

SOUTH AFRICA / JUDGMENT

Mayibuye I-Cremin Committee Re: Sub 121 of Farm Trekboer, District of Klip River KwaZulu-Natal commonly known as "Cremin" (LCC28/96) [1997] ZALCC 8 (21 November 1997) [1997] ZALCC 8

COURT

Land Claims Court

BEFORE

J Moloto, A Dodson

CASE / FILE NUMBER

28/96

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IN

THE LAND CLAIMS COURT OF SOUTH AFRICA

Held at

LADYSMITH

CASE NUMBER:

28/96

In the matter of

:

MAYIBUYE

I-CREMIN

COMMITTEE

Claimant

concerning

Sub 121 of the Farm Trekboer,

District of Klip River,

KwaZulu-Natal, commonly known
as "Cremin"

JUDGMENT

MOLOTO J:

Introduction

- [1] This matter was referred to the Land Claims Court (the Court) in terms of section 14(1)(c) of the Restitution of Land Rights Act,[1] alternatively section 14(1)(b) and (d). The reason tendered for referring the matter in the alternative was that, at the time of referring it, agreement had not yet been reached between the Department of Land Affairs (DLA) and the current owner of the land on the purchase price of the land to be restored.

The

facts

- [2] Briefly the facts are that a community of black people was removed from their land being Sub 121 of the farm Trekboer No 4225, district of Klip River, KwaZulu-Natal in extent 623,5821 (six hundred and twenty three comma five eight two one) hectares[2] (commonly known as Cremin) in 1977 by the government of the day in terms of its racial policy of clearing the so-called “black spots” in areas designated for occupation by white people only. The members of the community or the families composing the community held individual title to sub-divisions of the farm. A total of 114 landowners were affected by the removal, their land having been expropriated in terms of section 13(2) of the Development Trust and Land Act.[3] The land expropriated included their undivided shares in a commonage that formed part of the farm Cremin. The landowners had tenants who were also removed at the time of the forced removal. After their removal the sub-divisions (plots or erven) were consolidated and the farm became one unit, which was in time acquired by a certain Mr Derek Dreyer. He died in 1991 and the farm now forms part of his estate. The community was settled in Zakheni, a township outside Ladysmith, under leasehold by deed of grant.
- [3] The community established a committee called the Mayibuye I-Cremin Committee (the Committee) to lodge claims on behalf of the individual claimants of the various pieces of land. Not all dispossessed landowners or their descendants, if any, could be traced, although their land is identifiable. The community of landowners[4] does not want their former tenants back on the land, arguing that in view of the dramatic increase in the number of landowner-claimants, the return of their former tenants will render sustainable existence on the land impossible. Some eight claimants who claimed as former landowners were not able to satisfy the Regional Land Claims Commissioner (RLCC) as to the validity of their claims because the available records did not link them or their ascendants to any of the subdivisions originally expropriated. Among the originally dispossessed landowners, some have died without leaving children or grand-children or great grand-children etc in a direct descending line. The result is that some relatives of such deceased original landowners,

such as nephews and nieces, brothers and sisters, came forward to claim the land of such former landowners. Some dispossessed landowners left more than one direct descendant resulting in joint claims or even competing claims being lodged for the same piece of land.

Issues

for consideration

- [4] At a pre-trial conference on 13 March 1997, the Court isolated a number of issues from the above facts, which it asked the parties to attend to, alternatively, to present argument and make submissions to court on how they should be dealt with. These were :
- (a) the lack of agreement on the sale of the farm (Cremin) between the current owner and the Department of Land Affairs (DLA);
 - (b) the former tenants of the dispossessed landowners, who as potential claimants, clearly had an interest in the claim by the landowners, but had not been included in the settlement or served with the documents relating to the claims;
 - (c) the position of the eight claimants who could not be linked to any property (the eight disputants);
 - (d) the position of the properties in respect of which claimants could not be traced, or, having been traced, lost contact with the RLCC and the Committee and did not give the Committee power of attorney (the untraced claimants);
 - (e) how the Court should deal with the compensatory land that the dispossessed were settled on at the time of removal from their land;
 - (f) how to deal with the rights, inter se, of joint or competing claimants;
 - (g) whether a surviving spouse of a direct descendant is himself or herself a direct descendant in terms of the definition of direct descendant;^[5]
 - (h) the interpretation of the expression “direct descendant” in the Act, to determine the position of collateral relatives such as nephews and nieces, brothers and sisters etc.
- [5] These issues were resolved as explained hereunder:
- (a) The current landowner and the DLA have entered into an agreement of sale of the farm Cremin. The purchase price is R407 256,30 (four hundred and seven thousand two hundred and fifty six Rand and thirty Cents).
 - (b) The Court ordered that service of the relevant documents, including notification of the date, venue and time of the hearing, be effected on all former tenants whose whereabouts were known to the committee or the RLCC. These documents were also required to be displayed at a public place in any settlements which the former tenants were

known to inhabit. Affidavits confirming such service were duly filed. Despite thus having been given the fullest opportunity

to oppose the claims of the landowners, the former tenants neither entered appearance nor attended Court;

- (c) Only three of the eight disputants attended Court despite service having been effected on all of them. Two of them came to an agreement with the committee as a result of which they withdrew their opposition to the grant of an order restoring the claimants' land rights. The remaining disputant, Mr Bayi Elphas Hlela, opposed the grant of the order to Mr Welcome Ndlovu/Motloun[6] in relation to the subdivision they both claim.[7] He did so on the basis that he had acquired the land from the person who was still apparently the registered owner at the time of the expropriation. The Court ruled that Mr Ndlovu/Motloun's claim be excluded from the settlement and heard later as a disputed claim.
- (d) The properties of the untraced claimants have been dealt with by agreement as follows: the State will hold all these properties until they are successfully claimed or, failing that, until the expiry date for the lodging of claims.[8] Properties in respect of which no successful claims have been lodged at the expiry date will be transferred to the trust formed by the community, namely the Cremin Land Trust. Where a claim has been lodged at the expiry date but not finalised, the State will continue to hold the land until the claim is finalised and then transfer it to the successful claimant or the Cremin Land Trust, as the case may be.
- (e) The parties settled on the issue relating to the compensatory land by agreeing that the claimants keep it and the Court takes note of their settlement.
- (f) The parties came to an arrangement in terms of which co-claimants to the same subdivision either waived their right to claim in favour of one of them, or, where such an arrangement could not be made, took jointly. Accordingly we were not called on to decide how co-claimants or competing claimants should be dealt with.
- (g) Mr Rutsch (for the claimants) conceded that the surviving spouse of a direct descendant is himself or herself not a direct descendant in terms of the definition. The Court therefore dismissed the claim of Dombi Joyce Hadebe who had claimed Sub 27 (of 1) on the basis that she was the widow of the son of the person originally dispossessed. This concession was correctly made. Section 2(1) of the Act read with the definition of direct descendant plainly includes only spouses and partners in a customary union of the person originally dispossessed.[9]

Meaning of "direct descendant"

- [6] The only issue outstanding for adjudication and about which the parties' arguments and submissions needed to be weighed was the interpretation to be attached to the expression "direct descendant". The Court is indebted to Mr Rutsch and Mr Rall (for the DLA) for their insightful heads of argument and oral argument in Court.

[7] Section 2(1)(a) of the Act states:

“2(1) A person shall be entitled to enforce restitution of a right in land if-

- (a) he or she is a person or community contemplated in section 121(2) of the [Interim] Constitution or a direct descendant of such a person” (my emphasis

and Section 1(vi) of the Act states :

“ ‘direct descendant’ of a person includes the spouse or partner in a customary union of such person whether or not such customary union has been registered”

- [8] Mr Rutsch argued that “direct descendant” should be interpreted to mean intestate heirs according to statutory law and customary law of intestate succession. In doing so, the absurdity would be eliminated, so he argued, which results from a literal interpretation namely that there is a possibility of an endless list of descendants qualifying to claim. If they all claimed, the registration of the ownership of the land would become cumbersome and confusing.

- [9] In his own words, Mr Rutsch put the point thus:

“If one simply applied a literal interpretation, then a former registered owner could find himself or herself, on the successful prosecution of a claim, at best, the co-owner of his or her land with his or her spouse and all his children, and at worst, the co-owner of his or her land with his or her spouse, all his or her children, as well as all his or her grandchildren and, possibly great-grandchildren, as well as with the prospect that further natural direct descendants may be born prior to the expiry of the three year period contemplated in section 2(1)(c) of the Act, who also may successfully claim.

It is submitted that that would be an absurd result, and not in accordance with the intention or the purpose of the legislature.”

- [10] In interpreting “direct descendant” in relation to statutory law and customary law, so the argument went, the Court should reconcile the customs of the various population groups of South Africa with the Constitution to ensure that people’s fundamental rights[10] are protected and that the provisions of the Constitution are not contravened.

- [11] Mr Rutsch urged that this interpretation is in line with the intention of the legislature and the purpose of the legislation. The purpose of the legislation (which was intended by the legislature) “was to restore the status quo ante the dispossession.” In applying the various rules of intestate succession, so the argument went, collateral relatives such as nephews and nieces, brothers and sisters would be entitled to claim restitution where there were no direct, natural descendants. These relatives would normally inherit and had there been no dispossession they would have inherited the land under these circumstances.

- [12] I do not agree with the argument above. Firstly I do not agree that any absurdity or confusion results from a literal interpretation. The concept and practice of joint ownership and registration of jointly held shares are well established in our law. It is possible and easy

to express any number of joint owners as holding in undivided shares. Secondly, to interpret the phrase with reference to the laws of intestate succession would bring about the very confusion and cumbersomeness Mr Rutsch is arguing against. This would be so because the customs of the various population groups differ and would themselves create problems. Take as an example, the Zulu custom in terms of which the eldest son inherits everything to the exclusion of his siblings and his mother who was a partner to a customary union. This partner is a direct descendant according to the definition but would not inherit according to Zulu customary law. For other groups e g those governed by the common law, the surviving spouse inherits equally with the children in certain circumstances and in others inherits alone. In the latter case, this means the exclusion of the children. Thus in applying the same Act to various population groups, the Court would, on Mr Rutsch's argument, treat these groups differently

and in certain circumstances also in conflict with the equality clause in the Constitution. Such a varied and inequitable result

could never have been the purpose of the legislation nor have been contemplated by the legislature.

- [13] Secondly, Mr Rutsch argued that the expression "direct descendant" must be interpreted to include all "those people who would legitimately have had an expectation to acquire the property by natural succession according to the cultural norms, values and standards of the community to which the original land owner belonged." I cannot see the difference, in substance, between the two arguments. This latter position is the same as saying the laws of intestate succession of the various population groups of the country must be followed. What I have said with respect to the first argument applies equally to this argument.
- [14] In support of these arguments, Mr Rutsch referred to a number of authorities, some of which he rightly conceded were against him.[11] Others[12] clearly state that a departure from the literal meaning is justified if the literal meaning leads to absurdity. In my view the literal interpretation of the expression is not absurd, neither is it unreasonable nor ambiguous.
- [15] Mr Rutsch referred to academic writers who, he argued, take the view that there is no hierarchy of rules of interpretation, but that all the principles should be considered equal in weight. He quoted Du Plessis who states that the rule that words are: "to be afforded their 'ordinary' or 'natural' meaning may well be regarded as, chronologically speaking, the first rule of interpretation, but by no means may it be elevated to the paramount basic rule with which the process of interpretation begins, remains and ends- even if the language employed is presumably 'clear and unambiguous.' "[13]
- [16] Mr Rutsch argued further that the Act, being a creature of the (Interim) Constitution, enjoys a higher status than "ordinary legislation." Therefore the purposive approach which is adopted in interpreting the Constitution must apply to the interpretation of the Act. In support of this argument he cited a number of judgments.[14] While these judgments give

guidelines on how a Constitution must be interpreted, guidelines which admittedly go beyond the traditionally accepted rules of interpretation of statutes, none is authority for the proposition that the same guidelines should be applied to an Act which, though not a Constitution, is a creature thereof. In any event, even if I assume that this is the correct approach (an issue which I need not decide), I am still not persuaded that this requires the adoption of the meaning contended for by Mr Rutsch.

- [17] These propositions do not detract from the view that, when all else is taken into account, if the ordinary meaning of the words is clear, reasonable and unambiguous, and in keeping with their context and the purpose of the Act, then it must be given effect to.
- [18] Mr Rall argued that the word “descendant” (afstammelings) in its ordinary meaning has the same meaning as “issue”, namely, “blood relations in the descending line, ie children, grandchildren and more remote descendants.”[15]
- [19] The word “descendant” is defined in The New Shorter Oxford English Dictionary[16] as “a person, animal, plant or thing descended or derived from an ancestor or predecessor; issue, offspring.” “Issue” is in turn defined as “offspring, progeny, a child, children, a descendant, descendants”[17] and “offspring” as “a person’s children or descendants; an animal’s young, progeny.”[18] Therefore “direct descendant” would be “direct offspring” or “direct issue” or “direct child” or “direct progeny” or “direct young” or “direct children.” The use of the word “direct” to describe or qualify “descendant” in the Act can only be interpreted as evincing the legislature’s

intention to make it abundantly clear that only “blood relations in the descending line, that is children, grandchildren and more remote descendants”[19] are covered by the phrase, and nobody else.

- [20] In the cases which deal with the meaning of the expression “direct descendant” or “descendant” the question to be determined relates in one way or another to the law of succession. Therefore, in seeking guidance in those cases I am mindful of that fact and the distinction I made above on the applicability or otherwise of the law of succession to the case before us.
- [21] In *McKechnie & Others v Van Soelen, NO & Other*[20] the Court was not required to make a decision on the meaning of the expression “nearest direct male descendants”, but it was common cause that the testator’s grandchildren were the testator’s nearest direct male descendants (the parents having died).
- [22] Beadle J, in *The Master v Todd and Another*[21] explains the expression “direct descendant” in the following manner :

“I do not think the slight difference in the wording of the English and Natal Acts detracts from the value of Atkinson’s case and Seedat’s Executor’s case as authorities. ‘Lineal’ is defined in Webster’s dictionary as being ‘in the direct line of ancestry’, so the expressions ‘lineal issue’ of the English Act, ‘lineal descent’ of the Natal Act and ‘direct

descendant’ of the Southern Rhodesian Act may be regarded for this purpose as almost synonymous.”

- [23] The Appellate Division[22] defined the word “descendant” in the same way, per Jansen JA, when he said that “ . . . die woord ‘afstammeligen’ . . . op bloedverwante in die dalende lyn dui.”
- [24] In the circumstances, we ruled that collateral relatives such as brothers and sisters and nephews and nieces are not covered by the expression “direct descendant” in the Act and they can accordingly not sustain a claim for restitution. In the result, the claims of Vusumuzi Hlatshwayo, Mthunywa Amon Nxumalo, Vusumuzi Hadebe, Madoda Jocenia Sithole were dismissed.[23]
- [25] An order, for the remaining claimants, was made in the following terms : “The following order is made in terms of the provisions of Section 123(1)(b) of the Constitution of the Republic of South Africa Act (Act 200 of 1993), read in conjunction with Section 35(2) of the Restitution of Land Rights Act (Act 22 of 1994 as amended):
- (1) The Court makes the agreement of sale concluded on the 20th of June 1997 between the Estate of the Late Derek Dreyer and the Republic of South Africa, in terms of which the property described as Trekboer
- No. 4225 (“the property”) was sold, a copy of which is annexed to this Order as Annexure A, an order of Court.
- (2) As soon as it has taken transfer of the property, the State must, at its expense, sub-divide it in accordance with the subdivisional diagrams which existed at the time of the expropriation of the said subdivisions by the State. The subdivision must revive only such servitudes as operated between the various sub-divisions.
 - (3) The State must, at its expense, restore the subdivisions referred to in Annexures B and C to this order to the respective claimants as set out in Annexures B and C, in full title, as soon as possible after they have been created.
 - (4) The State must hold the balance of the subdivisions remaining after the restoration referred to in paragraph (3) in accordance with the agreement entered into between the Department of Land Affairs and the Mayibuye I-Cremin Committee on 12 April 1997, a copy of which is annexed to this order marked Annexure D.

- (5) The State must restore those subdivisions which remain unclaimed by the date referred to in section 2(1)(c) of the Act (“the claims expiry date”) to the Cremin Land Trust referred to in Annexure

D.

- (6) The State must restore those subdivisions in respect of which unsuccessful claims are made to the Cremin Land Trust on finalization of such claims, or the claims expiry date, whichever is the later.

- (7) The Court notes that the claimants accept restoration of the property

to the claimants in terms of this order as full and final settlement of their claims for restitution of land rights in terms of the Restitution of Land Rights Act (Act 22 of 1994).

The Court notes that the State has waived any claim against any of the claimants in respect of any compensation and/or compensatory land received by or on behalf of any claimant at the time of the expropriation by the State of the rights to the subdivisions, and that this records the State’s agreement to such waiver. The Registrar of Deeds must remove any note which he may have made in his records in terms of Section 11(6)(b) of the Restitution of Land Rights Act (Act 22 of 1994) as it was prior to amendment, if he has not already done so.”

JUDGE J MOLOTO

DODSON J:

- [26] I have read the judgment of my colleague, Moloto J. The facts, the sequence of events and the rulings and orders which were made (in all of which I agreed) are accurately described in his judgment and need not be repeated. I also agreed with the conclusion reached by him regarding the meaning of “direct descendant.” My reasoning, which differs only in minor respects, is as follows.

- [27] The effect of the Restitution of Land Rights Act¹ (the Act) is to extend the range of persons entitled to claim restitution beyond that provided for in s 121 of the Interim Constitution. Section 121 provides only for claims by a person or community which was originally dispossessed of their land. The Act extends the right to claim to “a direct descendant” of the person originally dispossessed.² Can this be interpreted to include collateral relatives such as brothers, sisters, nephews and nieces as we were asked by Mr Rutsch to do in this case?

- [28] As I understood Mr Rutsch’s argument, it boiled down to this: that the expression “direct descendant” must be interpreted to mean the heirs on intestacy of the person originally dispossessed. Where the relevant law of intestacy discriminates in conflict with the constitutional right to equality,³ the law of intestacy applicable must be adjusted to remedy any inequality. In this case, the law of intestate succession applicable was Zulu customary law. Applying that law, so adjusted, a brother, a sister, a nephew or a niece who was the sole

surviving relative of a person who was dispossessed of their property but had since died, would have a claim as a direct descendant of that person. He conceded that this was not the ordinary meaning of the words. However, a departure from the ordinary meaning was justified on a purposive approach to interpretation.

- [29] I will assume in favour of the claimants concerned that Mr Rutsch's analysis of Zulu customary law is correct, that it is capable of adjustment so as to comply with the right to equality⁴ and, having been so adjusted, would include those claimants who claim as collaterals in this case as intestate heirs of the persons originally dispossessed.
- [30] In my view the starting point in interpreting the expression "direct descendant" must be the presumption that an expression in a statute is intended to have the same meaning which it has at common law or which the courts have given to it in earlier decisions.⁵ Naturally this presumption will readily give way where, on a proper construction of the statute, it is clear that the expression was intended to have a meaning that is different from its common law meaning or from the meaning which the courts have previously given to it.⁶ The term "descendant" is discussed in Corbett et al *The Law of Succession in South Africa*⁷ as follows:
- "In their natural and ordinary meaning, the words 'descendants', 'afstammeligen', 'issue', all mean the same thing: blood relations in the descending line, ie children, grandchildren, and more remote descendants. However, the context may indicate that only children or children and grandchildren were meant. It is impossible on the other hand, to construe any one of these terms as including collaterals."* (My emphasis)
- [31] Apart from the authorities referred to in this work, the cases cited in my colleague's judgment also show that this is the meaning which has ordinarily been attributed by the courts to the term "descendant" or "direct descendant".⁸
- [32] The question which must then be asked is whether there is anything in the Act which requires this Court to adopt a meaning which is completely different to that which has been accepted in the authorities referred to. In examining this question, I am prepared to accept (without expressing a final view on the matter) that Mr Rutsch is correct in saying that this Court ought to approach the interpretation of the Act according to the purposive method of construction. That method requires me, in attributing a meaning to the words to be interpreted, to have due regard to the purpose of the legislation and the context in which the words appear in the Act, taken as a whole.⁹
- [33] In applying his argument based on the purposive method of construction, Mr Rutsch identified as a primary purpose of the Act and the relevant provisions of the Interim Constitution, the restoration of the status quo prior to the dispossession of land rights in each successful land claim. It is so that the legislation aims to redress the injustices of racial land dispossessions, but there are various provisions which suggest that this is not an exercise focused simply on restoring the status quo. Firstly, there is recognition in the legislation that restoration of the land originally taken away may not be desired by the claimant or may not be just and equitable or may not be in the public interest.¹⁰ In all of

these circumstances, restitution will not take the form of the return of the land originally dispossessed and the status quo will not have been restored. The legislation is also a product of compromise and aims at achieving a balanced approach to the problem of redressing racial dispossessions which does not amount to a simple turning back of the clock.¹¹ Thus, there are limits placed on the number of potential claims. One of these is that only racial dispossessions after 19 June 1913 can form the basis of a claim.¹² There is also a limited time period in which claims can be lodged.¹³ Claims are excluded where just and equitable compensation was paid at the time of the dispossession.¹⁴ If regard is had to these provisions, then an interpretation of “a direct descendant” which has the effect of preventing certain relatives from claiming is not in conflict with the purpose and overall scheme of the legislation, even though they might have inherited the land from the deceased were it not for the dispossession.

- [34] The purposive method of construction does not reject the actual wording of the statute as an equally important consideration in establishing the meaning of the statute.¹⁵ In analysing the language of the statute, the difficulty with Mr Rutsch’s argument is that the meaning which he seeks to attribute to the words “direct descendant” cannot be regarded even as a secondary, qualified or more unusual meaning of the words. The adoption of the meaning for which he contends would have the effect of amending the legislation in the process of interpretation. His interpretation requires that “a direct descendant of such a person” in s 2(1) of the Act must be replaced with “an intestate heir of such a person” or words to that effect. An heir on intestacy could even include a direct ascendant. The circumstances in which a court is prepared to countenance an interpretation which has this consequence are very circumscribed,

notwithstanding the adoption of a purposive approach to interpretation.¹⁶

- [35] One of those situations is where the wording chosen by the legislature would give rise to an absurdity. Mr Rutsch suggested that the absurdity which the usual meaning of “a direct descendant” gives rise to is the almost limitless number of potential claimants. He argued that this could include as potential claimants the direct descendants of the person dispossessed even where that person was still alive, as well as unborn direct descendants. That may be a reason to interpret s 2(1) of the Act so as to limit the range of potential claimants to the person who was dispossessed, or, if he or she has died, to the nearest surviving direct descendants at the time of the claim. That would not be an unusual interpretation to place on the subsection or on the term “direct descendant”, as is recognised in the above extract from *The Law of Succession in South Africa*. However this is an issue which we need not decide because of the agreements reached between the claimants in this case. Even if the expression does include all direct descendants, including the more remote ones, that does not amount to an absurdity. Whilst joint ownership may in certain circumstances be impractical,¹⁷ this does not make it absurd. As is pointed out in my colleague’s judgment the notion of joint ownership, is well established in our legal system. It is something which a number of the claimants have voluntarily opted for in this

case.

[36] A further indication that “direct descendant” in s 2(1) of the Act was not intended to have the meaning contended for by Mr Rutsch is the definition of “direct descendant” in s 1 of the Act. That expressly includes as a direct descendant the spouse or partner in customary union of the person originally dispossessed.¹⁸ This suggests that where a meaning other than the usual meaning was to be included in the term “direct descendant”, it was expressly provided for. No express provision whatsoever is to be found in the Act for the inclusion of intestate heirs as direct descendants. The use of the word “direct” to qualify “descendant” is also used elsewhere in legislation and in the law of testamentary succession¹⁹ and is in my view also a pointer to the adoption of the more usual meaning of descendant ie blood relations in the direct line of descent (subject, of course, to the express inclusion of spouses and partners in customary union as pointed out above).

[37] For these reasons, I agreed that the claims submitted by collaterals of the persons originally dispossessed should be dismissed.

JUDGE A DODSON

Heard on : 14 - 15 October 1997

Handed down on : 21 November 1997

For the claimants :

Mr J P Rutsch

For the Department of Land Affairs :

Adv A J Rall instructed by Mr Mackenzie (State Attorney)

For Estate Late Dreyer :

Mr Dreyer

[1]Act 22 of 1994, hereafter “the Act.”

[2]This is the current property description after consolidation of the various subdivisions expropriated from the community.

[3]Act 18 of 1936.

[4]I include in the term “landowners” those who claim as direct descendants of the land owners who have died since the

removal.

[5]The definition is quoted in para 7 of this judgment.

[6]In the papers, the Tswana version of his surname was used, namely Motloun, but during the proceedings he was referred to by the Zulu version of his surname, namely Ndlovu.

[7]Namely sub 55 (of 1).

[8]See s 2(1)(c) of the Act.

[9]The relevant provisions are quoted in para 7.

[10]For example rights protected by s 8(2) of the Interim Constitution, Act 200 of 1993 and s 9(3) and (4) of the Final Constitution, Act 108 of 1996.

[11]For example *Skotnes v South African Library* 1997 (2) All SALR 379 at 384J

[12]*Venter v Rex* 1907 TS 910 at 913 and the cases quoted therein; *Union Government (Minister of Finance) v Mack* 1917 AD 731 at 739; *Public Carriers Association v Tall Road Concessionaries* 1990 (1) SA 925 (A) at 942I and 943A-H; *S v Koch* [1991] ZASCA 29; 1991 (2) SA 741 (A) at 751F-I; *Boland Bank Limited v The Master and Another* [1991] ZASCA 65; 1991 (3) SA 387 (A) at 388J- 389B; *Van Heerden and Another v Gibbered NO and Others*

[1994] ZASCA 101; 1994 (4) SA 793 (A) at 795 E-H.

[13]*Du Plessis The Interpretation of Statutes* 1 ed (Butterworths, Durban 1986) at 104.

[14]*S v Makwanyane and Another* [1995] ZACC 3; 1995 (3) SA 391 (CC) at 403A-F; *De Klerk and Another v du Plessis and Others* 1995 (2) SA 40 (T) at 46B; *Naymakazi v President of Bophuthatswana* 1992 (4) SA 540 (BGD) at 548Gff; *S v Acheson* 1991 (2) SA 805 (NmHC) at 813B; *Government of the Republic of Namibia and Another v Cultura* 2000 and *Another* 1994 (1) SA 407 (NmHC) at 418A-E.

[15]*Corbett et al The Law of Succession in South Africa* 1ed (Juta, Cape Town 1980) at

555. See also *Boswell en Andere v Van Tonder* 1975 (3) SA 29 (A) at 35H.

[16]*Brown (ed) The New Shorter Oxford English Dictionary* 4 ed (Clarendon Press, Oxford 1993) at 643.

[17]*Ibid* at 1427.

[18]*Ibid* at 1985.

[19]See n 4 *supra*.

[20] 1963

(4) SA 789 (T) at 791B- 792A

[21] 1951

(1) SA 233 (SR) at 235B

[22]*Boswell v Van Tonder supra* n 15 at 35F-G.

[23] Their claims were in respect of the following properties: Hlatshwayo Vusumuzi: 0,116959 share in Sub 8 (of 1), Sub 78 (of 1)

and 0,00363 share in Sub 79 (of 1); Nxumalo Mthunywa Amon: Sub 37 (of 1); Hadebe Vusumuzi: Sub 81 (of 15) and 0,010909 share in Sub 79 (of 1); Sithole Jocenia Madoda: 0, 69014 share in Sub 23 (of

1) and 0,003636 share in Sub 79 (of 1).

1 Act 22 of 1994.

2 See s 2(1) read with s 1 of the Act, quoted in my colleague's judgment at para 7.

3 Section 8 of the Constitution of the Republic of South Africa Act 200 of 1993 (the Interim Constitution) and section 9 of the Constitution of the Republic of South Africa Act 108 of 1996.

4 Quite how the Zulu customary law of succession, which is based on the principle of patrilineality, could meaningfully be adjusted to accommodate the right to equality, is in itself a very difficult question. See in this regard the discussion in Bennett Human Rights and African Customary Law 1ed (Juta, Cape Town 1995) at 126-7.

5 S v Collop 1981(1) SA 150 (A) at 164A-B; In re Beukes and Bekker LCC 17/96, 24 July 1997, as yet unreported, at para 26. See also Devenish Interpretation of Statutes 1ed (Juta, Cape Town 1992) at 159 and Du Plessis The Interpretation of Statutes 1ed (Butterworths, Durban 1986) at 69.

6 Glen Anil Finance (Pty) Ltd v Joint Liquidators, Glen Anil Development Corporation (in liquidation) 1981 (1) SA 171 (A) at 181H-182D.

7 Corbett et al The Law of Succession in South Africa 1ed (Juta, Cape Town 1980) at 555.

8 See the authorities referred to at paras 21- 24 of his judgment. See also the following cases where it was taken for granted that this was the meaning of direct descendant: Kruger v King Williamstown Municipality 1959

(4) SA 547 (E); Breytenbach v de Villiers NO en Andere 1961 (2) SA 542 (T).

9 Jaga v Dönges NO and Another; Bhana v Dönges NO and Another 1950 (4) SA 653 (A) at 662G-663A; University of Cape Town v Cape Bar Council and Another 1986 (4) SA 903 (A) at 914A-E.

10 See the various forms of relief other than restoration provided for in s 123 of the Interim Constitution. Section 123(2) recognises that in certain circumstances it will not be just and equitable to restore land which is in the hands of a private owner. See also s 34 of the Act which provides for restoration of the land to be prevented on a blanket basis in certain circumstances.

11 See Murphy "The Restitution of Land after Apartheid: The Constitutional and Legislative Framework" in Rwelamira and Werle (eds) Confronting Past Injustices 1 ed (Butterworths, Durban 1996) 113 at 116.

212 Section 2(3) of the Act read with s 121(2)(a) of the Interim Constitution.

313 Section 2(1)(c) of the Act.

414 Section 121(4) of the Interim Constitution read with s 2(1) of the Act. See also s 2(1A) of the Act.

515 Jaga v Dönges supra n 9 at 662G; University of Cape Town v Cape Bar Council supra n 9 at 913H-J.

616 See Ngcobo and Another v Van Rensburg and Others LCC 18/97, 17 October 1997, as yet unreported at para 13.

717 Hence the maxim *communio est mater rixarum* - co-ownership is the mother of disputes. Van der Merwe “Things”

in Joubert (ed) 27 The Law of South Africa 2ed (Butterworths, Durban 1996) at para 208.

818 See my colleague’s judgment at para 7.

919 The Master v Todd and Another 1951

(1) SA 233 (SR) at 235B; Kruger v King Williamstown Municipality supra n 8; McKechnie and Others v Van Soelen N O and Others 1963 (4) SA 789 (T) at 791B;

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