

SOUTH AFRICA / JUDGMENT

Richtersveld and Others v Alexkor Ltd and Another (LCC151/98) [2001] ZALCC 34; [2001] 4 All SA 563 (LCC) (6 August 2001)

[2001] ZALCC 34

COURT

Land Claims Court

BEFORE

A Gildenhuys, M Wiechers

CASE / FILE NUMBER

LCC 151/98

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Source record**IN THE LAND CLAIMS COURT OF
SOUTH AFRICA****Heard at CAPE TOWN on
15 June 2001****CASE NUMBER: LCC 151/98
before Gildenhuys AJ and
Wiechers (assessor)
Decided on: 6 August 2001**

In the case between:

THE RICHTERSVELD COMMUNITY
.....First
Plaintiff
THE KUBOES COMMUNITY
.....Second
Plaintiff
THE SANDDRIFT COMMUNITY
.....Third
Plaintiff
THE LEKKERSING COMMUNITY
.....Fourth
Plaintiff
THE EKSTEENFONTEIN COMMUNITY
.....Fifth
Plaintiff
and
ALEXKOR LIMITED
.....First
Defendant
THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA

.....Second Defendant

JUDGMENT

GILDENHUYS AJ:

General background

- [1] This is an application for a certificate in terms of rule 18(6) of the rules of the Constitutional Court relating to an application to the Constitutional Court by the first to fifth plaintiffs for leave to appeal directly to that Court against an order made by this Court on 22 March 2001. The five plaintiffs also ask leave from this Court to appeal to the Supreme Court of Appeal against the said order of 22 March 2001, in the event of the Constitutional Court refusing the application for leave to appeal directly to it, and with effect from the date on which it does so.¹ The factual background
- [2] The communities inhabiting the territory commonly known as the Richtersveld applied to this Court in terms of section 2(1)(d) of the Restitution of Land Rights Act² for the restitution of rights in land in respect of a portion of the territory. I shall refer to that portion as the “subject land.” The subject land has, following the discovery of diamonds on it during the first half of the previous century, been used for the exploitation of diamonds.
- [3] The first plaintiff describes itself as a community known as the Richtersveld people. That community comprises the inhabitants of four villages in the Richtersveld, being Kuboes, Sanddrift, Lekkersing and Eksteenfontein. It claims restitution of the subject land. As an alternative, the second, third, fourth and fifth plaintiffs, describing themselves as communities constituted by the inhabitants of each of the four villages, brought separate community-based restitution claims in respect of the subject land.

The sixth plaintiff in the case before us is collectively the individual members of the communities constituting the other

plaintiffs. They did not apply for leave to appeal, and are irrelevant to this application.

- [4] The first defendant is the present registered owner of the subject land. The second defendant is the Government of the Republic of South Africa, represented by the Minister of Agriculture and Land Affairs. Both defendants opposed the claim for restitution. The issues and our findings thereon
- [5] The main issues which arose for determination at the hearing before us were:
- [1] This is an application for a certificate in terms of rule 18(6) of the rules of the Constitutional Court relating to an application to the Constitutional Court by the first to fifth plaintiffs for leave to appeal directly to that Court against an order made by this Court on 22 March 2001. The five plaintiffs also ask leave from this Court to appeal to the Supreme Court of Appeal against the said order of 22 March 2001, in the event of the Constitutional Court refusing the

application for leave to appeal directly to it, and with effect from the date on which it does so.¹

The factual background

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- [3] The first plaintiff describes itself as a community known as the Richtersveld people. That community comprises the inhabitants of four villages in the Richtersveld, being Kuboes, Sanddrift, Lekkersing and Eksteenfontein. It claims restitution of the subject land. As an alternative, the second, third, fourth and fifth plaintiffs, describing themselves as communities constituted by the inhabitants of each of the four villages, brought separate community-based restitution claims in respect of the subject land.

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plaintiffs. They did not apply for leave to appeal, and are irrelevant to this application.

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The issues and our findings thereon

- [5] The main issues which arose for determination at the hearing before us were:
- (a) whether the plaintiffs are communities whose members, themselves or through their forebears,
 - (b) had rights in the subject land,
 - (c) of which they were dispossessed after 9 June 1913,
 - (d) by racially discriminatory laws or practices.³
- [6] We found that the first plaintiff is a community with rights in the subject land, based on their beneficial occupation for a continuous period exceeding ten years.⁴ The members of the first plaintiff community were dispossessed of the subject land by State conduct after 1913 because their continued presence was incompatible with diamond exploitation on the land. We concluded that the first plaintiff failed to establish a claim for restitution in two fundamental respects. Firstly, inasmuch as the dispossession did not occur under a law or practice designed to bring about spatial apartheid, it was not a dispossession within the meaning of section 2(1) of the Restitution Act. Secondly, the plaintiffs failed to establish that

the dispossession resulted from a racially discriminatory law or practice. In my view, unless the first plaintiff can show that we were wrong in both these findings, its appeal must fail. These findings also proscribe the alternative claims by the second, third, fourth and fifth plaintiffs. Their application for leave to appeal must suffer the same fate as that of the first plaintiff.

- (a) whether the plaintiffs are communities whose members, themselves or through their forebears,
- (b) had rights in the subject land,
- (c) of which they were dispossessed after 9 June 1913,
- (d) by racially discriminatory laws or practices.³

[6] We found that the first plaintiff is a community with rights in the subject land, based on their beneficial occupation for a continuous period exceeding ten years.⁴ The members of the first plaintiff community were dispossessed of the subject land by State conduct after 1913 because their continued presence was incompatible with diamond exploitation on the land. We concluded that the first plaintiff failed to establish a claim for restitution in two fundamental respects. Firstly, inasmuch as the dispossession did not occur under a law or practice designed to bring about spatial apartheid, it was not a dispossession within the meaning of section 2(1) of the Restitution Act. Secondly, the plaintiffs failed to establish that the dispossession resulted from a racially discriminatory law or practice. In my view, unless the first plaintiff can show that we were wrong in both these findings, its appeal must fail. These findings also proscribe the alternative claims by the second, third, fourth and fifth plaintiffs. Their application for leave to appeal must suffer the same fate as that of the first plaintiff.

The application for leave to appeal

[7] The five plaintiffs served notice that they intend to apply to the Constitutional Court under rule 18(2) of the Constitutional Court rules⁵ for leave to appeal directly to that Court against paragraphs (a) and (c) of the following order which were made on their restitution claim:

- (a) the claims of all the plaintiffs are dismissed;
- (b) it is recommended to the Minister of Land Affairs that alternative relief to the plaintiffs which is feasible and appropriate, be considered; and
- (c) no order is made as to costs.⁶

[8] The five plaintiffs applied for a certificate from this Court in terms of rule 18(6) of the Constitutional Court rules. Rule 18(6) provides:

“(6)(a) If it appears to the court hearing the application made in terms of subrule (2) that-

- (i) the constitutional matter is one of substance on which a ruling by the Court is desirable; and

- (ii) the evidence in the proceedings is sufficient to enable the Court to deal with and dispose of the matter without having to refer the case back to the court concerned for further evidence; and
- (iii) there is a reasonable prospect that the Court will reverse or materially alter the judgment if permission to bring the appeal is given,

such court shall certify on the application that in its opinion, the requirements of subparagraphs (i), (ii) and (iii) have been satisfied or, failing which, which of such requirements have been satisfied and which have not been so satisfied.

- (b) The certificate shall also indicate whether, in the opinion of the court concerned, it is in the interests of justice for the appeal to be brought directly to the Constitutional Court.” I will consider these items sequentially hereunder. First item of the certificate: are there constitutional matters of substance on which a ruling by the Constitutional Court is desirable?

[9] The appeal involves the interpretation of section 25(7) of the Constitution⁷ and section 2 of the Restitution Act. These sections provide for the restitution of rights in land lost through racially discriminatory laws or practices. The plaintiffs contend that their ambit is much wider than was hitherto accepted by this Court. The Restitution Act gives effect to the constitutional right to restitution contained in the Constitution, and it must be interpreted against the backdrop of the Constitution. As such, its interpretation is a constitutional issue. Also, the racial discrimination to which the Restitution Act refers in section 2(1) is a denial of racial equality. That is very much a constitutional issue.⁸ If the limits to the right to restitution as presently applied by this Court are incorrect, a new delineation of such limits would be of great constitutional importance.

[10] The plaintiffs contend that the common law should be developed to recognise rights of the plaintiffs in the subject land which may hitherto not have been recognised. The question whether this Court has the power to develop the common law, and also

the question of whether the common law should be developed in the manner suggested by the plaintiffs, constitute significant

constitutional issues. Also of importance is the question whether the right to restitution provided in section 25(7) of the Constitution rules out other remedies to rectify past dispossessions of land. The plaintiffs specifically relied on remedies accepted in other countries to address injustices suffered by indigenous people through the dispossessions of their land by colonial governments, such as the recognition of indigenous title that survives colonial occupation.

- (b) The certificate shall also indicate whether, in the opinion of the court concerned, it is in the interests of justice for the appeal to be brought directly to the Constitutional Court.”

I will consider these items sequentially hereunder.

First item of the certificate: are there constitutional matters of substance on which a ruling by the Constitutional Court is desirable?

[9] The appeal involves the interpretation of section 25(7) of the Constitution⁷ and section 2 of the Restitution Act. These sections provide for the restitution of rights in land lost through racially discriminatory laws or practices. The plaintiffs contend that their ambit is much wider than was hitherto accepted by this Court. The Restitution Act gives effect to the constitutional right to restitution contained in the Constitution, and it must be interpreted against the backdrop of the Constitution. As such, its interpretation is a constitutional issue. Also, the racial discrimination to which the Restitution Act refers in section 2(1) is a denial of racial equality. That is very much a constitutional issue.⁸ If the limits to the right to restitution as presently applied by this Court are incorrect, a new delineation of such limits would be of great constitutional importance.

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[11] The appeal raises constitutional matters of substance. I do not think that there is a reasonable prospect that the Constitutional Court will reverse or materially alter our findings on these matters, as will be set out hereunder. If I am wrong in this view, a ruling by the Constitutional Court on the matters will be desirable. Second item of the certificate: is the evidence sufficient to enable the Constitutional Court to deal with and dispose of the matter?

[12] The parties agreed, at a pre-trial conference, that the issues to be determined at the hearing before us would comprise everything which the plaintiffs need to establish to entitle them to restitution, with the exception only of the form which such restitution should take (restitution, awarding alternative state-owned land or compensation) and the amount of compensation (if compensation is to be awarded). In my view, the evidence in the proceedings before this Court is sufficient to enable the Constitutional Court to deal with and dispose of the constitutional matters at issue without having to refer the case back for further evidence. If the appeal succeeds and it is found that the plaintiffs are in fact entitled to restitution, the matter will have to be referred back to this Court to decide on the form of restitution and the amount (if any) of compensation. Third item of the certificate: is there a

reasonable prospect that the Constitutional Court will reverse or materially alter the order of this Court?

- [13] I will deal separately with our findings on the two issues which brought about the dismissal of the plaintiffs' claims. Thereafter I will deal with other submissions by the plaintiffs on why they should get leave to appeal. The two issues on which our decision resulted in the dismissal of the plaintiffs' claim are firstly whether a dispossession which did not occur under

a law or practice designed to bring about spatial apartheid, qualifies for restitution and secondly whether the laws or practices under which the plaintiffs were dispossessed were racially

discriminatory in their effect. The other submissions by the plaintiffs revolve around their contention that they also had other

rights in the subject land, not only rights granted by the Restitution Act pursuant to their occupation for longer than ten years.

- [11] The appeal raises constitutional matters of substance. I do not think that there is a reasonable prospect that the Constitutional Court will reverse or materially alter our findings on these matters, as will be set out hereunder. If I am wrong in this view, a ruling by the Constitutional Court on the matters will be desirable.

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Third item of the certificate: is there a reasonable prospect that the Constitutional Court will reverse or materially alter the order of this Court?

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discriminatory in their effect. The other submissions by the plaintiffs revolve around their contention that they also had other

rights in the subject land, not only rights granted by the Restitution Act pursuant to their occupation for longer than ten years.

(a) Dispossession under a law or practice designed to bring about spatial apartheid

[14] We found that a dispossession which did not occur under a law or practice designed to bring about spatial apartheid, or broadly speaking, which was not intended for implementing the division of South Africa into separate geographical areas for different racial groups, would not qualify as a dispossession for purposes of the Restitution Act.⁹ The plaintiffs challenge the validity of this finding as being incompatible with section 25(7) of the Constitution and, if it is not, as being an incorrect application of section 2(1)(d) of the Restitution Act.¹⁰

[15] Section 25(7) of the Constitution reads as follows: “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.” [My underlining] The Act of Parliament envisaged in section 25(7) is the Restitution Act. It sets limits to the constitutional rights to restitution. The constitutional validity of the Restitution Act was not challenged.

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[16] The reasons for our finding that a dispossession as envisaged in section 25(7) of the Constitution and section 2(1) of the Restitution Act must be a dispossession under a law or practice designed to bring about spatial apartheid, are contained in our judgment.¹¹ If this

limitation is not applied, the right to restitution could be almost boundless, because very few disposessions which occurred during the apartheid years were uncontaminated by the racial policies of the time.¹² In my view, there is no reasonable prospect that another Court may come to a different conclusion.

- (b) Were the laws and practices under which plaintiffs were dispossessed, racially discriminatory in their effect?

[17] We found that none of the past laws or practices relating to the subject land which plaintiffs aver to have caused their dispossession, had any racial connotation whatsoever. They were, in some way or the other, linked to diamond mining. Our reasons for this finding are contained in our judgment.¹³

[18] The plaintiffs submit that the laws and practices under which they were dispossessed were racially discriminatory in their effect, although they might not have been intended or appreciated to be so. This, they say, is sufficient to bring them within the ambit of “racially discriminatory laws or practices” as meant by section 25(7) of the Constitution and section 2(1) of

the Restitution Act. I cannot agree that the exclusion of the plaintiffs from the subject land were racially discriminatory in

their effect. All the erstwhile inhabitants of the subject land were not Richtersveld people. There were also white people. They were all excluded from the subject land. It was done to facilitate the use of the subject land for diamond mining, in the belief that the land is crown land to which the erstwhile inhabitants had no rights. The fact that the vast majority of the excluded people were people of colour does not make their exclusion racially discriminatory. That would still be the position, even if the land was wrongly believed to be crown land. In our view the land was, under the law of the time, correctly regarded as crown land.¹⁴

[16] The reasons for our finding that a dispossession as envisaged in section 25(7) of the Constitution and section 2(1) of the Restitution Act must be a dispossession under a law or practice designed to bring about spatial apartheid, are contained in our judgment.¹¹ If this limitation is not applied, the right to restitution could be almost boundless, because very few disposessions which occurred during the apartheid years were uncontaminated by the racial policies of the time.¹² In my view, there is no reasonable prospect that another Court may come to a different conclusion.

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[19] It was also argued by the plaintiffs that the affront to the dignity of the Richtersveld people caused by their exclusion from the subject land made the exclusion racially discriminatory. I cannot agree. Any encroachment on the dignity of the persons excluded will impinge upon all of them, irrespective of race.

[20] I am of the view that there is no reasonable prospect that another Court will differ from our finding that the first plaintiff failed to establish that its dispossession resulted from a racially discriminatory law or practice. The same applies to the other plaintiffs.

(c) Plaintiffs’ contention that they had other rights in land

[21] The plaintiffs claimed to have acquired the following rights in the subject land:

- (a) ownership of the subject land; alternatively
- (b) the right to the exclusive beneficial occupation and use of the subject land; alternatively
- (c) the right to use the subject land for certain specified purposes; and alternatively
- (d) beneficial occupation of the subject land for a continuous period longer than ten years before the dispossession.

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- (d) beneficial occupation of the subject land for a continuous period longer than ten years before the dispossession.

[22] We found that the first plaintiff did in fact have a "right in land" over the subject land which arose from its beneficial occupation of that land for longer than ten years, and we furthermore found that the first plaintiff was deprived of the occupation of that land. The plaintiffs submit, however, that we should have found that they also had other rights, particularly ownership or the legal right to exclusive beneficial use and occupation of the subject land. They urged us to develop the common law to enable us to find that they had such rights, in the event of a finding that the existing common law does not accommodate the

rights claimed. In particular, they asked us to accept the doctrine of aboriginal title as part of the South African law, similar to what has been done in the United States of America, Canada, Australia and New Zealand. In our view the Land Claims Court, being a creature of statute, has no inherent power to develop the common law, or to introduce the doctrine of aboriginal title into South African law,¹⁵ nor to enforce the remedies provided by the doctrine, should the doctrine be or become part of South African law.¹⁶

[23] The doctrine of indigenous title, as applied in countries such as the United States, Canada, Australia and New Zealand to rectify injustices perpetrated by colonisers of the past, provides different remedies to the indigenous people than the remedy of restitution under section 25(7) of the Constitution and under the Restitution Act. The premise underlying the doctrine of indigenous title is that title to land held by indigenous people survived the appropriations by the colonising powers and remain valid. The right to restitution requires new rights to be awarded to people to replace previous rights of which they were dispossessed under racially discriminatory laws or practices. The jurisdiction of the Land Claims Court is limited to adjudicate on restitution.

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[24] An appeal against an order of a lower court to a higher court is against the order made by the lower court, not against the reasons for the order.¹⁷ We found that the first plaintiff had a right in land of which it was deprived, despite the first plaintiff's contention that we should have found a different type of right. The plaintiffs lost the case because they failed to establish two other

elements of their restitution claim, namely that its dispossession was of a kind that will support a claim for restitution, and that it resulted from a racially discriminatory law or practice. If we are wrong in our conclusion that the plaintiffs did not have ownership or some other legal title to the subject land, but only had a right emanating from their occupation for longer than ten years, it would not effect our order. Our conclusion that the plaintiffs failed to establish two essential elements of their restitution claim will hold, irrespective of the nature of the "right in land" which they lost.¹⁸

[25] The plaintiffs submitted, however, that if we had found that the first plaintiff had ownership or some other legal title to the subject land, the fact that the Government after 1913 ignored such title and dealt with the subject land as if it did not exist, constitutes a dispossession of such title. That dispossession, so they argued, was caused by racially discriminatory laws or practices. I cannot agree. If after 1913 any of the plaintiffs had legal title which the Government ignored, such title would not be destroyed just by being ignored. When the Government made the subject land over to the first defendant, it only made over

such assets, liabilities, rights and obligations as the State might have had.¹⁹ If any of the plaintiffs had legal title over the subject land, that title was not transferred to the first defendant. They may enforce their rights under any such title through the ordinary courts. The restitution procedure under the Restitution Act is not appropriate for enforcing legal rights over land which have remained intact.

[26] At best for the plaintiffs, the laws and practices applied since 1913 to exclude people (including the plaintiffs) from the subject land and to devote it to the exploitation of diamonds, constituted the consummation of the loss of rights which the Richtersveld people suffered when their land was incorporated into the Cape Colony in 1847. Their pre-annexation land rights were not recognised by the new regime and were lost because they, as a group of people, were regarded as insufficiently civilised. That loss, which was brought about by the racially discriminatory thinking prevalent during the colonial era, occurred well before 1913. It falls outside the ambit of the Restitution Act. The fact that the loss of rights in 1847 underlies subsequent measures taken in respect of the subject land, does not make the subsequent measures racially discriminatory.

[24] An appeal against an order of a lower court to a higher court is against the order made by the lower court, not against the reasons for the order.¹⁷ We found that the first plaintiff had a right in land of which it was deprived, despite the first plaintiff's contention that we should have found a different type of right. The plaintiffs lost the case because they failed to establish two other

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Fourth item of the certificate: is it in the interests of justice to appeal directly to the Constitutional Court?

[27] The grounds for appeal put forward by the plaintiffs raise constitutional issues as well as common law issues. An important common law issue is whether any of the plaintiffs had ownership or any other legal right in respect of the subject land which survived the British annexation in 1847. There is the further issue of whether the common law should be developed to revive and recognise such rights. It has been held by the Constitutional Court that where the development of the common law is at issue, the views and approach of the Supreme Court of Appeal will be of particular significance and value.²⁰ Where the issues in an appeal are not limited to constitutional issues, the appeal should ordinarily not be brought directly to the Constitutional Court.²¹

[28] There are a large number of laws and practices which, according to the plaintiffs, caused their dispossession. An

analysis

by the Supreme Court of Appeal of these laws and practices and of their effect on the plaintiffs, would be of great assistance

to the Constitutional Court.

[29] For the purposes of deciding whether an appeal directly to the Constitutional Court is in the interests of justice, Chaskalson P held as follows in the case of Member of the Executive Council for Development Planning and Local Government, Gauteng v Democratic Party and Others:²²

Fourth item of the certificate: is it in the interests of justice to appeal directly to the Constitutional Court?

[27] The grounds for appeal put forward by the plaintiffs raise constitutional issues as well as common law issues. An important common law issue is whether any of the plaintiffs had ownership or any other legal right in respect of the subject land which survived the British annexation in 1847. There is the further issue of whether the common law should be

developed to revive and recognise such rights. It has been held by the Constitutional Court that where the development of the common law is at issue, the views and approach of the Supreme Court of Appeal will be of particular significance and value.²⁰ Where the issues in an appeal are not limited to constitutional issues, the appeal should ordinarily not be brought directly to the Constitutional Court.²¹

[28] There are a large number of laws and practices which, according to the plaintiffs, caused their dispossession. An

analysis

by the Supreme Court of Appeal of these laws and practices and of their effect on the plaintiffs, would be of great assistance

to the Constitutional Court.

[29] For the purposes of deciding whether an appeal directly to the Constitutional Court is in the interests of justice, Chaskalson P held as follows in the case of *Member of the Executive Council for Development Planning and Local Government, Gauteng v Democratic Party and Others*:²²

“[E]ach case has to be considered in the light of its own facts. A factor will always be that direct appeals deny to this Court the advantage of having before it judgments of the SCA [Supreme Court of Appeal] on the matters in issue. Where there are both constitutional issues and other issues in the appeal, it will seldom be in the interests of justice that the appeal be brought directly to this Court. But where the only issues on appeal are constitutional issues the position is different. Relevant factors to be considered in such cases will, on one hand, be the importance of the constitutional issues, the saving in time and costs that might result if a direct appeal is allowed, the urgency, if any, in having a final determination of the matters in issue and

the prospects of success, and, on the other hand, the disadvantages to the management of the Court's roll and to the ultimate decision of the case if the SCA is bypassed.”²³

[30] In my opinion, there are no compelling reasons for allowing the plaintiffs to circumvent the curial structure created by the Constitution by permitting them to appeal directly to the Constitutional Court. The disadvantage of not having the views of

the Supreme Court of Appeal, particularly on the development of the common law, the fact that there are non-constitutional issues

involved, and the (in our view) slender prospects of success outweighs any advantages of an appeal directly to the Constitutional

Court. Application for leave to appeal to the Supreme Court of Appeal

[31] I have already concluded that, in my view, there is no reasonable prospect that the Constitutional Court will reverse or materially alter our order of 22 March 2001. For the same reasons, I am of the view that there is no reasonable prospect of the Supreme Court of Appeal coming to a different conclusion on the order which we made.

Conclusion

[32] For the reasons set out above:

(a) It is certified:

(i) The appeal raises constitutional issues of substance. If the finding that there is no reasonable prospect that another Court will reverse or materially alter the order of this Court is wrong, a ruling on the issues by the Constitutional Court will be desirable.

“[E]ach case has to be considered in the light of its own facts. A factor will always be that direct appeals deny to this Court the advantage of having before it judgments of the SCA [Supreme Court of Appeal] on the matters in issue. Where there are both constitutional issues and other issues in the appeal, it will seldom be in the interests of justice that the appeal be brought directly to this Court. But where the only issues on appeal are constitutional issues the position is different. Relevant factors to be considered in such cases will, on one hand, be the importance of the constitutional issues, the saving in time and costs that might result if a direct appeal is allowed, the urgency, if any, in having a final determination of the matters in issue and

the prospects of success, and, on the other hand, the disadvantages to the management of the Court's roll and to the ultimate decision of the case if the SCA is bypassed.”²³

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Application for leave to appeal to the Supreme Court of Appeal

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Conclusion

[32] For the reasons set out above:

(a) It is certified:

(i) The appeal raises constitutional issues of substance. If the finding that there is no reasonable prospect that another Court will reverse or materially alter the order of this Court is wrong, a ruling on the issues by the Constitutional Court will be desirable.

(ii) The evidence adduced in the Land Claims Court is sufficient to enable the Constitutional Court to deal with and dispose of the appeal, if leave to appeal directly to the Constitutional Court is granted. (iii) There is no reasonable prospect that the Constitutional Court will reverse or materially alter the order of 22 March 2001 if permission is granted to appeal directly to the Constitutional Court. (iv) It is not in the interests of justice that the appeal be brought directly to the Constitutional Court.

(b) The application for leave to appeal to the Supreme Court of Appeal against paragraphs (a) and (c) of the order made by this Court on 22 March 2001, is dismissed.

(c) No order is made as to the cost of the application for leave to appeal.

ACTING JUDGE A GILDENHUYS I agree

PROF M WIECHERS *ASSESSOR * (Assessor appointed in terms of section 28(5) of the Restitution of Land Rights Act, Act 22 of 1994). For the plaintiffs: Adv P Hathorn, Adv J F Roos, instructed by Legal Resources Centre, Cape Town. For the first defendant: Adv J J Gauntlett SC, Adv A Schippers instructed by E Moosa, Waglay & Peterson, Cape Town. For the second defendant: No appearance.

(ii) The evidence adduced in the Land Claims Court is sufficient to enable the Constitutional Court to deal with and dispose of the appeal, if leave to appeal directly to the Constitutional Court is granted.

(iii) There is no reasonable prospect that the Constitutional Court will reverse or materially alter the order of 22 March 2001 if permission is granted to appeal directly to the Constitutional Court.

(iv) It is not in the interests of justice that the appeal be brought directly to the Constitutional Court.

(b) The application for leave to appeal to the Supreme Court of Appeal against paragraphs (a) and (c) of the order made by this Court on 22 March 2001, is dismissed.

(c) No order is made as to the cost of the application for leave to appeal.

ACTING JUDGE A GILDENHUYS

I agree

PROF M WIECHERS

*ASSESSOR

* (Assessor appointed in terms of section 28(5) of the Restitution of Land Rights Act, Act 22 of 1994).

For the plaintiffs:

Adv P Hathorn, Adv J F Roos, instructed by Legal Resources Centre, Cape Town.

For the first defendant:

Adv J J Gauntlett SC, Adv A Schippers instructed by E Moosa, Waglay & Peterson, Cape Town.

For the second defendant:

No appearance.

1The procedure adopted by the five plaintiffs accords with generally accepted practise. See Mkangeli and Others v Joubert and Others 2001 (2) SA 1191 (CC) at para [6].

2Act 22 of 1994, as amended. I shall refer to this act as “the Restitution Act”.

3See section 2(1)(d) of the Restitution Act, which reads as follows: “(1) A person shall be entitled to restitution of a right in land if

(d) 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; and”

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

(d) 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; and”

4According to the definition of “right in land” in section 1 of the Restitution Act, the term means: “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.”

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5Rule 18(2) of the Constitutional Court rules reads: “(2) A litigant who is aggrieved by the decision of a court and who wishes to appeal against it directly to the Court shall,

within 15 days of the order against which the appeal is sought to be brought and after giving notice to the other party or parties

concerned, apply to the court which gave the decision to certify that it is in the interests of justice for the matter to be brought directly to the Constitutional Court and that there is reason to believe that the Court may give leave to the appellant to note an appeal against the decision on such matter.”

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concerned, apply to the court which gave the decision to certify that it is in the interests of justice for the matter to be brought directly to the Constitutional Court and that there is reason to believe that the Court may give leave to the appellant to note an appeal against the decision on such matter.”

6We handed this order down on 22 March 2001. The judgment is available on internet web site address <http://www.law.wits.ac.za/lcc/2001/15198sum.html>.

7The Constitution of the Republic of South Africa, Act 108 of 1996.

8See section 9 of the Constitution.

9In coming to this conclusion, we followed two previous decisions of the Land Claims Court, being *Minister of Land Affairs and Another v Slamdien and Others* [1999] 1 All SA 608 (LCC); 1999 (4) BCLR 413 (LCC) (a judgment by Dodson J, Meer J concurring) and *Jacobs and The Department of Land Affairs, in re The Farm UAP 28A*, LCC 3/98, 28 February 2000, [2000] JOL 6203 (LCC), internet web site <http://www.law.wits.ac.za/lcc/2000/398sum.html> (a judgment by Gildenhuys J, Bam P concurring).

10Section 2(1)(d) of the Restitution Act is quoted at n 3 above.

11Judgment at paras [83]-[94].

12For example, an expropriation for purposes of a school would be in furtherance of a policy that limits attendance at that school to learners of a specific racial group, and an expropriation for purposes of a post office would be in furtherance of a policy that required the facilities to be provided by the post office to be segregated between different racial groups.

13Judgment at paras [96]-[114].

14Judgment at para [43].

15Section 173 of the Constitution reads: “The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop that common law, taking into account the interests of justice.” Courts like the Land Claims Court, which have a status similar to High Courts, are conspicuously absent from the list of courts given the power to develop the common law. See also paras [49]-[53] of our

judgment.

15Section 173 of the Constitution reads:

“The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop that common law, taking into account the interests of justice.”

Courts like the Land Claims Court, which have a status similar to High Courts, are conspicuously absent from the list of courts given the power to develop the common law. See also paras [49]-[53] of our

judgment.

16Judgment at para [94].

17Mkangeli above n 1 at para [2]; *Western Johannesburg Rent Board and Another v Ursula Mansions (Pty) Ltd* 1948 (3) SA 353 (A) at 355.

18The “right in land” could be ownership or some other legal title, which we found they did not have, or a “right in land” created by the Restitution Act and emanating from their beneficial occupation of the subject land, which we found they did have.

19Section 2(2) of the Alexander Bay Development Corporation Act, 46 of 1989.

20Lane and Fey NNO v Dabelstein and others 2001 (2) SA 1187 (CC) at para [5]; Amod v
Multilateral Motor Vehicle Accidents Fund

[1998] ZACC 11; 1998 (4) SA 753 (CC) at para [33].

21Mkangeli above n 1 at para [12].

22 1998

(4) SA 1157 (CC).

23Above n 22 at para [32].

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