CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 26/17

In the matter between:

SALEM PARTY CLUB	First Applicant
LINDALE TRUST	Second Applicant
HENDRIK JOHANNES NEL	Third Applicant
CUAN KING	Fourth Applicant
JONATHAN GOTTFRIED STANDER AND MARIA PAULINA STANDER	Fifth Applicants
DAVID CRAWFORD GOWANS	Sixth Applicant
WILLEM CHRISTIAAN LODEWYK SCHOONBEE	Seventh Applicant
EZRA CHRISTIAAN SCHOONBEE	Eighth Applicant
KIKUYU LODGE	Ninth Applicant
JONATHAN FLETCHER HARRIS	Tenth Applicant
PATRICK GRANT BRADFIELD	Eleventh Applicant
E S A LODGES (PTY) LIMITED	Twelfth Applicant
SEVEN SUMMITS PROPERTY INVESTMENTS (PTY) LIMITED	Thirteenth Applicant
KENNETH JAMES SEYMOUR RICHARDSON	Fourteenth Applicant
VARYLYNN SHARRON HILL	Fifteenth Applicant
PHILLIP GEOFFREY AMM	Sixteenth Applicant

PATRICK GRANT BRADFIELD	Seventeenth Applicant
and	
SALEM COMMUNITY	First Respondent
GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA	Second Respondent
MINISTER OF RURAL DEVELOPMENT AND LAND REFORM	Third Respondent
DEPARTMENT OF RURAL DEVELOPMENT AND LAND REFORM	Fourth Respondent
CHIEF DIRECTOR OF THE DEPARTMENT OF LAND AFFAIRS	Fifth Respondent
PROVINCIAL OFFICE OF THE DEPARTMENT OF RURAL DEVELOPMENT AND LAND AFFAIRS	Sixth Respondent
MAKANA MUNICIPALITY	Seventh Respondent
REGISTRAR OF DEEDS	Eighth Respondent
LAND CLAIMS COMMISSION, EASTERN CAPE	Ninth Respondent
and	
ASSOCIATION FOR RURAL ADVANCEMENT	Amicus Curiae

Neutral citation:	*Salem Party Club and Others v Salem Community and Others* [2017] ZACC 46
Coram:	Zondo DCJ, Cameron J, Froneman J, Jafta J, Kathree-Setiloane AJ, Kollapen AJ, Madlanga J, Mhlantla J, Theron J and Zondi AJ
Judgments:	Cameron J (unanimous)
Heard on:	8 August 2017
Decided on:	11 December 2017

Summary: Land — Land reform — Claim for restitution of rights in land — Claim by community in terms of section 2(1)(d) of Restitution of Land Rights Act 22 of 1994 — Rights in land — Meaning of — Includes beneficial occupation, labour-tenancy, customary interest — Generous interpretation employed — Exclusive ownership not required — Existence of parallel rights recognised

Land — Land reform — Claim for restitution of rights in land — Dispossession — Meaning of — Subdivision of land through Court Order — No consultation with inhabitants — Constitutes dispossession

Land — Land reform — Claim for restitution of rights in land — Admission of evidence in terms of section 30(1) and (2) of the Restitution Act — Expert and historical evidence — Evidence assessed using ordinary rules

Land — Land reform — Purpose of Restitution Act — Recognition of rights of landowners

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ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the Land Claims Court), the following order is made:

1. Leave to appeal is granted.
2. The appeal is dismissed.
3. There is no order as to costs.

JUDGMENT

CAMERON J (Zondo DCJ, Froneman J, Jafta J, Kathree-Setiloane AJ, Kollapen AJ, Madlanga J, Mhlantla J, Theron J and Zondi AJ concurring):

Introduction

[1] This is an application for leave to appeal against a judgment of the Supreme Court of Appeal,[1] confirming by a majority a judgment of the Land Claims Court.[2] At issue is a contested claim to the Salem Commonage. This is a tract of land that in 1836 and 1847 two Governors at the Cape Colony (Cape), Sir Benjamin D'Urban and Sir Henry Pottinger, allocated in two deeds of grant to the Salem Party of the 1820 Settlers (Settlers). The claimants are said to be the descendants of persons living on the Commonage in 1940, when a judgment of the then Supreme Court in Grahamstown[3] divided the Commonage and apportioned most of it among the Settlers' successors. For both the claimants and the landowners – the Settlers' successors, who resist the claim – the ties of history and emotion to this land lie deep.

[2] By any urban and most agricultural standards, the area of land at issue is enormous: some 66 square kilometres in extent.[4] The Commonage, through which the Assegai River runs, is located in a region the Dutch-speaking farmers who settled in it during the late 18th century called the Zuurveld. It is a 5 000 square kilometre area between the Great Fish River to the north and the Bushman's River to the south in which bitter and violent racial wars were fought as white colonial domination was established. The claimants' and landowners' contentions before us are an integral product of that fraught history.

[1] *Salem Party Club v Salem Community* [2016] ZASCA 203; [2017] 1 All SA 712 (SCA) (SCA judgment) (Dambuza JA and Pillay JA, with Seriti JA and Mbha JA concurring; Cachalia JA dissenting).

[2] *Salem Community v Government of the Republic of South Africa* [2014] ZALCC 5 (LCC judgment) (Sardiwalla AJ).

[3] *Ex parte Gardner* 1940 EDL 175 at 184-5.

[4] To put this in context, the largest farm accessibly advertised for sale in the Eastern Cape at the time of writing is a game farm of 25 square kilometres. The largest agricultural farm was only 5.24 square kilometres.

Parties

[3] The first applicant is the Salem Party Club, a voluntary association with legal capacity that governs the recreational facilities in Salem, a settlement near Grahamstown in the Eastern Cape. These include a tennis club, cricket club, two churches and a community hall.[5] The Club and the individual landowners were the eighth to 24th defendants in the Land Claims Court.

[4] The first respondent is the Salem Community (Community/claimants). It comprises some 152 persons claiming to be descendants and beneficiaries of black people who, they say, occupied the Commonage, but lost their rights to it when they were dispossessed.[6] The Community and their descendants comprise a total of 1 170 beneficiaries in 378 households. They assert indigenous ownership of the farm Salem No. 498 on the basis of dispossession of a right in the land through past discriminatory laws and practices between 1947 and the 1980s. After the claim was instituted, the owners of certain properties agreed to settlements, under which their properties were restored to the Community and they received compensation. The remaining landowners are before this Court as applicants.

[5] The second to ninth respondents are government bodies with interests in the claim.[7] The ninth respondent is the Land Claims Commission, Eastern Cape (Commission), which investigated the merits of the claim and recommended restoration of the land to the claimants. It is the only government body that has actively participated in this litigation.

[5] The second to 17th landowners are landowners of portions 1-3, 7, 8, 13-17, 19-33, 36, and 38 of farm Salem No. 498, district of Albany. The Salem Club owns the remaining extent of farm Salem No. 498.

[6] The landowners' experts indicated that the indigenous population of the Zuurveld was preponderantly, but not exclusively, isiXhosa speaking; Setswana speakers were there too. For simplicity, I refer to the Community as consisting of "black people". Where reference is made to amaXhosa it is to accord with a historical source specifically referencing amaXhosa. Where political or cultural affiliation is unclear, I refer to isiXhosa-speaking people, not all of whom may have identified as amaXhosa.

[7] The second to eighth respondents were the first to seventh defendants in the Land Claims Court.

Condonation

[6] The claimants' written submissions were filed one day late. There was no prejudice and the landowners did not oppose condonation, which is granted.

Background

[7] The claimants sourced their statutory right in traditional rights in the land they said arose before 1812. The claimants sought to establish in the Land Claims Court that their ancestors had travelled through the area in which Grahamstown was later established and settled on the disputed land there as a community of amaXhosa under the traditional authority of Dayine.[8] This is said to have taken place before Grahamstown was established as a military outpost during the Fourth Frontier War of 1811 to 1812. Mr Nsele Nondzube, one of the claimants, testified that his grandfather described the Community's arrival in Salem to him from personal recollection.

[8] The experts who testified for the respective parties agree that isiXhosa-speaking people occupied the Zuurveld before any European settlers arrived.[9] The Dutch colonised the Cape under the Dutch East India Company in 1652. In 1780, the Dutch declared the Great Fish River as the Cape's boundary. The Great Fish River runs east through the northernmost portion of the Zuurveld and then south for the extent of the Zuurveld's eastern boundary.

[9] In 1780, a Dutch-speaking settler, Barend Bouwer, occupied a loan farm to the north of what would become Salem. He reported to the Burgher Military Council that isiXhosa-speaking people were "unlawfully" occupying land to the north-west. Bouwer occupied the land for at least five years, though there is no record of when he left.

[8] Also spelt "Dyanile", "Danyile", "Dayile" or "Dayele". We use the spelling suggested by Mr Nsele Nondzube during testimony. Mr Nondzube refers to Dayine as a chief during testimony, but later clarifies that he may have been subordinate to a chief.

[9] There is still contention as to whether rights arose from this occupation. The landowners' expert insisted that the occupation was without authority of any paramount chief and therefore did not constitute a "right" of occupation.

[10] Between 1780 and 1807, amaXhosa and white colonists, Dutch and British, fought three frontier wars in the Zuurveld. In 1795, as a result of the Napoleonic wars in Europe, the British annexed the Cape. The Cape reverted briefly to the Dutch, under the Batavian Republic, between 1803 and 1806, but returned to British rule and occupation in 1806.

[11] In 1807, the chief and former regent of the amaXhosa, Ndlambe, moved into the Zuurveld after his nephew, King Ngqika, defeated him. The parties' experts differed on whether Ndlambe considered himself to have a proper claim to the Zuurveld (because he ranked junior to and was under the authority of Ngqika), and whether, if he did, this would affect the rights of isiXhosa-speaking people living in the Zuurveld at the time.

[12] It is in this period that the claimants say their ancestors arrived in Salem and resided there under the leadership of Dayine. The landowners vigorously disputed the reliability of Mr Nondzube's testimony because, by simple generational computation, he could not have had a living ancestor who had witnessed and recounted to him events of nearly two hundred years before.

[13] In 1811, disputes between isiXhosa-speaking people and the colonists came to a head in the Fourth Frontier War.[10] The result was a horrific and brutal clearing of all amaXhosa from the Zuurveld. Men were killed; women and children taken hostage. All villages were burnt. Farmlands were trampled by oxen. The population of amaXhosa retreated north beyond the Fish River. In April 1819, isiXhosa-speaking warriors launched an attack on Grahamstown. It was repelled.

[10] The landowners' expert said this war began not because of disputes over land, but because of numerous cattle raids by both isiXhosa-speaking people and the colonists. The Commission's expert contended that this is "to mistake the symptoms for the cause" and that any cattle raids were only attempts to remove the other from the land.

[14] The British government in 1820 determined that the Zuurveld would be a buffer zone. Its design was to fill the area with British settlers. One group of these settlers, the Sephton Party, came to establish itself on the land, which the group called Salem.

[15] Between 1812 and 1857, two notable interactions between the Salem Settlers and isiXhosa-speaking people are recorded. The first was during the Seventh Frontier War in 1847. IsiXhosa-speaking people agreed not to attack Salem after negotiating with two of the Settlers.[11] The second was in December 1850, when a group of settlers on patrol was ambushed by isiXhosa-speaking people.

[16] In 1857, the prophetess Nongqawuse is said to have foretold that, if amaXhosa killed their cattle and destroyed their food stocks, they would be rewarded with fat new cattle and abundant grain, and would be able to drive the white people into the sea.[12] The result was catastrophic. Thousands of people died of starvation. The population of amaXhosa in its entirety is estimated to have dropped from 105 000 to fewer than 26 000. Survivors for the first time sought employment from white settlers – including in Salem.

[17] It is in and after this period that the claimants say that their ancestors, having been dispossessed of their land a half-century before, moved back to Salem. The white inhabitants of Salem began to employ black people to work on their farms, both seasonally and permanently. Employees lived either in houses constructed on the farmers' erven or on the Commonage. The first three black inhabitants on the Commonage were recorded in December 1877. They were situated on what was to become the Salem "location", an approximately 12-acre portion of land within the Commonage.

[11] The claimants and landowners broadly agree that this happened but differ as to the details.

[12] This narrative has been challenged in various respects: for example, it is argued that the consequences of the cattle killing were severely aggravated by independent environmental factors and that the blame was placed solely on amaXhosa superstition in an attempt to portray them as irrational. The resultant devastation is the same.

[18] The first recorded act of the Salem Village Management Board – which comprised the property owners who had rights in the Commonage – was in the same year. By June 1884, the Inspector of Native Locations recorded 130 black people living on the Commonage. They lived in 24 huts, with 70 cattle. Later that year, the Inspector noted that the management of the Commonage was no longer his concern, and that it was under the jurisdiction of the Board, which had taken over its management.

[19] On 19 June 1913, the Natives Land Act 27 of 1913 came into effect. It prohibited black people from acquiring title to land outside "native" areas, which amounted to less than 13% of the land surface of South Africa. It is this date that the Constitution pegs in recognising dispossession that affords entitlement to restitution.[13]

[20] In June 1917, the Board promulgated the Salem Village Management Board Location Regulations[14] (Regulations). These enabled any person over 18 seeking to live on the Commonage to apply to the superintendent for a "site permit". Issue of permits was not restricted to only those employed by landowners, though the original regulations provided that every permit-holder "or other resident in the location" was "obliged to satisfy the superintendent of the manner in which he obtains his livelihood". This regulation was amended in 1919 to add the condition that the obligation to satisfy the superintendent existed only "if requested on reasonable grounds to do so."[15] This attenuated the superintendent's power to control black inhabitants in Salem on grounds that they were not employed.

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[13] Section 25(7) of the Constitution provides:

> "A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress."

[14] Salem Village Management Board Location Regulations, GN 151, 13 June 1917. The Regulations were promulgated under the provisions of the Public Health Amendment Act 23 of 1897, section 9(7) of which empowered "urban local authorities" to issue regulations or by-laws "[f]or regulating the use of Native Locations and for maintaining good order, cleanliness and sanitation therein, and for preventing overcrowding and the erection or the use of unhealthy or unsuitable huts or dwellings".

[15] Salem Village Management Board Location Regulations, GN 454, 28 March 1919 (Amended Regulations) at regulation 30.

[21] The landowners urged that the regulations evidenced the extent to which the Board exercised control over the Commonage.

[22] The Regulations were restrictive. The residents were required to pay quarterly rent to the Board and could be ejected for failure to do so after three months.[16] The Regulations provided:

> "All dwellings shall be deemed to be the property of the Board, provided that on any holder of a 'site permit' being ejected through its cancellation, or leaving the location voluntarily, he shall be paid the then value of the dwelling to be assessed by three arbitrators. . . . No 'site permit' shall be transferred except with the permission of the superintendent."[17]

Although the Regulations permitted 24-hour visits without a permit, visitors had to "report themselves to the superintendent within three hours after arrival".[18]

[23] It is common cause that a location was formally established only in 1921. However, by June 1921, a committee appointed by the Salem allotment holders reported that the location was "a nuisance" and was not being used for the purpose originally intended. The view was taken that employers should rather house their employees on their individual properties.

[24] The white inhabitants of Salem were generally dissatisfied with the use and management of the Commonage. Some farmers were leasing portions of the Commonage to outsiders for grazing purposes, and the other owners were worried about interbreeding of stock. They were also having difficulty dipping their cattle for ticks and other insects because of the distance that cattle would travel away from their

[16] Regulation 10 of the Amended Regulations.

[17] Regulation 3 of the Regulations.

[18] Regulation 4 of the Regulations stipulated that "[s]trangers not desiring to remain longer than 24 hours may do so without obtaining any permit, provided that they report themselves to the superintendent within three hours after arrival".

farms. The minutes note that "[m]embers of the Community have been allowed to graze large herds of stock, free of charge to the Board while others have been charged grazing fees for their bona fide Native servants' stock." This indicates that the black inhabitants of Salem were using the Commonage to graze their cattle.

[25] In 1926, there were 10 huts recorded in the location. The records show a decrease in the number of huts, but a steady increase in the number of "natives" recorded as living in Salem. In its Health Report for the year ended 30 June 1933, the Board recorded "a small native location of some half dozen huts as the natives reside on their masters' private properties". In 1931, only 10 families were reported to be living on the Commonage, and all were recorded as employees in Salem. There is no indication of anyone living in the location after 1933.

[26] By 1940, the landowners of Salem had formed a committee under the chairmanship of Mr L B Gardiner.[19] Its objective was to subdivide the Commonage. Mr Gardiner applied to the High Court to have the two portions of Commonage granted in 1836 and 1847 consolidated and subdivided amongst the Settlers. At this point, archival evidence indicates there were approximately 450 black people living on the land. On 8 August 1940, the Grahamstown Supreme Court granted an order confirming that the Administrator's consent having been obtained, the Commonage could be subdivided amongst the Settlers.

[27] Following the order for subdivision, the Native Commissioner made a special visit to Salem. He recommended the disestablishment of the location. He noted that the "[n]ative population of the village is about 500, of whom about 50 work as servants. These servants live on the premises of their employers, and on the present Commonage which is privately owned." The Salem Location was officially disestablished on 14 November 1941.

[19] Also spelt "Gardner".

[28] The transfer of the Commonage land to the "Salem Party of Settlers" through deed number 25712 was effected on 29 December 1947. The claimants assert this moment as the beginning of the dispossession of their rights in land. The subdivided plots were distributed amongst the individual landowners of Salem beginning in April 1948.

Litigation history

[29] The claimants lodged their claim under the Restitution of Land Rights Act[20] (Restitution Act). The land they claim, fully described as the "remainder of the farm 498 and portions 1, 2, 3, 7, 8, 13 to 17, 19 to 33, 35, 36 and 38 of the farm Salem No. 498, district of Albany", is currently registered in the names of the landowners and the Club.

[30] For their claim to succeed, the claimants had to establish that (1) they were a community; (2) that held a right in land; (3) of which they were dispossessed;

[20] Act 22 of 1994. Section 10, headed "Lodgement of claims", in relevant part provides:

> "(1) Any person who or the representative of any community which is entitled to claim restitution of a right in land, may lodge such claim, which shall include a description of the land in question, the nature of the right in land of which he, she or such community was dispossessed and the nature of the right or equitable redress being claimed, on the form prescribed for this purpose by the Chief Land Claims Commissioner under section 16.
>
> (2) The Commission shall make claim forms available at all its offices.
>
> (3) If a claim is lodged on behalf of a community the basis on which it is contended that the person submitting the form represents such community, shall be declared in full and any appropriate resolution or document supporting such contention shall accompany the form at the time of lodgement: Provided that the regional land claims commissioner having jurisdiction in respect of the land in question may permit such resolution or document to be lodged at a later stage.
>
> (4) If there is any dispute as to who legitimately represents a community for the purposes of any claim under this Act, the regional land claims commissioner having jurisdiction may in the manner prescribed in rules made by the Chief Land Claims Commissioner in terms of section 16, in order to have a person or persons elected to represent the community—
>
> (a) take steps for drawing up a list of the names of the members of the community;
>
> (b) direct that a meeting of such community be convened and an election be held at that meeting;
>
> (c) take such other steps as may be reasonably necessary for the election."

(4) through racially discriminatory laws or practices; (5) after 19 June 1913.[21] The Land Claims Court and a majority in the Supreme Court of Appeal concluded that the claimants had proved these elements and upheld their claim. The landowners urge this Court to overturn those findings.

Land Claims Court

[31] The claim was lodged in December 1998.[22] In November 2002, the claim was published by the Commission in the Government Gazette[23] as the Restitution Act requires.[24] In June and July 2003, Mr Vincent Xhuba Paul, project officer for the Commission, conducted interviews with the Community, and made findings for his research report. The Commission referred the claim to the Land Claims Court in June 2010.

[32] The landowners filed their response in March 2011. Their defence raised procedural issues, but also asserted that the Settlers were awarded individual and collective rights over the Commonage that they exercised so as effectively to preclude any other groups from acquiring rights over the Commonage. The claimants' ancestors lived on the Commonage only "on the basis of individual employment agreements with owners". General habitation of the Commonage by black people was

[21] Section 2(1) of the Restitution Act provides:

> "A person shall be entitled to restitution of a right in land if—
>
> (a) he or she is a person dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices; or
>
> (b) it is a deceased estate dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices; or
>
> (c) he or she is the direct descendant of a person referred to in paragraph (a) who has died without lodging a claim and has no ascendant who—
>
> (i) is a direct descendant of a person referred to in paragraph (a); and
>
> (ii) has lodged a claim for the restitution of a right in land; or
>
> (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."

[22] The cut-off date for claims at the time was 31 December 1998.

[23] General Notice in terms of the Restitution of Land Rights Act, 1994, GN 2843–80, GG 24042, 15 November 2002.

[24] Section 11(1).

strongly denied. The only persons living on the Commonage were "a small number of farm workers with their families" who were there by the grace of their employers, the landowners. The claimants' rights, if any, were "limited only to the keeping of small numbers of livestock and cultivation of small patches of land".

[33] After the landowners' initial response, the claimants filed their statement of claim. In it, they asserted that their forebears "traditionally occupied the land as far back as the 1800s but the property was later transferred to various members of the [w]hite group." The claimants said they constituted about 500 people who occupied the location on the Salem Commonage before it was disestablished.

[34] The landowners filed an amended response in which they said that the Court should take into account the fact that the claimants had already received restoration of large tracts of the Commonage. In view of this, any further redress should be monetary.

[35] The parties agreed to defer the question of the feasibility of restoration. In the result, what was at issue in the Land Claims Court was solely the validity of the claim.[25]

[36] At the Land Claims Court hearing, the claimants claimed to have lost ownership, residence, grazing, use of land for agricultural purposes, access to firewood, burial sites, cropping, and use of the Commonage land.

[37] The claimants called two witnesses – Mr Nondzube, who recounted his grandfather's story of arriving in Salem before 1812, and Mr Mndoyisine Ngqiyaza. Mr Ngqiyaza was born in the location in Salem. He testified that, before the subdivision, his father was a subsistence farmer on the Commonage, but that he was

[25] LCC judgment above n 2 at para 2. This agreement was made on 21 January 2013, after the trial had started.

forced to seek employment with Mr Bradfield after the subdivision. The Land Claims Court found both these witnesses to be "honest and credible".[26]

[38] The Commission called three witnesses – Mr Paul, the Commission's researcher at the time the Salem claim was investigated; Professor Martin Legassick, an expert in 19th century South African history; and Mr Garthford Chandler, an expert in surveys and mapping. It furnished extensive details of the history of the land before 1913. Mr Paul testified that the portions of land granted to the settlers in Salem were already occupied by the "native community".[27] He considered the imposition of a hut tax to be an indication that black people had the right to be present in Salem.[28] The dispossession of land flowed from the Natives (Urban Areas) Act[29] because it failed to recognise that more than one community could be resident on the same land.[30]

[39] Professor Legassick testified on the nature of the Zuurveld as part of a frontier zone when the 1820 settlement took place. This precluded it from having a single clear authority. AmaXhosa were clearly present on the land before white settlers, but even after white settlers occupied the land, the authority over the land was still contested for decades as amaXhosa warriors continued to assert their rights.[31] His view was that amaXhosa acquired indigenous rights over the Commonage before the settlers arrived in Salem in 1820; the legislation and regulations in force between 1870 and 1940 allowed them to build up legal rights; it was a question of common sense, not law; that a "community" existed on the Commonage; the interpretation of laws and regulations were questions of grammar, not law; and the legal rights of black people living on the Commonage were violated because the Community was not consulted about the subdivision of the Commonage or the disestablishment of the location, which constituted a racially discriminatory practice. Professor Legassick

[26] Id at para 130.

[27] Id at para 21.

[28] Id at para 22.

[29] Act 21 of 1923.

[30] LCC judgment above n 2 at para 23.

[31] Id at para 25. This is evident from the continued wars in the area.

said history is recorded to "relegate the dominated to the shadowy status of people without a history".[32]

[40] Mr Chandler and the landowners' expert, Mr Adie Gerber, were able to agree that there was evidence of traditional dwellings along the Assegai River, with close connections to the commercial farming areas and the Commonage. From this, the experts agreed, one could infer that the dwellings may have been occupied by farm workers – but they qualified this by saying that they could not "infer from photography whether the occupants of the dwellings [were] farm workers or not."[33]

[41] The landowners strongly assailed the credibility of the claimants' oral evidence, which, they said, is contradicted by archival evidence.[34] They asserted that any rights the claimants' ancestors might have held before 1811 would have been extinguished by the Fourth Frontier War in 1811-1812. They questioned the Commission's reliance in the hearing on indigenous title, when the referral invoked the existence of a location housing black people only from 1921.[35]

[42] The landowners called two witnesses who had grown up in Salem – Mrs Ethel Phyllis Page (formerly van Rensburg) and Mr Albert Alexander van Rensburg, her brother. Both testified that they had neither seen nor heard of black people residing in the Commonage. The Land Claims Court regarded this as "improbable" and "startlingly different from the documentary evidence".[36]

[43] The landowners called Professor Hermann Giliomee, an historian specialising in the 19th century history of the Eastern Cape frontier. Professor Giliomee's conclusions were "diametrically opposed" to those of Professor Legassick.[37]

[32] Id at para 55.

[33] Id at para 32.

[34] Id at paras 51-2.

[35] Id at para 53.

[36] Id at para 130.

[37] As the minority put it in the SCA judgment above n 1 at para 17.

Professor Giliomee's view was that there were no grounds supporting the claimants' assertion of indigenous title. He considered Professor Legassick's views not to be an objective account of primary sources. In his view, it was clear that even if there had been occupation of the Zuurveld by isiXhosa-speaking people, they never asserted a right in land as a political entity. And there is no evidence that an autonomous community of black farmers – an "African peasantry" – emerged in Salem from the late 19th century onwards. He pointed out that a large number of black people settled on alienated Crown land or the farms of absentee landlords making a living as labour-tenants who "lived from the land [and] sold their produce, occasionally providing seasonal labour to the farmers, but not working fulltime on a farm". So, in the vicinity of Salem, the farmers were likely to have permitted their labourers to graze their stock on the Commonage. But he emphasised the absence of any reference to black farmers in any capacity other than as wage labourers and labour-tenants, who received cattle as a supplement to, or in place of, wages. Labourers were allowed to graze their cattle on the Commonage, but he considered it improbable that they could have "built up" rights as Professor Legassick suggested. Indeed, he viewed the documentary evidence as suggesting the opposite.

[44] In determining whether a community existed, the Land Claims Court described the Restitution Act's threshold as "deliberately low".[38] It found that there were shared rules and practices, and that the right to use the Commonage was held communally.

[45] The Land Claims Court followed this Court's decision in *Goedgelegen*[39] in determining whether the dispossession was "as a result of" past racially discriminatory laws or practices. This, it said, should be less restrictive than the common-law test for causation. It is necessary only that the dispossession was a consequence of the

[38] LCC judgment above n 2 at para 132.

[39] *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* [2007] ZACC 12; 2007 (6) SA 199 (CC); 2007 (10) BCLR 1027 (CC) (*Goedgelegen*).

discriminatory law or practice in question, and not that it arose solely from that discriminatory law or practice.[40]

[46] The Land Claims Court held that the 1940 decision by the Grahamstown Supreme Court to consolidate and subdivide the Commonage land, without consideration of the black people who were living on it, was a racially discriminatory practice.[41] It consequently granted a declaratory order that the Community was dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws and practices, with no order as to costs.

Supreme Court of Appeal

[47] Despite clear agreement on the majority of the factual issues and the nature of the evidence to be admitted, there was pronounced disagreement between the majority and the minority in the Supreme Court of Appeal. This seemed to rest almost entirely on the weight to be attached to the evidence in the light of the requirements of the Restitution Act.

[48] The minority found that the claimants failed to establish that any black people or other community occupied the Commonage before the settlers arrived in 1820. It found that the earliest evidence of black presence in the Commonage was from 1878 – that is, 58 years after the settlers' arrival.[42] The minority noted that the parties' land surveyors observed that in 1942 (five years *before* the dispossession allegedly began) there were 48 African dwellings, of which 26 were on the Commonage. The most plausible inference was that most or all the occupants of the 26 dwellings were farm labourers, or possibly labour-tenants, rather than members of an independent, autonomous community unconnected to the landowners.[43]

[40] LCC judgment above n 2 at paras 69 and 149-52.

[41] Id at paras 154-5.

[42] SCA judgment above n 1 at paras 334-9.

[43] Id at para 313.

[49] The minority rejected as vague, confusing, and contradictory the Community's claims of rights they exercised over the Commonage, the rules under which access to the land was determined, how and when the dispossession took place, and the racially discriminatory practice or laws that resulted in dispossession.[44] It described Mr Paul as "argumentative and evasive"[45] and his investigation as "very superficial".[46] It rejected, in strong terms, the evidence of all the witnesses called by the claimants and the Commission. Professor Legassick's opinion on the material questions of law was found to be inadmissible.[47] The minority ultimately concluded that no black people occupied the Commonage before 1820, and that there was no evidence that those amaXhosa whom the British forcibly expelled from the Zuurveld in 1811 returned to the Zuurveld and occupied any part of Salem Village or the Commonage at any time thereafter. They thus lost any indigenous title to land they might have had.[48]

[50] The minority found that the landowners' communal title to the Commonage, on the basis of the Governors' deeds of grant, was incompatible with the exercise of any indigenous rights by any other community.[49] On the *Goedgelegen* test, the claimants had failed to establish that they were descendants of a community as contemplated in the Restitution Act. Their forebears as a fact never "held" the land in common.[50] In fact, the evidence showed that the black people who lived on the private erven and on the Commonage did so because they were employed and not as members of an independent community.[51] The judgment characterises rights as something to be bestowed by an authority; hence the absence of authority was decisive. In any event,

[44] Id at para 293.

[45] Id at para 327.

[46] Id at para 330.

[47] Id at paras 331-3.

[48] Id at paras 341-51, relying on *Alexkor Ltd v Richtersveld Community* [2003] ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) (*Richtersveld*).

[49] SCA judgment above n 1 at para 352.

[50] Id at para 368.

[51] Id at para 372.

there was no clear evidence of dispossession within the meaning of the Restitution Act.[52]

[51] On this basis, the minority rejected the contention by counsel for the claimants that the community on the Commonage exercised a system of ownership in parallel with the landowners.[53] It doubted whether such a parallel system could exist in our law and, if it could, found that the Salem Party's ownership in any event extinguished any potential parallel title.[54]

[52] Finally, the minority found that the claim was not properly lodged and should fail for this reason too.[55] The minority would have upheld the appeal and dismissed the Community's claim.[56]

[53] The majority disagreed. It approached the claim as founded on occupation of the land for a continuous period of more than 10 years after June 1913,[57] and found sufficient evidence to conclude that a "community" of indigenous people occupied the Commonage from the late 1870s to the late 1940s.[58] The evidence established that, after the Fourth Frontier War in 1811 to 1812, amaXhosa indeed never regained general administrative authority over the Zuurveld area. Yet there was no evidence that the Board itself gained control over the Commonage. Quite the contrary, the Salem landowners consistently expressed discontent and uncertainty as to its control and management.[59]

[52] Id at para 379.

[53] Id at para 374.

[54] Id.

[55] Id at paras 393-5.

[56] Id at para 411.

[57] Id at paras 413 and 421-4.

[58] Id at para 435.

[59] Id at para 436.

[54] Although the Regulations prohibited settlement on the Commonage, its open occupation by black people was never policed or curtailed.[60] The need to establish a "Native Location", and the promulgation of "location regulations" in 1919,[61] indicated that the Community's ancestors lived on the Commonage.[62] Evidence showed that the Board was aware of inhabitants of the Commonage and was unsure itself of its jurisdiction over the Commonage outside of the location. It also shows that the black people did not live on the Commonage by the landowners' consent – for there was no legal basis on which they could consent.[63]

[55] The majority considered that the landowners' argument mistook the proper approach to land claims and the spirit of the Restitution Act. The fundamental principle is that the existence of rights, their nature, and whether they should be restored is not assessed according to the laws prevailing at the time of occupation. The determination is within the current land restitution legal framework. For obvious reasons, the black community living on the Commonage could have no rights within the laws of that time. Yet the evidence shows the existence of a community, even though it was conveniently invisible, save as a source of labour and other benefits derived from its members' skills.[64] These, the majority said, are the very injustices that the Restitution Act is designed to remedy. The fundamental spirit and purpose of the statute is "to restore the dignity of people who suffered the shame of being caused to be pariahs from their homes."[65]

[56] The majority took the view that the evidence of Professor Legassick and Mr Paul accorded with logic and probabilities and was based on the very records from which the Court was entitled to draw its own conclusions.[66]

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[60] Id at para 439.

[61] They were in fact originally promulgated in 1917.

[62] SCA judgment above n 1 at para 440.

[63] Id at para 441.

[64] Id at para 461.

[65] Id.

[66] Id at paras 465-9.

[57] It was evident from the archival records that, apart from their financial obligations to the Board, the black people on the Commonage were left to regulate their own lives. They decided (on their own): where each family would settle within the Commonage; which piece of land each family would plough; where to graze their cattle; where they would bury their dead; where they would access wood and water; and where they would perform their customary rituals. These were the different facets of their beneficial occupation. And in it they were guided by their traditional laws and custom.[67]

[58] The majority held that the documented history supports the contention that, as in all African communities, there must have been a traditional leadership structure on the Commonage.[68] Features of the Commonage Community's life – such as an established orderly settlement pattern, common traditional practices, pooling of resources for farming purposes, economic activity, and a leadership structure – demonstrate that the occupants of the Commonage were an established community as envisaged in section 2 of the Restitution Act, with or without a chief.[69]

[59] The evidence demonstrated that the Commonage was intended to serve as a public resource. Ignoring this would defeat the purpose of the Restitution Act.[70]

[60] Finally, the majority found that the dispossession was patently racially discriminatory. The failure to consult or in any way take the interests of the Community into account, and the process that forced hundreds of black people away from their homes on the Commonage for the benefit of 25 white farmers, was crude and racially discriminatory conduct. The 1940 Grahamstown Supreme Court order

[67] Id at para 450.

[68] Id at para 454.

[69] Id at para 473.

[70] Id at para 499.

"could not cleanse the dispossession of its racially discriminatory nature".[71] In the result, the majority dismissed the appeal with costs.[72]

Leave to appeal and jurisdiction

[61] At the heart of the parties' contest lies section 25(7) of the Bill of Rights,[73] which entitles "[a] person or community dispossessed of property after 19 June 1913

[71] Id at para 500.

[72] Id at para 508.

[73] Section 25 of the Constitution provides—

> "(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
>
> (2) Property may be expropriated only in terms of law of general application—
>
> (a) for a public purpose or in the public interest; and
>
> (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.
>
> (3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including—
>
> (a) the current use of the property;
>
> (b) the history of the acquisition and use of the property;
>
> (c) the market value of the property;
>
> (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
>
> (e) the purpose of the expropriation.
>
> (4) For the purposes of this section—
>
> (a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and
>
> (b) property is not limited to land.
>
> (5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.
>
> (6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.
>
> (7) 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.
>
> (8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).

as a result of past racially discriminatory laws or practices" to either restitution or equitable redress, to the extent provided by an Act of Parliament. That Act is the Restitution Act. Its interpretation and application raise constitutional issues. That gives this Court jurisdiction. In addition, the claim and the landowners' resistance to it raise significant issues. What is our history? How does the Constitution enjoin us to understand it? And how practically do we realise justice in the light of our history? The decisions of the Land Claims Court and Supreme Court of Appeal give rise to reasonably arguable questions of law. And the order the Land Claims Court granted, and the Supreme Court of Appeal upheld, may be over-extensive in their ambit. Leave to appeal must be granted.

Amicus

[62] The Association for Rural Advancement was admitted as a friend of the court (amicus curiae). It made written and oral submissions disputing that indigenous title was extinguished through conquest, as well as on intertemporal law (whether one applies the law valid at the time of events in issue, or contemporary law) and on the approach to hearsay evidence under the Restitution Act.

Approach to historical evidence and interpretation

[63] Reliance on expert testimony is a common feature in adjudication. Courts routinely rely on experts in fields from medicine to sociology to clarify issues and to understand complexities in evidence. This has its dangers when a court seeks clarity on facts. There are limitations to the capacity to determine a fact with sufficient certainty on the basis of opposing experts' views. But there is an added rawness to the interpretation of history, especially in the context of rights in land, and an added difficulty for judges in coming to an understanding of historical truths. For the law is obliged to provide finality by interpreting historical events "where finality, according to the professional historian, is not possible".[74]

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(9) Parliament must enact the legislation referred to in subsection (6)."

[74] See Ray "Native History on Trial: Confessions of an Expert Witness" (2003) 84 *Canadian Historical Review* 253 at 272: "[C]ourts are handed disputes that require for their resolution the finding of certain historical facts.

[64] Here, we have to consider what it means to have a case built partially on oral history,[75] with different recollections of grazing procedures and with numbers that sometimes don't quite tally. Do we expect uniform historical accounts of things that are said to have happened more than 150 years ago?

[65] The Supreme Court of Canada in *Delgamuukw* recognised this difficulty in determining aboriginal rights which, similarly, often requires oral history.[76] Lamer CJC noted that "[t]he difficulties with the features of oral histories is that they are tangential to the ultimate purpose of the fact-finding process at trial – the determination of historical truth".[77] Oral history is not only concerned with historical facts, but also the values and convictions of the community it recollects.[78] Lamer CJC continues:

> "Notwithstanding the challenges created by the use of oral histories as proof of historical facts, the laws of evidence must be adapted in order that this type of evidence can be accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with, which largely consists of historical documents."[79]

The litigating parties cannot await the possibility of a stable academic consensus." See also Martin "Historians at the Gate: Accommodating Expert Historical Testimony in Federal Courts" (2003) 78 *New York University Law Review* 1518 at 1520-1.

[75] This does not mean that written history always comes closer to "the truth" than oral history, but oral history presents a different challenge to judicial decision-making that courts must grapple with. The passing of oral traditions is critically described by Nelson Mandela in *Long Walk to Freedom* (Abacus, London 1995) at 26-7:

> "I did not yet know that the real history of our country was not to be found in the standard British textbooks . . . . It was from Chief Joyi that I began to discover that the history of the Bantu-speaking people began far to the north, in the country of lakes and green plains and valleys, and that slowly over the millennia we made our way down to the very tip of the continent. However, I later discovered that Chief Joyi's account of African history, particularly after 1652, was not always so accurate."

[76] *Delgamuukw v British Columbia* [1997] 3 SCR 1010 (SCC); 153 DLR 193.

[77] Id at para 86.

[78] Id.

[79] Id at para 87.

[66] The Land Claims Court relied partly on witnesses' factual accounts of the Community's history, but also on the expert historians' views of this history. The often acrid conflicts between Professor Legassick and Professor Giliomee, the historians for respectively the Commission and the landowners, starkly illustrate the fractures in determining how our history should be understood. Both were prominent, accomplished and distinguished academicians.[80] Their approaches to the same historical materials differed radically. Though Professor Giliomee suggested that Professor Legassick approached the sources with a view to attaining a particular goal or outcome,[81] it would be unfair not to record that this, to the extent that it implies an attribution of normative preconception to the assessment of historical sources, was true also of Professor Giliomee's evidence.

[67] Professor Giliomee himself rightly noted that "no historian is free from a particular theoretical and ideological approach". And his own testimony was laden with the insistent assertion that the claimants could not and did not acquire rights in or over the Commonage.[82] That deduction was a normative conclusion – one inescapably requiring the attribution of value or judgment – for the Court, and not the experts, to draw from the established historical facts in the light of the Constitution and the Restitution Act.

[68] There is no Archimedean point from which history can be understood, interpreted or written, outside one's own time, material circumstances or social allegiances. That is true of all judgements. This does not mean that history, or other normative judgements, including judicial determinations, become a free-for-all of

[80] Professor Legassick died on 1 March 2016, in his 76th year, after testifying in the Land Claims Court, and before the appeal in the Supreme Court of Appeal.

[81] Professor Giliomee seemed to consider the main difference between himself and Professor Legassick as lying in "whether one starts the research with a theory or with approaching the primary sources with a relatively open mind and whether one writes history to change the present or to understand the past in its own terms".

[82] Professor Giliomee's supplementary expert report, commissioned and lodged in order to rebut the evidence of Professor Legassick, asserted flatly that though it was not denied that there were black people living on the Salem Commonage in 1913, there was "no evidence that a community, as defined by the Restitution of Land Rights Act No 22 of 1994, had been formed of Africans on Salem and that people living [t]here had rights in land."

subjective interpretation. It merely serves to enjoin scrupulous care in acknowledging and taking responsibility for one's own ideological positioning within the disciplinary constraints and commitments of one's craft. This Court has explicitly acknowledged that this is true of its own judgments.[83] The normative value system our courts are required to adhere to and expound is that embedded in the Constitution.[84] Interpreting and applying this value system, too, requires care in owning up to one's own predispositions and preconceptions.

[69] So understanding history, like adjudication, is a necessarily value-laden task. This does not free us from the constraints of the evidence in seeking the truth or truths the materials and sources yield. We are guided by the Restitution Act, together with the usual techniques available to any court in assessing expert evidence.[85]

[70] The Restitution Act foresees some of this complexity. It requires courts to "admit any evidence" they consider relevant and cogent to the matter even if it is not admissible in any other court of law.[86] This specifically includes historical expert evidence, which is necessary to assist in establishing the facts to support land rights or dispossession, or otherwise.

[71] We are obliged to interpret the Restitution Act to afford claimants the fullest possible protection of their constitutional guarantees[87] and to advance the declared

[83] *Daniels v Scribante* [2017] ZACC 13; 2017 (4) SA 341 (CC); 2017 (8) BCLR 949 (CC). See for example paras 22-4, 115-7 and 154.

[84] *Carmichele v Minister of Safety and Security* [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) at para 54: ("It is within the matrix of this objective normative value system" of the Constitution that the common law must be developed).

[85] These include, as argued by the amicus curiae, examining the epistemological basis of the expert's research and evaluating whether the expert is qualified to draw the conclusions they draw.

[86] Section 30(1) of the Restitution Act.

[87] See *Goedgelegen* above n 39 at para 53: "We must prefer a generous construction over a merely textual or linguistic one in order to afford claimants the fullest possible protection of their constitutional guarantees".

purpose of the Restitution Act, which is to provide restitution and equitable redress to as many victims of racial dispossession of land rights after 1913 as possible.[88]

[72] The Supreme Court of Appeal majority interpreted these hermeneutic injunctions as requiring it to approach the Restitution Act as "an extraordinary piece of legislation, *sui generis*, which generates processes and approaches not normally associated with normal litigation and rules of practice". The statute, it said, "implores the courts to lean towards granting rights in land where it would be *just and equitable* to do so within [its terms]".[89] That is undoubtedly right. Equally so is the majority's injunction that courts "should lean liberally towards the realisation of the objectives of the Act".[90] The history from which the statute springs, and its own express purposes, demands this.

[73] This is because the Restitution Act is not a victor's charter, intent at whatever cost or with whatever means on depriving those who have of what they have. It is a nuanced and generous framework for restoring rights and dignity to those dispossessed of their land after 1913, while affording compensation to those who are affected by successfully proven claims. The present case, as will emerge, is a vivid instance of how the statute's just balance operates, in recognising claimants' entitlements while not eschewing those of the presently possessed.

[74] And in finding that balance, we do not disclaim history. We cannot, for recognition of history's gross injustices underlies every single provision in the statute. It only means that, in approaching and understanding what the historical sources tell us, we seek to find habitable means of upholding and fulfilling the statute's restorative principles of historical justice. The practical import of this will now become clearer.

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[88] Id at para 42, urging an interpretation of the statute that "advances the declared purpose of the operative legislation, which is to provide restitution and equitable redress to as many victims of racial dispossession of land rights after 1913 as possible".

[89] SCA judgment above n 1 at paras 414-6. (Emphasis added.)

[90] Id at para 421.

Was there a community of black people living on the Salem Commonage?

[75] The Commission's referral document, the statement of claim (embracing the averments in the referral) and the claimants' further particulars asserted that the claimants were a community of black families whose forebears traditionally occupied the entire Commonage from the 1800s. In addition, the claimants claimed that the Community occupied the Commonage beneficially for more than 10 years.

[76] The Supreme Court of Appeal majority concluded, on a holistic reading of the statute and the statement of claim, that the claim was founded on occupation of the land for a continuous period of more than 10 years after June 1913.[91] This approach operated, in effect, as a confession and avoidance of the minority's objection that the claimants' case changed as the trial progressed, and ultimately bore no resemblance to their pleaded case.[92] The Supreme Court of Appeal majority approached the claimants' pleadings with a measure of permissiveness. This was right.

[77] Our general approach to pleadings is that they be used to define the issues between the parties, and not that parties are strictly bound to them where it prevents courts from fully investigating the facts placed before them. This is old-established doctrine. As the Appellate Division said in 1936, "[t]he importance of pleadings should not be unduly magnified."[93]

[78] We must also remember that in the context of land claims a community of people seeks to recall to a court, sometimes after more than a century has passed, how they came to live together and regulated their livelihoods. It would be inapposite to expect details of how precisely their ancestors agreed to graze their cattle, or which precise right in land this grazing would implicate. Similarly, the initial references in the claimants' pleadings to labour-tenancy rights should not be taken to discountenance the existence of other rights. That would be both unfair and illogical,

[91] Id at paras 413 and 421-4.

[92] Id at para 389.

[93] *Shill v Milner* 1937 AD 101 at 105.

given that their claim was at the nascent stage of its conception and formulation, and the statute itself had been passed only a few years earlier.[94] Moreover, some members of the Community may indeed have acquired labour-tenancy rights. But this cannot prevent others – those who were not employees of the landowners – from properly expounding their histories. Changes in pleadings in claims based on historical rights will therefore often be both just and necessary.

[79] This accords with the approach taken in *Delgamuukw* and in the recent *Tsilhqot'in* decision,[95] again by the Supreme Court of Canada in the context of aboriginal rights. McLachlin CJC explained why a "functional approach" to pleadings should be preferred. First, legal principles "may be unclear at the outset, making it difficult to frame the claim with exactitude".[96] Second, "the evidence as to how the land was used may be uncertain at the outset" and is "not an 'all or nothing' proposition".[97] This requires judges to make decisions based on the best evidence before them.[98] That is so here.

[80] The fundamental questions before the Land Claims Court were: whether a community of black people existed on the Salem Commonage; whether they acquired or exercised rights in the land; and whether they were dispossessed of those rights by a racially discriminatory law or practice after 1913. Those issues were boldly confronted and fully traversed before the Land Claims Court in a trial stretching over many days.[99] The basis on which the Land Claims Court decided in favour of the claimants, and on which the Supreme Court of Appeal upheld that judgment, was fully and squarely explored in evidence and debated in argument in the trial forum. No point was raised or pursued in a way that could have prejudiced either party in

[94] The claim was lodged on 24 December 1998; the Act was passed four years before.

[95] *Tsilhqot'in Nation v British Columbia* [2014] 2 SCR 257; 2014 SCC 44 (*Tsilhqot'in*).

[96] Id at para 21.

[97] Id at para 22.

[98] Id at para 23.

[99] The Land Claims Court conducted an in-site inspection (inspection *in loco*) on 24-25 April 2012, and heard evidence on 3 to 4 July 2012, 10 October 2012, 21 January to 1 February 2013, 27 May to 4 June 2013, 7 June 2013 and 22 to 24 July 2013. Judgment was delivered on 2 May 2014.

presenting its case. It would be quite wrong to disown the claimants' entitlements on the basis of their procedural clothing, and before this Court the landowners rightly made little of these issues.

[81] The approach of the majority in the Supreme Court of Appeal also rendered it unnecessary for the claimants to source their rights in a continuous claim of indigenous title predating the arrival of the 1820 Settlers. The historical evidence that the present claimants' predecessors were the people Colonel Graham expelled from the Zuurveld in 1811 is tenuous, and no credible link was established in the evidence between the Community's ancestors and the Salem land before the Settlers arrived in 1820. But, as the Supreme Court of Appeal recognised, the claimants were not required to establish a continuous entitlement to the land arising from settlement that predated colonisation. The Restitution Act recognises a very wide range of interests in land, including "a customary law interest" and "beneficial occupation".

[82] Then came the Fourth Frontier War, of which we have indisputable records of the brutal efficiency with which British troops under Colonel Graham – after whom Grahamstown is still named – hunted down and cleared the Zuurveld of its indigenous inhabitants.[100] In probability there was no significant settlement of black people at or on the Salem Commonage for some six decades after that war. This is not a matter of extinguishing rights by conquest – a question much debated before the Land Claims Court – but rather physically removing conquered people from land, when according to the Articles of Capitulation of 10 January 1806 the British colonists should have respected their rights to it.[101]

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[100] British soldiers hunted down and shot those amaXhosa who remained and "cleared" the Zuurveld of all Xhosa villages and farms. The extent of the horror is recounted in Maclennan *A Proper Degree of Terror (John Graham and the Cape's Eastern Frontier*) (Ravan Press, Johannesburg 1986) at 125:

> "Graham's Boers and Khoikhoi were hunting unwounded men, women and children alike as if they were wild beasts; they would have had little compunction about putting wounded men down like unwanted animals.
>
> On 24 February, the whole force returned to the base camp, 'having so effectually carried my orders into execution' said Graham to Reynell, 'that hardly a trace of the Kaffir man remains'."

[101] See [131] and n 151 below.

[83] It was in this period that the land under management of the Salem Party Club came to be developed to include a church and a cricket pitch. Counsel for the landowners, rightly, insisted that a community could not have accrued rights on this defined portion of the Commonage that was under consistent use, development and supervision by the landowners from 1832.

[84] The first plain evidence of the return of black people to the Salem area dates from 1877 – the very year in which the Board's first official act is recorded.[102] In January 1878 the Inspector of Native Locations for Salem, Kariega and Assegai Bush meticulously recorded and reported various totals, including his 1877 "Return of Natives, Stock &c" showing one hut and three people living on the Commonage. For the total three areas under his jurisdiction, the Inspector recorded 115 huts, 53 kraals and 515 inhabitants. By February 1880, nine huts, 42 people and 47 cattle are recorded.

[85] One can go on, virtually year by year, to itemise the rest of the recorded evidence and its significance. That is not necessary. The sources are fully set out, with contrasting perspectives and interpretations, in judgments of the Land Claims Court and of the minority and majority in the Supreme Court of Appeal.[103] For this judgment it is enough to say that I agree with the inferences the majority of the Supreme Court of Appeal extracted from this evidence.

[86] Though the archival materials on a few occasions present ambiguities, overwhelmingly they establish that, from 1878, a growing community of black people was living on the Commonage and using the land for habitation, farming, drawing water, grazing of stock, traditional practices and burials.

[102] The landowners appear to consider the Native Inspector's Report to have been compiled in July 1878, while the Commission considers it to be January 1878, reporting on December 1877. Professor Legassick specifies the date for the Inspector's visit as 18 December 1877, but we have not been able to locate this date in the record before us.

[103] LCC judgment above n 2 at paras 58, 128-30 and 132; SCA judgment above n 1 at paras 56-9, 85-7, 113, 314, 358-60, 364, 437, 448 and 456-61.

[87] Only one piece of archival evidence need be highlighted: the pivotal piece. It dates from 1941. This is the after the 1940 order of the Grahamstown Supreme Court authorising the subdivision of the Commonage. The evidence consists of a report by the Native Commissioner for Grahamstown dated 15 July 1941. Its significance merits its inclusion in its entirety in the footnote below.[104]

[88] Given the order of the Grahamstown Supreme Court the year before, dividing up the Commonage, the visit of the Native Commissioner was plainly of some moment, and his report composed deliberately after careful assessment. In the evidence as a whole, the report is a quite remarkable document. It was addressed by a senior official – Native Commissioners had the rank of Magistrate[105] – to the Secretary of Native Affairs in Pretoria. That official was not only the Commissioner's

[104] The report reads:

> "On the 8th instant, I proceeded to Salem where I was met by Mr J F Harris, the Secretary to the Village Management Board there. We at once drove to a spot about a mile to the south-east of the village, where I was informed the Native Location had previously existed. Today, there is only one disused and dilapidated hut there, and this had previously been used by a Native employee of the Board. The location was about 15 acres in extent, and ceased to exist twelve years ago.
>
> The location site was never actually defined by resolution of the Village Management Board, but a portion of the Commonage was set aside to be used as a location. No Location Superintendent or Advisory Board was ever appointed, but a Borough Ranger held office up till 1940 when he left for active service, and nobody has since been appointed in his place. The Regulations framed under Government Notice No. 454 dated 28/3/1919 have really never been put into operation.
>
> The European population of the village is between 90 and 100 with 25 families, while the Native population is about 500, of whom about 50 work as servants. These servants live on the premises of their employe[r]s, and on the present Commonage which is privately owned. I am given to understand that certain Europeans have permitted squatting in the past, but I am asking the local District Commandant to investigate the matter.
>
> A survey of the Commonage is now taking place and each owner will obtain his pro rata share. This means that the old location site will also be subdivided and cease to exist as a location.
>
> There is little or no probability of the Salem European Village expanding in the near future, but the labour requirements may increase, as I understand, pineapple and chicory growing is to be more extensively taken in hand. It seems clear however, that even if the labour requirements do increase and even if squatting is entirely stopped, there would still be ample room on each farm for these Natives to live, as each farm will range in extent from 150 to 600 morgen.
>
> I would therefore recommend the disestablishment of the Salem Native Location."

[105] See Johnson *The Native Commissioner* (Penguin Group, Cape Town 2007).

boss, but also the most senior bureaucrat responsible for the enforcement of white control over the indigenous population of South Africa. Native Commissioners were specifically tasked to secure the system of rigid separation and racial control (before the even more brutal and systematic measures the apartheid government introduced in 1948). Hence the significance of the report and its observations can hardly be overestimated.

[89] The report shows the Commissioner on a formal mission to Salem. And an assessment of the area's population, both white and black, lay at the centre of his mission. Though there were no tabulated sheets or formal returns, no systematic dwelling-to-dwelling tally, it may be seen as something akin to a census.[106]

[90] For the Commissioner was engaged in a formal, official exercise in demography. He was assessing Salem's "native" population with a view to a practical decision – the final, statutory, disestablishment of the Salem location. And his field of expertise was precisely the location, identification and determination of indigenous populations in contradistinction to white populations, with a view to the control of the former and the continued supremacy of the latter. It is hardly imaginable that he would have undertaken the task that produced these estimates or recorded them haphazardly. Both the tone and the details of his report proscribe that.

[91] In this light, his findings are decisively significant. He records that "[t]he European population of the village is between 90 and 100 with 25 families, while the Native population is about 500, of whom about 50 work as servants". Given the setting, to dismiss these estimates as "excessive", or "improbably high"[107] is to mistake the man, the official, his mission and the practical political significance of his duties.

[106] Contrast the minority judgment in the SCA above n 1 at para 105.

[107] SCA judgment above n 1 at paras 105 and 314.

[92] Counsel for the landowners, recognising the difficulties the Commissioner's report presented, urged that it was "against the run of play". The contrary is true. The population estimate of 500 meshes with every archival and documentary signification of the growth of the black African population at and on the Commonage over the preceding 63 years.

[93] And, during oral argument, when a large, blown-up reproduction of an aerial photograph taken in 1942 was displayed to the Court, it emerged for the first time that there were not merely 26 traditional dwellings, but 26 *clusters* of dwellings along the Assegai River, all within walking distance of the Commonage or on the Commonage itself. A further 22 dwellings were present to house employees on the landowners' properties. It is a matter for justifiable surmise that between 450 and 500 people could be housed in these clusters of dwellings.

[94] And it is not only the figure of 500 that is significant, although its own importance lies in how thoroughly it squares with very nearly every other piece of recorded demography since 1878. It is the Commissioner's estimate that only 50 of the 500 black people at Salem were working for the 25 "European" families at Salem. Where then were they living? Not in the location. That we know from the same report. The location had "ceased to exist" 12 years before.

[95] The only, and obvious, answer is that the overwhelming preponderance of black people at Salem were living on the Commonage. This accords with the claimants' case, and with the oral evidence of their witnesses. It is inconsistent with the landowners' evidence. Mrs Page, and her brother, Mr van Rensburg, were both firmly insistent that they had seen no black people living on the Salem Commonage.[108] None at all. Never. No black people at Salem, other than those working in white households or for white farmers.

[108] See the excerpts from Mrs Page's evidence in the SCA judgment above n 1 at paras 239-55 and 480-3.

[96] How do we square this with the Commissioner's 1941 tally? Did the witnesses' powers of observation simply fail to encompass the hundreds of people who, by officially made, carefully recorded, historically preserved account, were in fact there? There is no reason to think that either sibling was fabricating. On the contrary, both appear to have been entirely sincere in what they recalled.

[97] The inference must be that the witnesses' recollection was radically mistaken. Why their recall fell subject to so radical an oversight is a matter for justified inference as to the impact of an upbringing, like too many of us had, that foregrounded the virtues and visibility of white people to the exclusion – the disappearance, the evaporation, the virtual non-existence – of all others.

Were the black people living on the Commonage a "community"?

[98] The statute defines "community" as meaning "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". This Court held in *Goedgelegen* that this definition sets a "low threshold" for what constitutes a community: it sets no "pre-ordained qualities" to qualify.[109]

[99] Though the Restitution Act permits the Land Claims Court to "admit any evidence" that it considers relevant and cogent to the matter even if not admissible in any other court of law,[110] it does not seem to me that there is any particular mystique to the rules of evidence the Land Claims Court should apply. A court's approach to the evidence must take account of the distinctive nature of land claims. These claims often depend on hearsay evidence. The Restitution Act makes provision precisely for this. And while the statute accommodates the distinctive nature of the claims, which must be taken into account in the reception and assessment of evidence, it seems to me that the ordinary civil standard of proof applies.

[109] *Goedgelegen* above n 39 at para 41.

[110] Section 30(1) of the Restitution Act.

[100] The claimants therefore had to establish, more probably than not, that as a community their rights in the land were derived from shared rules that determined access to it.

[101] The claimants tried to establish this first through indigenous rights awarded by traditional authority before 1820. The landowners' evidence cast considerable doubt on the existence of a community under traditional leadership before 1820. The majority in the Supreme Court of Appeal appeared to accept that the evidence relating to this traditional authority was "unclear".[111] This caution was correct.

[102] Despite this, the majority concluded that there was no obstacle to applying the statutory definition of "community". This was because, as in all African communities, "there must have been a traditional leadership structure on the Commonage".[112] So the claim did not hinge on whether a community was established under traditional authority before 1820.

[103] This is right. It accords with the decision of this Court in *Goedgelegen*.[113] There it was authoritatively held that an accepted tribal identity, the authority of a chief designated by tribal hierarchy, or occupation of land in accordance with ancient customs and traditions are not requirements for a "community" under the Restitution Act.

[104] The majority in the Supreme Court of Appeal held that – with or without a chief – features in the life of the Community on the Commonage demonstrated that the occupants constituted an established community as the statutory definition envisages.[114] These included an established orderly settlement pattern, common

[111] SCA judgment above n 1 at para 454.

[112] Id.

[113] *Goedgelegen* above n 39 at para 43.

[114] SCA judgment above n 1 at para 473.

traditional practices, pooling of resources for farming purposes, economic activity and a leadership structure.

[105] This conclusion, too, is in my view right. There is no evidential magic in it. It is an inference from the conduct of any human group, larger than a single family, living over extended time in proximate circumstances. As Professor Tony Honoré explained in his ground-breaking jurisprudential analysis of "groups" more than four decades ago—

> "when a great deal of interaction takes place over a considerable period, conventions develop which would not otherwise have come into being. Time is usually, though not always, needed for these conventions to develop. It is the existence of conventions rather than the amount of interaction or the time it lasts that can best be taken as a defining characteristic of a group."[115]

[106] The generalised abstractions of Professor Honoré's conceptual analysis resonate vividly with the claimants' evidence. As Professor Legassick observed in his expert report, "[p]eople occupying the land in a given place for two to three generations must interact with one another, visit each other, do things together, establish rules of behaviour, including those determining access to the land, and, in other words, must constitute a community". Over time, he noted, "they would have developed explicit or implicit shared rules on grazing and where to graze their stock, ploughing and where to plough, the collection of wood, [and] where to bury their dead".

[107] In cross-examination Professor Legassick insisted that "people don't exist without interacting with one another, having to decide where to graze their cattle, having to decide where to put their huts and therefore to have common laws and regulations". This is not evidential flim-flam. It is a soundly-grounded supposition

[115] Honoré "What is a Group?" in his *Making Law Bind* (OUP, Oxford 1987) at 64. The essay first appeared in (1975) 61 *Archiv für Rechts-und Sozialphilosophie* vol 61(2) 161.

from human conduct. It is applicable, as a matter of obvious inference, to the group of black people living on the Salem Commonage from at latest 1878 until at least 1941.

[108] The evidence is thoroughly considered in the judgments of the Land Claims Court[116] as well as of the Supreme Court of Appeal minority[117] and majority.[118] It is not necessary to reconsider it here. It is necessary to mention only one inescapably graphic instance. It concerns a lime pit or quarry on the Commonage. Both Mr Nondzube and Mr Ngqiyaza, who testified for the claimants, mentioned it.[119] Lime obtained there was said to have been used in initiation rituals, for paint and for cosmetic and also medicinal purposes. The Commission's expert archaeological survey report located the lime quarry and springs on the Commonage.[120]

[109] The claimants' evidence that lime from the quarry was used in initiation practices was not challenged.[121] Mr Dave Mullins, a former Salem landowner, and former chairman of the Salem Landowners' Association, who testified for the landowners (though he had already sold his property, Avondale) was consistent with this evidence. He testified that clay from the lime pit "was used for initiates' abakhwetha"[122] and also "by women who had recently had a baby".[123]

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[116] LCC judgment above n 2 at paras 21-3, 33, 132 and 135-6.

[117] SCA judgment above n 1 at paras 113, 115-8, 131, 135, 137, 145, 289 and 321.

[118] Id at paras 450-1, 455, 463, 467-8, 473 and 488.

[119] Mr Nondzube testified in some depth at the inspection *in loco* and in his evidence in chief about the uses of the quarry while Mr Ngqiyaza confirmed its existence under cross examination.

[120] The experts were Mr Tim Hart and Mr David Halkett. They note that, though it was clear that the lime pit existed, there are no signs of recent use. They also refer to the 1941 aerial photograph and say that the quarry had not yet developed then "indicating that its excavation and use occurred after 1941". There is however ample other evidence that the lime mine was used before 1941, including by the 1820 settlers to paint their homes when they first arrived in Salem.

[121] See SCA judgment above n 1 at paras 203-4 (minority) and para 457 (majority).

[122] IsiXhosa for initiates in an early-adulthood rite-of-passage circumcision school. The transcript misspells the word as "amaqweta".

[123] Mr Mullins proceeded: "Later on Mr Pat Bradfield opened a lime mine there and it was used by the farmers for spreading on their fields to raise the pH of the soil."

[110] This detail, though small, shone light on the question whether community practices occurred on the Commonage. The evidence established that the black people living on the Commonage sustained and practised initiation rituals there. These are known to be profoundly central to the Xhosa culture. How could they have done so without "the existence of conventions" that, both analytically and by common sense human experience, are the hallmarks of human group activity? [124] The answer hardly needs to be spelt out.

[111] Mr Mullins also recounted that there were elders on each farm who collectively formed a leadership structure. He said that they dealt with initiation and discipline. The import of this evidence was that the leadership structures were confined to those who were employed by the landowners of Salem, and who thus exercised no independent rights over the Commonage. The number of black people recorded at Salem in 1941, but not employed by the farmers, contradicts this. It requires no recourse to imagination to infer, as a matter of probability, that they, too, lived under collective leadership structures.

[112] The landowners invoked this Court's statement in *Goedgelegen* that the "acid test remains" whether a community "derived their possession and use of the land from common rules".[125] That is correct. It is what the statute requires, namely a group of persons whose rights in land are derived from shared rules determining access to land held in common by the group.[126] Whether the "acid test" is fulfilled is a question of fact. In *Goedgelegen*, the acid test was applied, not to determine the existence of a community, but to determine whether it was dispossessed of rights in land.[127]

[124] Honoré above n 115 at 64.

[125] *Goedgelegen* above n 39 at paras 44-6.

[126] Section 1 of the Restitution Act.

[127] *Goedgelegen* above n 39 at para 45.

[113] There, dispossession occurred because common rules determining access to land were supplanted by labour-tenancy rules.[128] These, this Court said, did "not sit well with commonly held occupancy rights".[129] The Court concluded that, when the dispossession in question occurred, "no rights in land remained vested in the labour-tenants as a community".[130] The "acid test" was in other words applied to establish that dispossession had occurred, and is not the test for establishing whether rights existed before dispossession. It follows that *Goedgelegen* cannot be authority for the legal proposition that the landowners' formal title necessarily precludes those employed on farms from establishing, through custom, their own distinctive rights in terms of the statute.

[114] The landowners strongly contended that the Commonage was jealously guarded and, hence, that a high level of control was consistently exercised over it. Those working on the Salem farms therefore acquired no rights over the Commonage. Yet, as will shortly emerge, the contention cannot be sustained in the light of the great mass of archival and documentary evidence. This shows long-standing absence of control in regard to occupation, rights of pasturage, subletting, collection of firewood and cactus-control over the vast extent of the Commonage.

[115] At the end of all this, the question is: Did the social and functional arrangements of this particular group of people, numbering several hundreds, who lived on the Commonage over an extended period of more than 60 years, include common rules that determined how they accessed and utilised the Commonage?[131] In my view, as a matter of greater probability than not, that inference may be drawn.

[116] What those "rights" were is now the question.

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[128] Id at para 47.

[129] Id at paras 44-6.

[130] Id at para 47.

[131] See Honoré above n 115 at 54 where he illuminatingly explains that social groups consist of people "who interact in such a way as to have links with one another irrespective of the classification made by the inquirer".

The rights the black people living on the Commonage exercised

[117] The landowners contended that, if, as I have already found, there were black people on the Commonage in 1913 and after, they could never have acquired rights to or over it. This was because the gubernatorial grants of 1836 and 1847 gave title to the Commonage to the Salem Party of 1820 Settlers. The Settlers' rights excluded any possibility that other rights could arise over the same land. Zero-sum. The Settlers had. And the Community could never acquire.

[118] The minority in the Supreme Court of Appeal endorsed this contention on the basis that the exercise of indigenous title to the Commonage was inconsistent with the award of ownership rights to the Salem Party.[132] It was impossible for land that had been given to landowners for their common use and benefit at the same time to become the object of rights on the part of the claimants' predecessors.[133] And the registered common law rights of the landowners could not co-exist with the acquisition of any indigenous rights over the Commonage. The suggestion that some system of parallel ownership – indigenous or otherwise – existed alongside the landowners' ownership, in which they either acquiesced or of which they were unaware, was thus untenable.[134]

[119] This approach proceeds from an assumption about the ideological and legal power of the historical credentials of the landowners' title. I examine the difficulties it gives rise to shortly. But first two general points.

[120] The first is that our courts have long established that entitlements to land under the Restitution Act can exist simultaneously with title registered in another's name. In *Ndebele-Ndzundza*, a traditional community occupied land whose registered title was conferred on another.[135] The Supreme Court of Appeal held that the statute does not

[132] See SCA judgment above n 1 at paras 346-8.

[133] Id at para 405.

[134] Id at para 374.

[135] *Prinsloo v Ndebele-Ndzundza Community* [2005] ZASCA 59; 2005 (6) SA 144 (SCA) (*Ndebele-Ndzundza*).

afford registered title "unblemished primacy".[136] Instead, it "recognises complexities" that arise from the existence of traditional rights in land co-existing with formal registered title "and attempts to create practical solutions for them in its pursuit of equitable redress".[137]

[121] The Court in *Ndebele-Ndzundza* accordingly held that the community there had "established rights in the land that registered ownership neither extinguished nor precluded from arising".[138] This Court expressly endorsed *Ndebele-Ndzundza*.[139] Any different approach would, it said, "elevate ownership notions of the common law to the detriment of indigenous law ownership for purposes of restitution of land rights".[140]

[122] Thirteen years ago this Court recognised that, in counterposing different aspects of the right to property and housing, "[t]he judicial function . . . is not to establish a hierarchical arrangement between the different interests involved, privileging in an abstract and mechanical way the rights of ownership".[141] This was in an eviction case. But it applies just as well here. We must "balance" and "reconcile" rights "in as just a manner as possible taking account of all the interests involved".[142]

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[136] Id at para 38.

[137] Id.

[138] Id.

[139] See *Goedgelegen* above n 39 at paras 22 and 40.

[140] Id at para 22. See also Budlender "The Right to Equitable Access to Land" 1992 (8) *SAJHR* 295. At 302, he gives the following warning regarding litigating on rights in land:

> "The rights of the property-holders are the status quo, which courts will inevitably tend to protect. In a contest between those who seek to retain what they have, and those who seek to overturn the existing order, vested rights will consistently dominate over change."

This, despite the then pattern of property relations being "the result of generations of laws and practices which would not have survived for a minute in a bill of rights society."

[141] *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7; 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC) (*PE Municipality*) at para 23.

[142] Id. Van der Walt in *Constitutional Property Law* 3 ed (Juta online publication, 2015) persuasively extends the reasoning in *PE Municipality* id to competing rights to property at 524-5. See also *Daniels* above n 83 at paras 133-8.

[123] The second point is that this involves no mystery and no novelty. It flows from both the broadly generous, restitutionary purposes of the statute and from its detailed wording. The statute defines a "right in land"[143] with encompassing amplitude. And it spells out that the rights in land it recognises, with a view to restitution, may be "registered or unregistered". The fact that the statute recognises interests in land irrespective of registration suggests that registered title, on its own, while significant, is neither indefeasibly primary nor exclusionary. This is what *Ndebele-Ndzundza* and *Goedgelegen* held.

[124] Beyond these two observations, how strong was the title to the Commonage that the landowners' predecessors enjoyed?

[125] In 1823, the colonial government in London gave the Sephton Party of Settlers title to 700 morgen of land (about six square kilometres)[144]. The 700 morgen were divided into 50 individual erven. This averaged 14 morgen or 30 acres per family. On 15 December 1836, Governor D'Urban made a different and much larger grant. This was to the Salem Party as a whole. It consisted in a portion of 2 333 morgen (approximately 20 square kilometres), granted to the Party as common land on perpetual quitrent.

[126] In 1847, Governor Pottinger made a further grant. This was of an additional 5 365 morgen (approximately 45 square kilometres), also as commonage. The grant was in favour of the present and future proprietors of locations in the Salem Party. The quitrents of both this and the 1836 grant were paid off and converted to freehold title in 1848.

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[143] "Right in land" is defined in section 1 of the Restitution Act to mean—

> "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."

[144] A morgen is a Dutch unit of measurement just more than two acres in extent. It has fallen out of use in South Africa.

[127] These two grants constitute the Commonage in issue in these proceedings. Both grants afforded the Commonage to "the Salem party of settlers" on specified conditions. These included that the boundaries had to be "properly traced out" and the land "brought into such a state of cultivation as it is capable of". It was to be used for grazing purposes only.

[128] The 1940 judgment of the Grahamstown Supreme Court stated that "both grants were issued under Cape Ordinance 15 of 1844" (Ordinance).[145] This repeats what the second grant says. Yet both statements appear to be mistaken. The expressed purpose of the Ordinance is "to provide for the enregisterment in the land registers of the Cape of certain subdivisions of the locations and extensions of the Settlers of 1820". It allows the Governor by proclamation to publish the names of people entitled to subdivided portions of pre-existing locations and, if no objection is lodged, to grant the subdivisions.[146] The purpose of the Ordinance was to allow registration of land in the name of each family of 1820 Settlers where the land had previously been registered in the name of the head of the *party* of Settlers.

[129] The Salem Party families applied for enregisterment of their subdivided land portions under the 1844 Ordinance. This they were given. The first proclamation under that Ordinance was made on 27 March 1845. A second proclamation, which appears to incorporate the second grant of the Commonage, was made on 24 February 1848.[147] The proclamations set out the size of the families' independent allotments together with their respective shares in the Commonage.[148]

[145] *Gardner* above n 3 at 177.

[146] Section 2.

[147] Proclamation by His Excellency Lt General Sir Henry George Wakelyn Smith, GN 2204, 24 February 1848.

[148] Some documents, though none authoritative, indicate that the initial grant of land in 1823 included a large portion of the Commonage. This does not appear from either of the title deeds.

[130] All this points to two conclusions. First, the Ordinance did not authorise Governor Pottinger's grant of the greatest bulk of the Commonage in 1847.[149] Second, the Ordinance afforded no retrospective authority for the earlier grant of 1836. And there is nothing in the 1844 Ordinance that authorises any new grants of land after its promulgation. The Ordinance thus does not assist with the 1847 grant either, despite the title deed specifically invoking it.

[131] What then was the legal source of the Governors' grant of the Salem Commonage to the Salem Settlers? And how solid were those grants? This Court invited the parties to assist.[150] Unlocking the aetiology of the grants proved a

[149] An address to the Cape Legislative Council in 1847 refers to the 1844 Ordinance. The address arises from a complaint to Governor Pottinger made by Rev Shaw and Mr Matthews that the individual settler families had not yet been awarded title in the Salem land. Apart from a concern that the Settlers expected more land than they were initially awarded, the complaint was that the land they had been allocated was still registered only under the name of Hezekiel Sephton, the leader of the Party. The 1844 Ordinance was promulgated specifically to deal with complaints of this kind about allocation of title. The complaint was resolved later in 1847, when the Surveyor-General indicated that individual titles were ready to be signed by the Governor. In 1848, the Surveyor-General published a recommendation in the Government Gazette that the quitrent be remitted and freehold title awarded under the 1844 Ordinance. The subdivision in 1848 included corresponding shares in the Commonage.

[150] On 15 August 2017, this Court issued directions inviting submissions on authority for the grants of the Commonage. The directions noted that Gane J in *Gardner* above n 3 stated that both grants were issued under the Ordinance, and asked whether the Ordinance could stand as authority for the grants.

The directions were as follows:

> "1. According to the judgment of the Grahamstown Supreme Court dated 8 February 1940 in *Ex Parte Gardiner* 1940 EDL 175 (Gane J; Lansdown JP concurring) both grants of the Salem Commonage to the Salem Party of Settlers dated 16 December 1836 and 23 November 1847 'were issued under Cape Colony Ordinance, No. 15 of 1844'.
>
> 2. The parties are invited to submit written argument of no longer than 15 pages on the following questions:
>
> (a) Do the provisions of Cape Ordinance 15 of 1844 provide lawful warrant for the grant of the Salem Commonage to the Salem Party of Settlers, and, if so, how?
>
> (b) If not, what legislative or other authority, whether in the form of a Cape Ordinance, a colonial statute or any other law or common law authority or delegation of royal prerogative or other power, existed for the grant of the Salem Commonage to the Salem Party of Settlers? The parties are particularly requested to assist in regard to the 1836 grant, by Governor Sir Benjamin D'Urban, which predated Cape Ordinance 15 of 1844.
>
> (c) If none, in what way, if any, does this affect the applicants' defence to the claim?
>
> (d) Specifically, how does the absence or otherwise of legislative, common law or other authority or delegated power for the grants of 1836 and 1847 affect

near-intractable task, certainly with the historiographical skills available to the Court and to the parties.[151] It nevertheless became apparent that no power could be located

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> the exercise and acquisiton of rights of usage in and over the Commonage by—
>
> i) the Settlers and their successors; and
>
> ii) indigenous people who were present on or at the Commonage from, at latest, 1878?"

[151] A Proclamation by Governor Sir John Cradock dated 28 January 1814, eight years after the Articles of Capitulation of 10 January 1806 surrendered the Cape to the forces "in the service of His Britannic Majesty", provided, specifically in relation to the Zuurveld, that "to such persons, who may be inclined to settle there" the Governor "will grant in perpetuity, according to the rules and customs of this Colony, in perpetual and moderate Quitrent, certain tracts and proportions of Land, after admeasurement, and upon Diagrams formed". The Proclamation makes further known "that the Proprietors shall be excused the Rent reserved for Ten years" on certain conditions. The Proclamation appears to envisage individual, not collective, grants of land.

Governor Cradock, who granted the initial 700 morgen to the Settlers and proclaimed the right to grant land in perpetual quitrent in the Albany district, received his Instructions in April 1811. They begin:

> "With these our Instructions you will receive our commission under our great seal of our United Kingdom of Great Britain and Ireland . . . In the execution thereof of our said commission you are to take upon you the administration of the government of the said Settlement and to do and execute all things belonging to your command according to the several powers and authorities of our said commission."

The Instructions go on to "command that all the powers of government within the said Settlement shall be vested solely in you our Governor." He was then requested to furnish reports on among other things the management and disposal of land.

The Instructions were followed by a report to the Privy Council on 4 March 1812 by Mr Robert Peel on behalf of Governor Cradock. This report was not available to the Court. But the minutes of a meeting on 23 September 1812 and a covering letter of the Privy Council, discussing Governor Cradock's report, were available. These indicate that the subject of the report is "Land Tenure at the Cape of Good Hope". The report suggested a change from the Dutch system of loan farms and 15-year quitrent tenures to perpetual quitrent: this would provide more security to farmers, and entail more payment in rent for the colonial government.

The Privy Council's response was that Governor Cradock should consider long, but terminable, leases, as opposed to perpetual quitrent. Despite this, on 6 August 1813, Governor Cradock issued a proclamation allowing the conversion of loan farms to perpetual quitrent. In exchange, the holders of perpetual quitrent would pay an increased annual rent. On 28 January 1814, Governor Cradock issued the Proclamation discussed above. The Proclamation thus appears to have been issued directly pursuant to Governor Cradock's Instructions from the Privy Council, following discussion about what the nature of the system of tenure should be.

The Proclamation is worded broadly and without restrictions as to the size of land to be awarded or its use. In this it differs from the Proclamation of 6 August 1813, which limited the size of the land that could be converted to perpetual quitrent.

Milton "Ownership" in Zimmermann and Visser (eds) *Southern Cross, Civil Law and Common Law in South Africa* (Juta & Co Ltd, Cape Town 1996) describes Governor Cradock's 1813 Proclamation "for all its gushing benevolence" as "a document of remarkable obscurity"(at 666). Milton quotes the Chief Justice of the Cape Supreme Court in *De Villiers v Cape Divisional Council* (1874) 5 Buch 50 who said "it is impossible to conceive a statute more loosely drawn or more inartistically worded" (Fn 76 at 666). Milton's assessment is that "[f]or nearly sixty years officials at the Cape implemented the Cradock Proclamation without any clarity as to what exactly were the legal rights and duties of holders of land under this tenure . . . . In practice, the officials charged with the registration of grants in Cradock's tenure 'either did not know the provisions of the Proclamation or disregarded them'" (at 668).

Governor D'Urban's Instructions from 1833 are comprehensive and mandate the setting up of the Legislative and Executive Councils and specify what laws the Council is empowered to make. The powers relating to land

appear to be Instructions 39 and 40 (words that appear unclearly in the copy the Cape Archive supplied to the Court are in square brackets):

> "Thirty ninth. And whereas we have by our said Commission given to you full power and authority in our name and on our behalf, but subject nevertheless to such provisions as are in that respect contained in these our Instructions, to make and execute in our name, and under the Public Seal of our said settlement grants of waste land to us belonging within the same to private persons, or for the public uses of our subjects there resident. Now we do hereby require and authorise you from time to time as occasion may require to cause all necessary surveys to be made of the vacant or waste lands to the belonging in our said settlement and to cause the persons making such surveys to report to you what particular lands it may be proper to reserve for public roads or other internal communications by land or water as the sites of towns, villages, churches, school houses or parsonage houses, or as places for burial of the dead, or as places for the future extension of any existing towns and villages, or as places to be set apart for the recreation or amusement of the inhabitants of any town or village or for promoting the health of such inhabitants, or as the sites or quays or landing places or [sowing] paths, which it may at any future time be expedient to erect, from, or establish on the sea coast, or in the neighbourhood of navigable streams, or as places which it may be desirable to secure for any other purposes of public conveniences, utility, health, or enjoyment, and you are especially to require persons making such surveys to specify in their reports, and to distinguish in the charts or maps to be thereunto assessed such tracts, pieces, or [parcels] of land within our said settlement as may appear to them best adapted to answer and promote the several purposes before mentioned. And it is our will and we do strictly enjoin and require you that you do not on any pretence whatsoever grant convey or [illegible] to any person or persons any of the lands which may be so specified as fit to be reserved as aforesaid, nor permit any such lands to be occupied by any private person for any private purposes.
>
> Fortieth. And we do further charge and require you not to make any grant of land to or any [illegible] for, or for the use of any private person by any one instrument or by successive instruments exceeding one hundred acres without inserting therein a provision or condition to the effect that such grant cannot be considered valid until our will and pleasures shall be known thereupon."

It seems difficult to extract from these powers a basis upon which Governor D'Urban could have been empowered to grant land as private commonage to what Gane J in the 1940 judgment called "a somewhat inchoate and amorphous body" such as the Salem Party. This is because, though no definition of "waste lands" appears, the second reference to "vacant or waste lands" in these Instructions, as well as a reference to waste lands in the supplementary Instruction to Governor D'Urban of November 1833, suggests that "waste land" is "unappropriated lands *within the old limits of the Colony*" – in other words, up to the Bushman's River, thus excluding Salem. The concluding portion of Instruction 39 ("and we do strictly enjoin and require you that you do not on any pretence whatsoever grant convey or [illegible] to any person or persons any of the lands which may be so specified as fit to be reserved as aforesaid, nor permit any such lands to be occupied by any private person for any private purposes") seems to envisage a clear distinction between land for public purposes and for private purposes so as to render the powers it confers incompatible with the award of the Commonage.

What appears to be the supplementary Instruction to Governor D'Urban, who took up his posting in 1834, signed by Secretary of State for the Colonies, Lord Stanley, on 10 November 1833, reads:

> "I was in hopes that I should be enabled to furnish you upon your departure for the Cape with instructions for the guidance of the proceedings of your government in regard to the disposal of crown lands. I allude more particularly to those in the ceded territory, which are understood to be better adapted for cultivation, than the unappropriated lands within the old limits of the Colony.
>
> On the one hand [humour/honour] the strong objections which have been stated to us against the proposal of my predecessor for disposing of the waste lands by sale – and on the other hand the very meagre nature of the information which I have been able to obtain [in] relation to the lands of the ceded territory, compel me to invite your own early and serious attention to the whole of this important subject, in order that you may submit for my consideration such measures as may seem best calculated for bringing the public lands within the scope of private industry without unnecessarily or imprudently sacrificing the interests of the crown."

that expressly or implicitly authorised either Governor to grant the Salem Commonage to the Settler Party. It may well be that sovereign power for this kind of allocation existed under colonial law.[152] There is merely no evidence before us either that this power, if it existed, was properly devolved – or that, in making the grants, either Governor properly exercised it.

[132] None of this suggests that the Salem Party did not acquire rights to the Commonage. Plainly they did. The Proclamations of 1845[153] and 1848,[154] proceeding on the power of the gubernatorial grants, vest specific shares in the Commonage in named members of the Salem Party. Over the course of a long century, from the time of the two grants, until the judgment of the Grahamstown Supreme Court in 1940, the Salem Party of Settlers and their successors treated the Commonage as, in title, theirs.

[133] In their written argument submitted in response to this Court's directions after the hearing, the landowners pointed out that the conversion of the quitrent title, in the Commonage, to freehold title in 1848, the confirmation of the grants to the Salem Settlers by the Proclamation of 1845, and the issue of a certificate of amended title on consolidation, in November 1947, are all executive and administrative acts that have stood unchallenged (and accepted) for a very considerable period of time.

These instructions, too, do not appear to authorise the grant of Commonage to the Settler Party.

The Government Gazettes for 1836 and 1847 do not evidence notification of the award of the Salem Commonage.

See, generally, Mandelbrote "Constitutional Development, 1834-1858" in Walker *Cambridge History of the British Empire* (CUP, Cambridge 1936) vol 8 and the decision of the Privy Council in *Reverend William Long v Rt Reverend Robert Gray DD Bishop of Cape Town (Cape of Good Hope)* 1864 UKPC 9, delivered on 24 June 1864, which describes some of the allocation of colonial powers to officials and other bodies during the period at issue.

[152] See *Lam Yuk Ming v A-G* [1980] HKLR 815 (executive government in a ceded colony, through the attorney-general, employing its prerogative power to dismiss a group of government pharmacists protesting against working conditions notwithstanding that a legislative council existed, quoting, at 821, Roberts-Wray *Commonwealth and Colonial Law* (Stevens, London 1966) at 931 and concluding that, "[i]f the Crown has a right to put all the inhabitants to the sword or to exterminate them, then surely it has the right to suspend from office any whom it has spared and put into office in its service. And it has the right to delegate that power to the Governor of this Colony").

[153] Proclamation on Subdivision of Settler Lands, 27 March 1845.

[154] Proclamation above n 165.

[134] This is true. Legal acts, even if invalid, may have legal consequences. That is well established.[155] But the point is not to deny that the Salem Party acquired rights over the Commonage and exercised them over a very long period of time. It is different. It is that the rights they exercised were never immaculate. This case pits contesting versions of history and historical claims to justice against each other. Legal ideology, which protects principally the claims of those in possession, is invoked to help. It aspires to immaculacy. That aspiration fails here. Even under the garb of colonial laws, as they existed at the time, the original grants seem dubious. This does not strip the landowners of their historical claim to justice. It merely puts their claim in its proper historical perspective, as the Restitution Act requires.

[135] Alongside this, the claimant Community's exercise and acquisition of rights in and over the Commonage in the six decades between 1878 and 1941 seems less startling than conventional legal thinking would make it seem.

[136] And it is notable that Gane J, in delivering the judgment of the Supreme Court in Grahamstown in 1940, expressly rejected the Salem landowners' argument that they were "in law absolute co-owners in undivided shares" of the Commonage. "I do not agree," he said, "that in either of these grants the language used has the effect of making the settlers co-owners in undivided shares of the land conveyed".[156] Instead, he considered that the effect of the first grant was to convey to the Salem Party of Settlers "an extent of ground in trust for each individual of the party with a view to a special purpose".[157] The grant's words "as commonage" imposed a *modus* or condition on the use of the Commonage.[158]

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[155] See for example: *Merafong City Local Municipality v AngloGold Ashanti Ltd* [2016] ZACC 35; 2017 (2) SA 211 (CC); 2017 (2) BCLR 182 (CC); *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd* [2014] ZACC 6; 2014 (3) SA 481 (CC); 2014 (5) BCLR 547 (CC) and.*Oudekraal Estates (Pty) Ltd v City of Cape Town* [2009] ZASCA 85; 2010 (1) SA 333 (SCA).

[156] *Gardner* above n 3 at 177.

[157] Id at 177-8.

[158] Id at 178.

[137] Gane J expressed pronounced scepticism about the landowners' claim that the Commonage should be divided amongst them. The Salem Party, though "a somewhat inchoate and amorphous body", was capable of owning the Commonage.[159] Nevertheless, the "Governor of the day would have been sufficiently astounded," Gane J said, "had he been told that the effect of these grants was to give for nothing to each settler, in addition to the modest allowance of 100 acres . . . which he received in his own right, and for which he had in many instances paid before departure from England, an additional piece of land of about 153 morgen."[160] This construction, Gane J said, "is so improbable that it should not be adopted unless the words invincibly compel" it. "It is to be noted," he added, "that it has taken the settlers of this particular party . . . a century to formulate such a contention".[161]

[138] Gane J observed that "the position of the commonage-holders in this case appears to be very similar to the position of a native tribe holding communal property".[162] In addition, the "power of disposition" was "limited by the fact that the land [was] held for special purposes . . . and that the Village Management Board" controlled it.[163] It added that "[i]t is a most unusual thing for the members of a local authority deliberately to hand over all their rights of commonage to private owners".[164] "At this point," Gane J said, "the Court might not unreasonably, and perhaps quite appropriately fold its hands and simply refuse the application".[165] The landowners had "not made out the primary ground" on which they rested their case.[166]

[159] Id.

[160] Id at 179.

[161] Id.

[162] Id at 180.

[163] Id.

[164] Id at 183.

[165] Id at 181.

[166] Id.

[139] Despite the threadbare basis of the claim before it, the Grahamstown Supreme Court found a way to grant the landowners their wish. On 29 February 1940, it issued a rule nisi allowing objection to the consolidation and subdivision of the Salem Commonage. The return date was 8 August 1940. In response, the Provincial Secretary of the Cape Province recommended that authorisation be given to alienate the land. He noted that the division would have to be done through the ordinary law[167] by which Village Management Boards were authorised to dispose of their common land. Yet his report noted the proposal to subdivide all the common land as "most unusual", since it meant that the Board would "be left with no common land."[168]

[140] Against this background, three features of the Commonage and its grant were crucial to the black inhabitants' capacity to establish entitlements in and over the Commonage after 1878.

[141] The first is the somewhat opaque and uncertain legal lineage of the two grants of the Commonage. What the Cape Governors gave to the Salem Party was neither impeccable nor immaculate. The grants were imbued from conception with a touch of the frontier: rough-hewn and purpose-built. This rough-readiness remained their feature. It is indeed reflected in the perplexity of the Grahamstown Supreme Court, when with studied reluctance it granted the order that led to the division of the Commonage. In short, the landowners' predecessors' title was never irrefutable.

[142] The second is that the beneficiaries of the grants were "inchoate and amorphous". Apart from the church and the cricket field, which were closely managed, there was never a single owner exercising unified dominion or control over the Commonage. The Board sought to exercise control, but the patently uneven effects are well documented. Though most of the Salem Party received specified

[167] Section 49 of Ordinance 10 of 1921.

[168] A similar passage appears in a document titled "Salem Village Management Board: Remarks of Judge Regarding advisability of subdivision of Commonage". It says: "[i]t is a most unusual thing for the members of a local authority deliberately to hand over all their right of commonage to private owners."

shares in the Commonage, these remained undivided, and none, until the 1940 judgment, received exclusive domain over any part of it. The relation of each beneficiary of shares in the Commonage remained indefinite in the sense that it consisted in an undivided share in a huge tract of land that remained relatively undomesticated.

[143] The third factor flows from the second. It is the simple vastness of the Commonage. It was huger by many multiples than any of the individually assigned allotments. It was for precisely this reason that the Board, according to the archival evidence, was unable effectively to manage or control it. In my view, the grant of so large a portion of land to such an "inchoate and amorphous body", at the time it was made, was not effective to exclude the exercise over the land and the acquisition over it of rights under the Restitution Act.

[144] These characteristics of the Commonage evidence that it is not at all implausible that a community was able to grow there. This does not mean that the Community derived its rights from the settlers' actions or inactions. No. Their rights were derived from their use of the land and their self-regulation in respect of that use. Even if the settlers were proved to have immaculate title to the land, the Community could still have developed their own rights. But in practical terms this was facilitated by the features I have cited of the settlers' own material relation to the land, which was not indefeasibly exclusionary.

[145] Indeed, the Community that lived on and at the Commonage from the late 19th century had a system of traditional law that related to vast, open, unoccupied tracts of land. That law provided that the land could be utilised in accordance with custom. This entailed, as set out by this Court in confirming the Supreme Court of Appeal in *Richtersveld*, a system of law "known to the [C]ommunity, practised and

passed on from generation to generation".[169] It is an evolving system of law, initially unwritten, "that has its own values and norms".[170]

[146] The Community that lived at and on the Salem Commonage after 1878 utilised the Commonage in accordance with its traditional rules and conventions. That usage was in accordance with customary law, which treated unoccupied land as a shared resource, available for utilisation and, in turn, it vested the Community with rights in and over the Commonage. And it was not dependent on, nor did it derive from, consent from the landowners. As the Supreme Court of Appeal majority rightly observed, the indigenous inhabitants' acquisition of rights over the Commonage was not forestalled because they were there at the behest of the landowners. On the contrary, there is no evidence that the landowners or the Board ever consented to the indigenous inhabitants' occupation.[171]

[147] The community members who were employed by the settlers and resided on their land would also have established rights through a labour-tenancy, in accordance with the claim as originally pleaded. But they too formed part of the Community that jointly used the Commonage to support their existence and customary practices. No distinction need be made between those who were employed and those who were not.

[148] It over-simplifies the complexities the Restitution Act recognises to assert that the black inhabitants of the Commonage could neither acquire nor exercise rights over it because registered title to it vested in the Settler Party. The statute expressly recognises beneficial occupation as a right in land. It also recognises "a customary law interest". The Commonage was a vast tract over which no exclusive control was

[169] *Richtersveld* above n 48 at paras 53 and 57.

[170] Id at para 53.

[171] The majority noted that, by contrast, the evidence recorded leases the Village Management Board granted to white farmers who were not owners so that they could conduct farming activities on the Commonage (SCA judgment above n 1 at para 437).

exercised and over which traditional communities asserted, or possibly re-asserted use from, at latest, 1878.

[149] Given the extent of the Commonage, the lack of sustained, effective, control over it by the landowners, and the decades-long utilisation of the Commonage by black people in accordance with custom, I conclude that they held a right in the land under the Restitution Act. This right embraces both customary law interests and beneficial occupation for a period of more than 10 years. While the Community did not have exclusive occupation or use of the land, they exercised rights to residence, use of land for agricultural activities and traditional practices, access to firewood and burial rites.

Was the Community dispossessed of its right in the Commonage as a result of past racially discriminatory laws or practices?

[150] As explained, one year after the order of the Grahamstown Supreme Court in 1940, the Native Commissioner recorded 500 black inhabitants of the Commonage, 50 of whom were employed by Salem landowners. The Court order provided for the subdivision and allocation of the Commonage to the landowners by individual title. In 1947, the subdivision was effected. Thereafter, the black population was dispersed. This is undisputed. And it prompts an inevitable inference of fact. It is that the dispersal of the Community was a direct consequence of the Court's order.

[151] Was there racial discrimination? The Court's provisional order of February 1940 required that it be published twice, in each of two publications. The first was *Grocott's Daily Mail*. This is an English-language newspaper published in Grahamstown from 1870. The second was the *Union Gazette*. This was an official government publication, bilingual in English and Afrikaans, published in Pretoria, with a circulation confined almost exclusively to officials and lawyers. In addition, the order was to be served personally on the Union Minister for Lands, the Administrator of the Cape Province and the Registrar of Deeds in Cape Town, as well as the Superintendent-General of Education for the Cape Province.

[152] These are the provisions the Court made for its order to be brought to the notice of those who could be affected by it. It is plain that they took no account of the largest group of persons affected – the 450-odd black people living on the Commonage who were not employed on farms. The Community on the Commonage far outnumbered the landowners who sought to have the Commonage divided between them. Yet no provision was made for them to be informed or consulted. For, in the then-prevailing *mores*, the Community didn't count. And the order had no regard to the fact that hundreds of people were living on the Commonage and drawing sustenance from it.

[153] They were, to the Court, as invisible as those same people were to the van Rensburg siblings. They were for all purposes non-existent. This is not to berate the person of the Judge. It would be anachronistic to have expected otherwise. Rather, it is to draw attention to individual and institutional blindness caused by an efficiently enforced system of racial subordination and by individual complicity in it. The system rendered the inhabitants invisible; the Court and its order were exponents of it.

[154] And in this way, the lack of attention to the Community and the absence of consultation about the subdivision and parcelling out of the Commonage on which it lived was a racially discriminatory act of dispossession.

Remedy

[155] The order the Land Claims Court granted, which the Supreme Court of Appeal confirmed, was a simple one-liner. Apart from disclaiming any costs award, it provided:

> "The Salem Community was dispossessed of a right in land after 19 June 1913, as a result of past racially discriminatory laws and practices in terms of section 2 of the Restitution of Land Rights Act 22 of 1994."[172]

[172] LCC judgment above n 2 at para 162.

[156] The parties however appeared to understand this to pack a considerable punch. Although in the Land Claims Court the parties had agreed to defer the feasibility of restoration, the order the Court granted implied that the Community was entitled to the return of the Commonage as a whole. That is certainly how, in its submissions before this Court, the Commission understood the order. If so, that would not be right or just.

[157] I have already found that the Salem Party of Settlers did not possess exclusive rights in the Commonage before 1940. So, too, the rights the Community exercised over the Commonage did not exclude the Settlers from possessing and exercising their rights in the Commonage. Both groups used and exercised rights over the Commonage. Could either the Salem Party or the Community do as they please with the land between 1878 and 1940? In both cases the answer, clearly, is "no". The Salem Party had to apply to the Grahamstown Supreme Court for the right to subdivide and alienate the land, a right they did not possess before the Court order. Their rights were awarded through dubious original grants and confirmed through proclamation, but they were never sufficient to exclude the development of parallel rights by the Community.

[158] Since the Community's rights never excluded the Salem Party's rights in the Commonage, they could not alienate any part nor all of the Commonage. Nor could they exclude the land-owners from the Commonage. The system of registered title precluded that. Equally, the Community's rights could not preclude the Salem Party from grazing their cattle there, or prevent recreational riding or cycling over the Commonage, as the van Rensburg siblings did. Until dispossession, neither party's rights amounted to exclusive ownership.

[159] The landowners contended in their application for leave to appeal that the dispossession of the rights the Community exercised over the Commonage could not justify restoration of the landowners' entire farms. There is justice in this contention, which the Land Claims Court will consider in the remedy phase of these proceedings.

It is clear that the property controlled by the Salem Party Club itself, comprising the church or churches and the cricket field, is distinctive. Control was effectively exercised over these portions of the Commonage. But, further, the history of the Commonage reveals a richness and complexity in which both the black Community and the white landowners enjoyed a living functional relationship with the land.

[160] For this complexity, the Restitution Act makes provision. The Community is entitled to a measure of restitution which does not necessarily include the landowners' entire farms. The appropriate opportunity for exploring this will be when the question of restoration is considered at the second stage of the trial before the Land Claims Court.

[161] To summarise: the applicant Community has established rights, but not exclusive rights, to the Commonage. Both the Community and the Salem Settlers exercised rights of usage over the Commonage. The claimants used the land to live on, for grazing and agricultural activities and traditional rites and practices, for access to firewood and to bury their dead. The evidence shows that the Salem Settlers used the Commonage for grazing and other agricultural purposes, for recreation, for rights of way and for letting out to others. Neither the Settlers nor the Community had exclusive occupation. Though the Settlers had registered title, the Community, too, acquired rights alongside it. This accommodation of both groups' entitlements, and the history that records it, will be reflected in the eventual order of the Land Claims Court.

Costs

[162] It is appropriate that, as in the Land Claims Court, no costs award should be made.

Order

[163] The following order is made:

1. Leave to appeal is granted.
2. The appeal is dismissed.
3. There is no order as to costs.

For the Applicants:	A Dickson SC and M Roberts SC instructed by Messrs Cox and Partners.
For the First Respondent:	V Notshe SC and M Kgatla instructed by Ngcebetsha Madlanga Inc.
For the Ninth Respondent:	J Krige and B Joseph instructed by M Mlola.
For the Amicus Curiae:	J Thobela-Mkhulisi and M Suleman instructed by the Legal Resources Centre.