensitive to the environmental considerations, has already and would continue to liaise with the authorities responsible for environmental affairs and that the community in fact had plans to promote eco-tourism on the farm if it was restored.

[100] The claimant did not place Gaigher's report in dispute. I must therefore accept that the area is an environmentally sensitive one and that the current use tends to promote the protection of the environment. There is no doubt that this is in the public interest. However that is as far as it goes in terms of value to the current user and the public. If restoration will not prejudice the sustainable management of the farm from an environmental perspective, there is no reason why the current use should hold sway over restoration. It must be recognised that the modern approach to conservation is not to consider protection of the environment as something which must necessarily exclude communities and their activities.[146] Rather it focuses on co-opting communities into the sustainable management of the environment. In fact, this approach seems to underlie Gaigher's report where he says that -

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144 The questionnaire referred to in paragraph [97] suggests that these are also to be found at Kranspoort.

145 United Nations Education, Scientific and Cultural Organisation. The relevant treaty is the Convention Concerning the Protection of the World Cultural and Natural Heritage adopted by the General Conference of UNESCO on 16 November 1972 and ratified by South Africa on 10 July 1997. Its application will be regulated locally by the World Heritage Convention Act 49 of 1999 which awaits promulgation. The area is not one of the three South African sites which have recently been listed as World Heritage Sites. See the internet website at http:\\www.environment.gov.za.

146 Glazewski *Protected Areas and Community-based Conservation* in *Environmental law in South Africa* (Butterworths, Durban, in press); Summers *Legal and Institutional Aspects of Community-based Wildlife Conservation in South Africa, Zimbabwe and Namibia* in Glazewski et al (ed) *Environmental Justice and the Legal Process* (Juta, Cape Town 1999) at 188 - 210.

> "the [Western Soutpansberg] Conservancy Group also fully acknowledged that we in South Africa have entered a new socio-political era, in which the country, its regions and all its subregions must take into account the interests of ALL its peoples. It was therefore decided to ensure that the planning process must be transparent and all-inclusive. Thus all stakeholders and role players must be involved." (his emphasis)

[101] Part of that new socio-political era is the process of restitution. Moreover, the community is part and parcel of the historical heritage of the area. The questionnaire to which I have referred acknowledges the mission station as a feature of "cultural-historical importance" and that it has "played an important role in the lives of many people in the area". In the circumstances, the community is an important stakeholder and there is no reason why it should not be embraced in the Conservancy's plans if the claimant community is prepared to comply with the standards set for the sustainable management of the area. In this regard, I tend to agree with the submission on behalf of the Church that a relatively unplanned settlement of a large number of people on the land may impact negatively on the environment. At the same time I accept the genuineness of the community's desire to manage the land in an environmentally sensitive manner. The solution to this problem is not to deny restoration but to frame any restoration order in a way which will seek to ensure the protection of the environment and an orderly and planned restoration. The fact that the community intends to use the land for agricultural production need not be inconsistent with the sustainable management of the farm. Gaigher's report acknowledges the reality of continued agricultural production within the conservancy. The current use of the land is thus not a reason to refuse restoration.

[102] Section 33(eC) relates to financial compensation and is not applicable. Section 33(f) refers to -

> "any other factor which the Court may consider relevant and consistent with the spirit and objects of the Constitution and in particular the provisions of section 9 of the Constitution."

No submissions were made by the parties in relation to this paragraph. In so far as it operates as a catch-all in respect of other relevant factors, I also take into account, in favour of an order of restoration, the fact that such an order is supported by the Department of Land Affairs and the Regional Land Claims Commissioner. I am accordingly satisfied that a proper application of section 35, read with section 33, of the Restitution Act justifies an award of restoration of rights in land in respect of both Portion 1 and the Remainder.

Adjustment of rights

[103] Section 35(4) of the Restitution Act provides as follows:

> "The Court's power to order the restitution of a right in land or to grant a right in alternative state-owned land shall include the power to adjust the nature of the right previously held by the claimant, and to determine the form of title under which the right may be held in future."

The claimant seeks an order adjusting the rights in land which it previously held to full ownership rights in respect of both Portion 1 and the Remainder. In so far as Portion 1 is concerned, an order which simply restored beneficial occupation to the community on the same basis as they enjoyed before would not be satisfactory to any party. The community may have difficulty in raising finance for development of the farm. It would also perpetuate the unjustified uncertainty regarding the strength of their rights in the land. The Church has, according to Professor Malan, changed its philosophy regarding missionary work. They no longer seek to create religiously based communities which are separated from the rest of society, but rather see the whole of society as the domain for mission work and the spreading of the gospel. The relationship which existed before the removals between the Church and the community can therefore not be resurrected. The purchaser of Portion 2 (the south-eastern portion of the farm), Mr Venter, would have no use for a farm which was fully occupied and used by the community. Likewise Mr Goosen, the purchaser of Portion 3, would lose occupation of all but, perhaps, the manse and orchard, in relation to that part of the former Portion 1 which he has purchased. Justice and equity accordingly require that the community's rights in respect of Portion 1 be upgraded to that of full ownership and that the parties who currently hold rights in Portion 1 be compensated fully for the expropriation of their rights in that portion.

[104] In so far as the Remainder is concerned, a simple restoration of quasi-possession in relation to the various uses that the community had there would not be satisfactory for similar reasons. The options that are open are to adjust that quasi-possession either to registered servitudinal rights or to full rights of ownership. Dealing with the first option, that would seem to be an ideal solution for the members of the claimant community in that they would then have protected benefit of the Remainder on a similar basis to that which the community enjoyed before. However it would leave the owner of that land in a difficult situation. Assuming that the ownership remains with the Church, it would be the owner of a farm over which the community enjoyed substantial rights.

Access to the farm would probably still have to be gained via Portion 1, which would not be ideal. The amount of compensation which the owner was entitled to would also be diminished by the fact that only servitudes rather than full ownership rights would be expropriated from it. That in my view is not a just and equitable solution from the perspective of the owner. The community would also benefit from an adjustment of rights to full ownership in that they would then have the use of the ploughing fields and the orchard on that land. My order will accordingly provide for such an adjustment.

Formulation of order

[105] Section 35(2) contains some important provisions in relation to the formulation of an order of restoration. The relevant paragraphs provide as follows:

> "(2) The Court may in addition to the orders contemplated in subsection (1)-
>
> (a) determine conditions which must be fulfilled before a right in land can be restored or granted to a claimant;
>
> (b) if a claimant is required to make any payment before the right in question is restored or granted, determine the amount to be paid and the manner of payment, including the time for payment;
>
> (c) if the claimant is a community, determine the manner in which the rights are to be held or the compensation is to be paid or held;
>
> (d) .....
>
> (e) give any other directive as to how its orders are to be carried out, including the setting of time limits for the implementation of its orders;
>
> (f) make an order in respect of compensatory land granted at the time of the dispossession of the land in question;"

Also important is section 35(3):

> "(3) An order contemplated in subsection (2) (c) shall be subject to such conditions as the Court considers necessary to ensure that all the members of the dispossessed community shall 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 the community to the members of such community."

[106] Section 35(2)(b)(regarding any payment to be made by the claimant) and 35(2)(f) (regarding an order in respect of compensatory land received by the claimant at the time of the dispossession) are there to ensure that a claimant does not get an unjust advantage through the order. Applying these to the facts of this case, there was no suggestion by any party that any order in terms of these provisions was called for in this matter. No compensatory land was received. However I have carefully considered whether the claimant should not be required to make a payment in respect of the award of the Remainder, bearing in mind the substantial difference between the title which they will receive and the much more limited right which they had to it before the removals. However, in the absence of any claim for such a payment from the Department and in the light of the failure to compensate the vast majority of the community members for the loss of their substantial improvements at the time of the dispossessions, I have decided against this. In this regard it must be noted that almost all of the homes built by the community at Kranspoort no longer stand.

[107] Paragraphs (a), (c) and (e) of section 35(2) and section 35(3) give the Court further wide powers to devise appropriate conditions to ensure that the order will be implemented fairly and will bring about a workable and practical result. In considering how these provisions should be applied, I have had regard to some emerging literature regarding the aftermath of restoration orders and agreements. It appears from this literature that there is a trend of serious problems arising with the implementation of restoration orders and agreements.[147] These problems have related to -

(i) lack of co-ordination between the restitution process and the planning, budgeting and development programmes of provincial government;[148]

(ii) shortage of land;[149]

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147 Du Toit *The End of Restitution: Getting Real About Land Claims* unpublished paper prepared for Land and Agrarian Reform Conference, Pretoria 26-28 July 1999; Mayson et al *Elandskloof Land Restitution: Establishing Membership of a Communal Property Association* in Proceedings of the International Conference on Land Tenure in the Developing World with a Focus on Southern Africa 27 - 29 January 1998; Lund *Lessons from Riemvasmaak for land reform policies and programmes in South Africa Volume 2: Background Study* (Programme for Land And Agrarian Studies, University of the Western Cape, Bellville and FARM-Africa, London 1998).

148 Du Toit above n 147 at 8.

149 Mayson above n 147 at 554.

(iii) absence of proper planning before the resettlement of the land;[150]

(iv) disputes over entitlement to membership of the community;[151] and

(v) a shortage of skills and resources needed to redevelop the land.[152]

[108] Du Toit, in an insightful article on the restitution process[153] describes the difficulties faced by the beneficiary of a restitution order as follows:

> "This brings us to the most pressing and painful part of the problem - which is that the moment of return to the land cannot live up to the expectations and hopes generated by it. For of course what was lost can never be returned. Part of the problem is the fact that the land is not the only thing that was lost. What was destroyed through . . . removals was a whole way of being, a set of community relations, a system of authority and let [us] not forget, a broader system of economic relations and livelihoods *of which the land was but a part*, and which gave it its function and its value. The terrible truth of Restitution has thus been that the moment of return to the land is often a moment of disappointment and anti-climax. To settle on the spot from which one's forebears - or even a younger, more vigorous, more hopeful self - were once removed, is not necessarily to return to that more authentic, more dignified, more hopeful mode of existence. As we have seen in numerous cases, from Riemvasmaak and Elandskloof to Doornkop and Ratsegae, to return from exile to the promised land is to return to face the complex, dispiriting and painful problems in the new South Africa once again in new and often more intractable ways. For communities have grown, services are needed and the rural and national economies that made certain forms of existence possible may no longer be in place. If existence without piped water and electricity was acceptable in the past, it is no longer so - and these services have to be paid for, and paid for in a very different, increasingly globalised, economy. In all too many cases, we may be looking at a scenario where the land is returned to those who lost it - only to be lost again to the banks, or to those who are willing to pay good cash for it.
>
> . . . .
>
> This is not to suggest that the project of restoration or return is pointless and should be given up. The moment of the [realisation of the implications of returning] is of course potentially an immensely fruitful one. It can be the moment at which reality, however painful it is, is accepted, and at which a more modest, more grounded process of decision making can start on new terrain. But this is very difficult, not least because it must needs involve a final and full acceptance of the difficulties of the present. And

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150 Du Toit above n 147 at 24 - 27.

151 Mayson above n 147 at 548.

152 Mayson and Lund above n 147 at 556 and 43-4 respectively.

153 Du Toit above n 147.

> negotiating this transition requires forms of practice - and forms of support - which have not thus far been made available to claimants or implementors." (his emphasis)[154]

[109] He goes on to say the following:

> "Dealing with these difficulties will require a number of shifts in the conceptualisation and practice of restitution:
>
> *In the first place, we need to move away from an approach that places an emphasis on* ***negotiations*** *to one that focuses more on a process of* ***planning.***
>
> The most difficult and important question in restitution is not whether or not land claimants can get the outcome they prefer, but prior to that: whether they have made an informed choice in the first place. All too many claimants have chosen for land (or for money) - without being informed as to the exact implications, and often, it seems with very unrealistic hopes as to the kind of support and development aid they would get.
>
> Three things follow from this. One, to be offered a choice by a harried government official at a once-off workshop, between a number of cut-and dried options ('restoration', 'alternative land', 'compensation') is not to be offered a choice at all. There needs to be much more scope for flexibility, and for claimants to design a range of tailor-made, integrated solutions . . .
>
> Two, . . . [r]estitution planning should begin from the realisation that the implementation and development problems attendant on the resolution of a Land claim are not likely to be resolved by more resources magically being made available by other role players and arms of government. . . . Whatever solutions are to be found will have to be based on the resources that the Restitution process itself makes available. The key question will be how to use those resources most effectively.
>
> Three, this takes time: it requires, not so much an 'options workshop' as a participatory planning *process*. . . . In my view, the argument that investment in the process of community-based planning is idealistic, expensive and unworkable is eloquently answered by the scenes now unfolding at Doornkop, Elandskloof and Riemvasmaak - projects that are likely to cost many times the money and time that was 'saved' through under-investing in planning." (his emphasis) [155]

[110] If one considers the facts of this matter, there lie the seeds for similar problems to emerge. The members of the claimant community are scattered over a wide area. The community has not adopted any written constitution. There has been a variable record of attendance at community meetings. The meeting at which the Kranspoort Community Committee was elected was not particularly well attended. The community has done some planning in relation to their anticipated return, but it is not enough. There is also the risk that , if there is a substantial resettlement of the community on the land, there will be an over-exploitation of the resources at Kranspoort if agricultural activity by a large number of people is not carefully controlled. A minute dated 28 January 1956 in the referral suggests that the community's stock levels before the 1955/6 removals

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154 Du Toit above n 147 at 14 - 15.

155 Du Toit above n 147 at 24 - 25.

were completed, were 603 cattle, 224 donkeys and 166 goats. That makes a total of 993 stock in an area which would always have been substantially less than the combined area of Portion 1 and the Remainder.[156] The actual carrying capacity of the land was never proved in Court. An opinion which appears in the Church's bundle of documents suggests that when it briefed counsel for this purpose in August 1966 (the opinion had nothing to do with the particular facts of this case) it gave instructions that the carrying capacity of Portion 1 was 170 livestock. The Court can nevertheless take judicial notice of the fact that 993 stock was an extra-ordinarily high stock level for the area of land available. There is accordingly a real risk of the depletion of the renewable resources at Kranspoort if the community simply re-establishes the land uses which prevailed before the removals, as they have suggested they intend doing.

[111] Broadly speaking the potential problems at Kranspoort thus relate to -

(i) organisational matters;

(ii) decision making on the basis of insufficient information;

(iii) absence of planning; and

(iv) the risk of unsustainable depletion of renewable resources.

In my view appropriate conditions can and must be formulated in terms of paragraphs (a), (c) and (e) of section 35(2) and section 35(3) of the Restitution Act and the Communal Property Associations Act[157] to address these problems.

[112] In relation to organisational problems, section 2(1)(a) of the Communal Property Associations Act specifically envisages a restitution order which is conditional on the formation of a communal property association in terms of the Communal Property Associations Act. I will

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156 Given my finding that the Remainder was used for grazing seasonally when the fields were being cultivated. See paragraph [62]. The combined area of the farm is 1542,8568 ha. Portion 1 was 908,5135 ha. The Remainder was 634,3433 ha.

157 Above n 58.

refer to such an association as "a CPA". As its name suggests, it is a voluntary association with corporate personality which is formed for the purpose of acquiring and managing property held in common.[158] That Act makes detailed provision for the registration and supervision of CPAs under the auspices of the Department of Land Affairs. Section 9(1) of the Communal Property Associations Act requires that the constitution of a CPA comply with certain general principles. These are:

(i) "[f]air and inclusive decision-making processes";

(ii) "equality of membership";

(iii) "democratic processes";

(iv) "fair access to the property of the association";

(v) "accountability and transparency".

[113] The prospect that these principles will be given effect to in practice is enhanced by various provisions in the Communal Property Associations Act. Section 9(1) prescribes detailed, practical rules corresponding with each principle which seek to ensure their implementation in the management of the CPA. In terms of section 8(2)(c), the constitution of the CPA must comply with these principles before it qualifies for registration. Section 9(2) requires that the constitution be interpreted in accordance with those principles. Section 11 gives the Director-General of Land Affairs wide powers relating to the inspection and monitoring of the affairs of a CPA. Section 14 criminalises certain abuses of power and breaches of the constitution of a CPA. In terms of section 8(10), amendments to the constitution require the approval of the director-general.

[114] Not only do these principles provide a framework for the proper governance of the community, but they are also aimed at ensuring that there is equitable access to the asset which is the subject matter of the restitution order. The Court is obliged in terms of section 35(3) of the

158 See the long title of, and preamble to, the Communal Property Associations Act and the definition in section 1 of "holding of property in common".

Restitution Act, in prescribing under section 35(2)(c) how the restored rights in land are to be held, to impose such conditions as it considers necessary to ensure that there is equitable access to the restored asset. If the order in this matter is made subject to the formation by the claimant community of a CPA which will take transfer of the restored land, this will also satisfy the requirements of section 35(3).

[115] In relation to the problem of insufficiency of information in decision making, I will impose conditions in terms of section 35(2)(a), which will require the community, through the medium of the CPA, to evaluate the implications of restoration and make a final decision at a properly constituted general meeting as to their preference or otherwise for that form of relief. At the meeting, the relevant authorities will be required to provide guidance and information relating to the assistance which the community can expect in the process of implementing the restoration order.

[116] In relation to the absence of proper planning, a condition will be incorporated in the Court's order in terms of section 35(2)(a) to require that there be proper planning before there can be restoration. If restoration must await a proper plan, it will act as a strong incentive for the planning process to proceed. The condition will require the presentation to and approval by the Court of a suitable plan for the commencement of the development and use of the farm.[159] In scrutinising that plan, the Court will not act as a super-planner judging the merits of the plan which is presented. Rather it will satisfy itself that -

(i) a reasonable degree of planning has taken place,

(ii) on the basis of a sufficiently participatory planning process and

(iii) there is a clear commitment to the implementation of the plan or plans formulated.

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159 I deliberately exclude resettlement as something which must necessarily be planned for as there may be viable options for the future use of the farm for the benefit of the community which do not involve a complete resettlement of the community on the land. A core group alone may return to run the farm productively for the benefit of all, for example. It is up to the community to decide on the basis of an informed decision making process. If resettlement is envisaged, there must obviously be planning for this.

[117] The fourth problem to which I alluded was the risk of unsustainable depletion of renewable resources on the farm. The effect of such a depletion would be to prevent the younger members of the community from having equitable access to the restored asset in the future. As I have said, section 35(3) empowers and obliges the Court to impose conditions which will ensure equal access to the restored asset by all members of the community, including younger members who will come to access the property in their own right in the future. This allows me to impose conditions aimed at eliminating the risk of such depletion. Such an interpretation of section 35(3) "promotes the spirit purports and objects"[160] of section 24(b) of the Constitution which provides that -

> "Everyone has the right . . . to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that -
>
> (i) prevent pollution and ecological degradation;
>
> (ii) promote conservation; and
>
> (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development."

[118] Moreover, the case of *Makuleke Community Claim pertaining to Pafuri area of Kruger National Park* [161] is authority for this Court's having imposed conditions which are aimed at giving effect to a community's undertaking to exclude land uses on land restored under the Restitution Act which would be inconsistent with the status of the area as a protected natural environment. In this case we are not dealing with a formally protected natural environment, but there is uncontested evidence of its *de facto* significance from an environmental perspective, along with statements by Mr Serumula that they will respect that state of affairs. All of these considerations justify the imposition of appropriately formulated conditions in this matter aimed at the sustainable management of the farm.

[119] Some of the conditions referred to in the preceding paragraphs were not canvassed in the proceedings. I accordingly intend phrasing the order so as to allow the affected parties to apply to Court to vary that part of the order which relates to those conditions, in case there are circumstances which have not been foreseen by the Court which would cause it to operate unfairly.

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160 Section 39(2) of the Constitution.

161 [1998] JOL 4264 (LCC), internet website http://www.law.wits.ac.za/lcc/1998/makulekesum.html.

In particular, the information on the basis of which I have determined the grazing capacity referred to in paragraph 3.2.1.2 of the order is based on the 1993 *Grazing Capacity Maps*[162] issued by the Department of Agriculture in terms of the Conservation of Agricultural Resources Act[163] and the claimant community may wish to seek the variation of this figure on the basis of a more up to date analysis of the farm. I should add in relation to the order that I consider the Department of Land Affairs to be the representative of the State in these proceedings. To the extent that the order affects other departments of State, it is incumbent upon that department to draw the provisions of this order to their attention.

[120] When the Court made the order in terms of rule 57,[164] it included the following:

> "Those questions of law and fact in relation to the individual claims which are common to the adjudication of the community claim, will be finally adjudicated in the proceedings relating to the community claim."

Given my finding that a community does exist, it is not necessary to canvas the extent to which the alternative claims have been proved.

Costs

[121] There is a well established practice of this Court, starting with the case of *Hlatshwayo and Others v Hein*,[165] not to make an award of costs in matters falling under the Land Reform (Labour Tenants) Act[166] and the Extension of Security of Tenure Act.[167] The tendency of this Court has been

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162 1st ed (Department of Agriculture, Directorate: Resource Conservation 1993).

163 Act 43 of 1983.

164 See paragraph [22].

165 1998 (2) SA 834 (LCC); [1997] 4 All SA 630 (LCC); 1998 (1) BCLR 123 (LCC).

166 Act 3 of 1996. See, for example, *New Adventure Investments and Another v Mbatha and Others* 1999 (1) SA 776 (LCC) at 779H-780A; *Van Zuydam v Zulu* 1999 (3) SA 736 (LCC) at 751D; [1999] 2 All SA 100 (LCC) at 112d.

167 Act 62 of 1997. See, for example, *City Council of Springs v The Occupants of the Farm Kwa-Thema, 210* [1998] 4 All SA 155 (LCC) at 165g; *Skhosana and Others v Roos T/A Roos se Oord* [1999] 2 All SA 652 (LCC) at 666c-e.

to follow that approach in matters arising from the Restitution Act.[168] I am not sure that the reasons for the adoption of that approach in relation to the former statutes are applicable in matters relating to the latter. Nevertheless, I consider myself bound by those decisions which have followed the *Hlatshwayo* approach in restitution matters. The claimant sought a costs award against the Church and its associated parties in this matter. Counsel for the claimant warned of the risk of vexatious defences being raised to land claims without any risk of a costs order and to the detriment of the restitution process in the event of costs orders not being made in such matters. The raising of a vexatious defence can still be met with a costs order under the *Hlatshwayo* approach.[169] In this case I do not consider the Church's defence of the matter to have been vexatious. The law in this area is novel and a number of difficult points arose for decision. A number of aspects of the law have been clarified in this case and it may well be that a stricter approach may have to be adopted in the future if similar points are raised again without good reason. I therefore agree with the submission of counsel for the Department of Land Affairs that no costs order should be made in relation to the claim.

[122] There was also a dispute in relation to liability for the wasted costs associated with the postponement of the matter in January. A decision in this regard was held over for decision at the trial. In my view there were elements of blameworthiness on the part of both the Church and the claimant. It is my view that no costs order should be made in relation to the postponement.

Terms of the order

[123] I accordingly make the following order:

1 The Court declares that the claimant community is entitled to restitution in terms of the Restitution of Land Rights Act No 22 of 1994 arising out of the dispossession of rights in the farms referred to in paragraph 5 of this order.

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168 *Boltman v Kotze Community Trust concerning Farm Quispberg 805, district of Calvinia* LCC5/99, 11 August 1999, as yet unreported; *Former Highlands* above n 38 at [19].

169 See, for example, *Singh and Others v North Central and South Central Local Councils and Others* [1999] 1 All SA 350 (LCC) at 399f - h.

2 The claimant community must apply to the Court in terms of rule 37 of the Land Claims Court rules within 6 months of the date of this order (or such extended period as the Court may on good cause allow), for an order confirming compliance with the following conditions-

2.1 the claimant community must form and register a communal property association in terms of the Communal Property Associations Act No 28 of 1996 on the basis of a draft constitution and list of initial members which complies with this order and which has received the prior approval of the Court in chambers;

2.2 the communal property association referred to in paragraph 2.1 must ratify the decision to seek restoration of the farms referred to in paragraph 5 as the appropriate form of relief, at a properly convened general meeting of the initial members of the communal property association;

2.3 the claimant community must formulate a plan to the satisfaction of the Court for the development and use of the farms and provide sufficient proof of -

2.3.1 community participation in the planning process; and

2.3.2 its commitment to the proper implementation of the plan.

3 The constitution of the communal property association must -

3.1 provide for membership as of right on the part of any person who -

3.1.1 complies in his or her individual capacity with section 2 of the Restitution Act in relation to the farms; or

3.1.2 is verified by the executive structure of the communal property association, as having been accepted as part of the Kranspoort community;

3.2 include conditions prohibiting the grazing -

3.2.1 on any unirrigated veld on the farms, of -

3.2.1.1 more livestock than the grazing capacity determined by an official of the national or provincial government department responsible for agriculture in the area, acting in his or her official capacity; or, failing, such determination

3.2.1.2 more than one large stock unit (or, alternatively, an equivalent number of other stock units as provided for in GN R2687 dated 6 December 1985 in Government Gazette No 10029) for every 10 hectares of such veld;

3.2.2 of any livestock whatsoever in any area of the farms identified by any official of the national or provincial government department responsible for environmental affairs as an area where such grazing is incompatible with the protection of any endangered fauna or flora inhabiting that area.

4 At the meeting of the communal property association which is convened to consider the ratification referred to in paragraph 2.2, the Regional Land Claims Commissioner and the Department of Land Affairs are requested to -

4.1 provide information regarding -

4.1.1 all of the available alternative forms of relief in terms of the Restitution Act;

4.1.2 the financial aid which may be made available in terms of section 42C of the Restitution Act upon the restoration of the farms;

4.1.3 government agricultural and environmental services which will be available;

4.1.4 the financial and other assistance available from government for the development of housing and related infrastructure on the farms;

4.2 endeavour to secure the attendance of representatives of national, provincial and local government who are able to inform the claimant community about any forms of State assistance which may be available for the use and development of the farms.

5 Within a reasonable time after an order confirming compliance with paragraphs 2.1 to 2.3, the State must acquire or expropriate the farms described as -

5.1 Portion 3 of the farm Kranspoort 48, Registration Division LS, Transvaal held under certificate of consolidated title T 19024/88; and

5.2 Portion 2 (a portion of Portion 1) of the farm Kranspoort 48, Registration Division LS, Transvaal held under certificate of registered title T 19023/88,

in terms of section 35 read with section 42A of the Restitution Act and restore them to the communal property association formed in terms of paragraph 2.1, subject to all existing servitudes registered against the title deeds.

6 In the event that -

6.1 before expiry of the period referred to in paragraph 2, the communal property association decides not to ratify the decision to seek restoration of the farms; or

6.2 the claimant community fails to comply timeously with paragraph 2 for any other reason,

paragraphs 2 to 5 and 7 of this order lapse and the further conduct of the proceedings will be decided at a conference to be held in terms of rule 30 of the Land Claims Court Rules on a date to be determined by the presiding judge.

7 Any party may apply to Court within the period referred to in paragraph 2 for the variation of paragraphs 2.2, 2.3, 3 or 4, if it is able to show good reason for such variation.

_____

JUDGE AC DODSON

I agree

_____

JUDGE J MOLOTO

I agree

_____

ASSESSOR PLEWMAN

For the claimant:
JG Rautenbach instructed by *Legal Resources Centre, Johannesburg*.

For the Department of Land Affairs:
Adv H Havenga instructed by *the State Attorney, Pretoria*.

For the remaining participating parties:
Adv JG Bergenthuin instructed by *Van Zyl, Le Roux and Hurter, Pretoria*